The University of the State of New York

The State Education Department
State Review Officer
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No. 20-068

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Adam Dayan, PLLC, attorneys for petitioners, by Amled Pérez, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Shefa School (Shefa) for the 2021-22 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

For the 2018-19 school year (kindergarten), the student attended a nonpublic school with a dual language curriculum and received special education teacher support services (SETSS), speech-language therapy, and occupational therapy (OT), as well as specialized reading remediation (Dist. Ex. 1 at p. 5). The parents obtained a private neuropsychological evaluation of the student "to assist in school planning," which was conducted over five sessions in March, April, and August 2019, and, according to the resulting report, the evaluator found that the student demonstrated average intelligence and marked challenges in the areas of listening and reading comprehension, oral expression, early reading skills, math calculation and spelling, and that the student met the criteria for a diagnosis of an expressive/receptive language disorder and a specific learning disorder: reading disorder (id. at pp. 1, 5, 22, 25). The student began attending Shefa, a

religious "community day school for students with language disabilities," at the beginning of the 2019-20 school year, and she continued her attendance there through the 2021-22 school year (Parent Ex. L ¶¶ 5, 14).

In a January 28, 2021 notice, the district notified the parent of the student's CSE meeting on February 23, 2021; and on February 23, 2021, a CSE convened to conduct an annual review and developed an IEP with a projected implementation date of March 8, 2021 (Dist. Ex. 3 at pp. 1, 18-19; see Parent Ex. I at pp. 1-3).[1] Having found the student eligible for special education as a student with a speech or language impairment, the CSE recommended integrated co-teaching (ICT) services in a general education classroom with three periods per week of direct SETSS in a group for English language arts (ELA) (Dist. Ex. 3 at pp. 1, 18-19).[2] The CSE recommended related services including one 30-minute individual session per week of counseling, two 30-minute individual sessions per week of OT, two 30-minute individual sessions per week of speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (id. at p. 18). In addition, the February 2021 CSE recommended a variety of different strategies, environmental modifications, and/or human material resources as supports for the student's management needs, developed 13 annual goals, and included several testing accommodations (id. at pp. 5, 7-17, 20).

The parents executed an enrollment contract with Shefa on January 29, 2021 and March 8, 2021 (Parent Ex. C at p. 5).

In a May 9, 2021 prior written notice, the district notified the parents of the student's continued eligibility for special education services and the February 2021 CSE's recommendations for the 2021-22 school year (Parent Ex. J at p. 1). In addition, the prior written notice indicated that the February 2021 CSE considered the August 5, 2019 neuropsychological assessment as well as the oral report provided at the CSE meeting in making its program recommendations (id.). According to the prior written notice, the February 2021 CSE considered options including SETSS only, as well as a 12:1 special class in a community school, but rejected those options (id. at pp. 1-2). The school location letter, dated May 9, 2021, provided the parents with the name and location of the public school site the student had been assigned to attend as well as the name of an individual for the parents to contact to assist in arranging a visit to the assigned public school (id. at p. 4).

In an August 25, 2021 letter to the school district, the parents provided notice of their intention to place the student at Shefa for the 2021-22 school year and pursue funding/reimbursement from the district for the cost of the placement (Parent Ex. B at p. 2). The

[1] The date of the CSE meeting is unclear in the hearing record, as in various locations the IEP is referred to as being developed on either February 23, 2021 or March 23, 2021 (compare Parent Exs. A at p. 5, J at p. 1, and Dist. Ex. 3 at p. 23, with Dist. Exs. 2 at p. 1, and 4 at p. 1). In its answer, the district asserts that the error is typographical as shown in the scheduling notice of the CSE meeting, the CSE meeting minutes, as well as in considering the implementation date of the IEP being March 8, 2021 which is prior to March 23, 2021; therefore, going forward in this decision, the date of the meeting and resultant IEP shall be referred to as February 23, 2021 (see Dist. Exs. 2; 3 at pp. 1, 25; Ex. 4; Answer at p. 2 n.1).

[2] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

parents noted that they had "strongly objected to the recommendation" of ICT services at the February 2021 CSE meeting due to the student's need for more individualized attention and a smaller classroom setting, that the recommendation would not provide enough language support for the student, and that as of the date of the letter, the parents had not received the student's IEP (id. at pp. 2-3). Further, the parents noted that they attempted to contact the assigned public school to set up a tour but did not receive a response; the parents also queried how the district would conduct remote instruction in the event that it was necessary and they requested "appropriate transportation" to Shefa (id. at p. 3).

In a letter to the district dated October 26, 2021, the student's mother indicated that her investigation of the assigned public school revealed that it could not provide the appropriate educational support services that the student needed (Parent Ex. K at p. 2). Following an October 20, 2021 observation of the specific class where the student would have been placed and a conversation with the assigned school's parent coordinator, the student's mother opined that the class would be overwhelming for the student (id.). In addition, she expressed concern that a multisensory reading methodology was not offered to students in the assigned public school, and that many of the students in the classroom appeared to be functioning at a significantly lower academic level than the student (id. at pp. 2-3). The student's mother indicated that without a copy of the IEP, she was not sure if the related services would be supportive enough for the student's particular needs, and that the assigned public school lacked a sensory gym to support the student's OT and developmental goals (id. at p. 3). As such, the parent indicated the student would continue at Shefa until the district provided "an appropriate placement for her" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated November 8, 2021 the parents alleged that the district failed to offer the student a FAPE for the 2021-22 school year (Parent Ex. A). The parents described the student's needs and related that during the February 2021 CSE meeting they objected to several aspects of the CSE's recommendations for the student for the 2021-22 school year, including the proposed ICT services, group SETSS, and the lack of a reading program endorsed by the student's current providers at Shefa (id. at pp. 5-6). Next, the parents asserted that they had not received a copy of the student's February 2021 IEP and, therefore, could not assess its appropriateness (id. at p. 6). The parents contended that they were unable to visit the assigned school before the start of the 2021-22 school year because the school did not respond to their request for a tour, but were able to visit it in October 2021 (id.). The parents stated that they were shown a "potential placement" classroom with 22 students, one regular education teacher, and one special education teacher and contended that such a "large class setting would not provide sufficient individual attention and would be too overwhelming and distracting" for the student to succeed (id. at pp. 6-7).

Lastly, the parents contended that the unilateral placement of the student at Shefa was reasonably calculated to provide the student with an educational benefit, and that the parents communicated their concerns and cooperated with the district throughout the special education process, entitling them to tuition reimbursement and other relief (Parent Ex. A at pp. 7-8).

B. Impartial Hearing Officer Decision

An impartial hearing commenced on December 22, 2021, and concluded on April 4, 2022, after four days of proceedings (Tr. pp. 1-74).

In a decision, dated April 24, 2022, the IHO determined that the February 2021 IEP met the student's academic and social/emotional needs and offered the student a FAPE (IHO Decision at pp. 5-7, 9). The IHO noted that the CSE was composed of district members, as well as the parents and the student's private school teachers and providers and that, in developing the IEP, the CSE relied on a neuropsychological evaluation of the student, which identified the student's academic and cognitive functioning, as well as reports from the student's teachers and input from the parents (id. at p. 5). The IHO also discussed the services and goals set forth in the IEP and noted that the annual goals and short-term objectives were created in collaboration between the CSE, the parents, Shefa staff members and a review of the student's evaluations (id. at p. 6). The IHO noted that the CSE recommended speech-language therapy three times per week, twice individually and once in a group of three, and found that the speech-language goals addressed the student's fluency, decoding, reading comprehension, and grammar (id.). With respect to the CSE's recommendation for individual OT twice per week, the IHO noted that the goals addressed activities of daily living, organization, writing, and working at an appropriate pace (id.). With respect to the CSE's recommendation for counseling, the IHO noted that the inclusion of counseling addressed the parents' concerns about the student's self-esteem and aimed to teach the student coping strategies to reduce the need for perfection and reduce academic frustration (id.). The IHO concluded that all of the IEP goals were measurable, used appropriate metrics, and contained appropriate short-term objectives to reach the annual goals and the IHO noted that the parent had testified that she agreed to the program set forth by the CSE (id.).The IHO noted that the recommended ICT services in a general education class placement constituted the student's least restrictive environment (LRE) and would have allowed the student to be integrated with general education students, which would have personalized her education experience without limiting her exposure to students of one disability or learning style (IHO Decision at p. 7). The IHO also found that the ICT placement's reduced student to teacher ratio would have allowed the teachers to address the student's need for one-to-one instruction, small group instruction, repetition, and scaffolding and that the additional SETSS and related services in the student's IEP were sufficient to allow her to make progress in an educational environment that did not consist of only students with disabilities (id. at pp. 7, 9).

The IHO found that the IEP's inclusion of SETSS, counseling, OT, and speech-language therapy would have provided additional small group and one-to-one support (IHO Decision at p. 6). The IHO also found that the IEP included the use of manipulatives, graphic organizers, multi-sensory instruction, and preferential seating and that the repetition, teacher check-ins, and instructional breakdowns called for in the IEP would have ensured that the student grasped concepts and could have participated in the work provided (id.).

With respect to the parents' assertions that the public school site the student had been assigned to attend could not implement the February 2021 IEP, the IHO found those assertions to be speculative (IHO Decision at pp. 7-8). Alternatively, the IHO determined that the district had shown that the assigned school had the capacity to implement the February 2021 IEP (id. at p. 8).

Lastly, the IHO considered the parents' allegation that they had not received a copy of the February 2021 IEP prior to the start of the 2021-22 school year (IHO Decision at pp. 8-9). The IHO found that the district's failure to provide the parents with a copy of the IEP was a procedural violation that did not rise to the level of a denial of FAPE because it did not impede the parents' opportunity to participate in the decision-making process in developing the student's IEP (id.). In particular, the IHO noted that the parent was present and fully participated in the CSE meeting at which the student's IEP was developed, visited the assigned school, and obtained an independent evaluation of the student that was considered by the CSE (id.).

The IHO concluded that the district offered the student a FAPE for the 2021-22 school year and denied the parents' request for tuition reimbursement for the cost of the student's attendance at Shefa for that school year (see IHO Decision).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2021-22 school year. The parents argue that the IHO was incorrect in denying their request for tuition reimbursement and funding for the student's attendance at Shefa during the 2021-22 school year and raise five specific arguments on appeal. First, the parents assert that the IHO erred in finding that the district met its procedural obligations despite its failure to provide the parents with a copy of the February 2021 IEP prior to the start of the 2021-22 school year. Second, the parents contend that the IHO erred in "making determinations about incorrect issues in controversy" by rendering certain findings concerning the assigned school. Third, the parents argue that the IHO erred in relying on a district witness who did not attend the February 2021 CSE meeting in finding that the IEP offered the student a FAPE. Fourth, the parents assert that the IHO erred in finding that the parent had agreed with the February 2021 IEP. Fifth, the parents claim that the IHO erred in finding that the parents' concerns with the program provided at the assigned school were speculative and argue that the parents had formulated specific objections based on their most recent visit to the school.

The parents request an order finding that the district failed to offer the student a FAPE, that Shefa was an appropriate unilateral placement, and that equitable considerations favor the parents. The parents seek relief in the form of tuition reimbursement for the cost of the student's tuition at Shefa along with the cost of transportation for the 2021-22 school year.

In an answer, the district argues that the IHO correctly held that the district offered the student a FAPE during the 2021-22 school year and asks that the parents' appeal be dismissed. Initially, the district contends that the parents have not sufficiently appealed from the IHO's lack of findings on the appropriateness of the unilateral placement at Shefa, that equitable considerations weighed in favor of an award of relief, or that they were entitled to relief for transportation expenses. The district asserts that these claims are raised solely in the final paragraph of the request for review without citation to the hearing record or arguments in support of why the parents should prevail on those claims.

Next, the district asserts that the IHO correctly held that the February 2021 IEP offered the student a FAPE and notes that the parents have only appealed that finding to the extent that they assert that the IHO should not have relied on the testimony of a district witness from the assigned

school regarding the IEP. The district contends that the parents have not shown that a CSE witness was required because the content of the IEP is what the IHO considered and correctly determined to be appropriate.

The district argues further that the IHO correctly determined that any failure to provide the parents with a copy of the IEP did not impede their opportunity to participate in the decision making process because a parent attended and participated in the February 2021 CSE meeting, and noted the parents' concerns with the proposed program, the CSE considered the parents' private neuropsychological evaluation, and the parent conceded that she was aware of the IEP's recommendation for an ICT classroom and had received the May 2021 prior written notice and school location letter that described the main recommendations in the student's IEP prior to the start of the 2021-22 school year.

With respect to the parents' claim that the IHO erred in finding that the student's mother had agreed with the content of the IEP, the district asserts that the hearing record supported a finding that the parent agreed to the recommended program at the time of the CSE meeting because the student's mother conceded to that fact in testimony, although at a different point in the impartial hearing than that cited to by the IHO.

Lastly, the district contends that the parents' statement in their memorandum of law on appeal that they never alleged in their due process complaint notice, nor argued at the impartial hearing, that the assigned school could not implement the February 2021 IEP prevents the parents from bringing such an argument on appeal.

The district requests that the IHO's decision be upheld in its entirety.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Scope of Review

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).[4] An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

On appeal, the parents have not challenged several findings made by the IHO. Most importantly, the parents have not challenged any of the IHO's specific findings with respect to the

[3] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

[4] Briefly considering the district's argument that the parents have not sufficiently appealed from the IHO's lack of findings on the appropriateness of the unilateral placement at Shefa, that equitable considerations favor relief, or that they are entitled to relief for transportation expenses, I note that based on the other determinations herein I need not reach this question. Nonetheless, had a ruling been required it is likely that identifying the claims in the request for review and then making a more thorough argument in a memorandum of law, as the parents have done herein, would have led to a finding that the claims were sufficiently pled (see Req. for Rev. at pp. 7-8; Parent Mem. of Law at pp. 12-18).

appropriateness of the February 2021 IEP wherein the IHO found that the recommendations for ICT services, SETSS, and related services were appropriate and designed to meet the student's needs, and that the annual goals and short-term objectives addressed the student's needs and were appropriately crafted (see IHO Decision at pp. 5-9). Additionally, the IHO's specific finding that the CSE's recommended program addressed the student's academic and social/emotional needs, is likewise unappealed (id. at pp. 6, 9).[5]

As such, the parents are deemed to have abandoned any argument that the February 2021 IEP failed to offer the student a FAPE and the IHO's findings regarding the appropriateness of the February 2021 IEP have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[6]

B. Provision of IEP to Parents

On appeal, the parents contend that the IHO erred in finding that the district met its procedural obligations despite its failure to provide the parents with a copy of the February 2021 IEP prior to the start of the 2021-22 school year.

Districts must ensure that the parents are provided with a copy of the IEP (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]); however, a failure to provide a copy of the IEP is a procedural violation that does not necessarily rise to the level of a denial of a FAPE, and evidence that the parent attended the CSE and had awareness of the programming recommended by the CSE may defeat a claim that such a procedural violation impeded a student's education (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013] [finding that any failure to provide the parents with a copy of the student's IEP prior to the start of the school year did not impede their opportunity to participate in the decision-making process when the parents, among other things, attended the CSE meeting with their

[5] Although the parents claim that the IHO erred in relying on the testimony of a district witness who did not attend the February 2021 CSE meeting, a review of the IHO's decision does not show any undue reliance on this testimony as support for the IHO's finding that the February 2021 IEP offered the student a FAPE; rather, the IHO's reasoning with respect to the IEP relied on other evidence of the student's needs and the recommended program including the private neuropsychological evaluation and the IEP itself (IHO Decision at pp. 4-6; see Dist. Exs. 1; 3).

[6] Briefly considering the claim that the IHO erred in finding that "the parent agreed to the program set for by the CSE," I note that there is a record basis for the IHO's finding (see IHO Decision at p. 6). Although the IHO cited to page 70 of the transcript as the basis for this statement, no testimony about such agreement by the parent can be located therein (see Tr. p. 70). However, earlier in the proceedings the parent was asked the following question during cross-examination: "And you expressed an agreement with the IEP class at that meeting, correct?" which was answered in the affirmative (Tr. pp. 65-66). Ultimately, the IHO did not rely heavily on evidence of the parents' agreement with the IEP to conclude that the district offered the student a FAPE, and, therefore, even if the IHO had erred factually, such error would not warrant reversal of her finding that the district offered the student a FAPE.

attorney and participated in the development of the student's IEP]; see also Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

Here, I find that the hearing record supports the IHO's determination that the failure to provide the parents with a copy of the February 2021 IEP did not rise to the level of a denial of FAPE in this instance for the same reasons cited by the IHO in her decision. The student's mother and several of the student's providers at Shefa attended the February 2021 CSE meeting by telephone (Tr. pp. 65-66; Dist. Exs. 3 at p. 26). The CSE meeting minutes reveal that the parent's concerns with the recommended program—including that the size of an ICT classroom was problematic and that the lack of a particular type of language instruction was an issue—were considered by the CSE (Dist. Ex. 4 at p. 4; Parent Ex. N ¶¶ 6-7). Additionally, the IEP, the CSE meeting notes, and the prior written notice reflect that the private neuropsychological evaluation obtained by the parents was considered by the CSE and input from the student's providers at Shefa with respect to the student's academic and social functioning was integrated into the IEP (see Dist. Exs. 1; 3 at pp. 1-5; 4 at pp. 1-5; 5 at pp. 1-2).

Moreover, it is clear from the hearing record that the parents were cognizant of the program and service recommendations of the CSE. For example, the in-person and affidavit testimony of the student's mother confirms that she was aware that the CSE recommended that the student be enrolled in an ICT classroom with SETSS, in addition to receiving related services such as OT, speech-language therapy, and counseling (Parent Ex. N ¶ 6; see Tr. p. 66).

In addition, there is no dispute that the parents were provided with a prior written notice before the start of the 2021-22 school year that included a description of the other options that the CSE considered, noted each evaluation procedure, assessment, record, and report that the CSE used as a basis for the proposed IEP, and listed the primary contents of the recommended program as consisting of a 10-month school year, placement in a district non-specialized school, an ICT classroom with SETSS, individual counseling, individual OT, and both group and individual speech-language therapy (see Dist. Ex. 5 at pp. 1-2).[7]

In light of the above, I decline to disturb the IHO's finding that the failure to provide the parents with a copy of the February 2021 IEP prior to the start of the 2021-22 school year constituted a procedural error, but that the procedural error did not deny the student a FAPE because the parent attended the CSE and was made aware of the education program recommended by the February 2021 CSE.

[7] State and federal regulations require that a district provide parents of a student with a disability with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1). Pursuant to State and federal regulation prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

C. Assigned Public School Site

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id. at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[8] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F. 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Initially, the parents argue that they were not permitted to tour the assigned school site until a month into the school year and did not receive a copy of the student's IEP until after they did

[8] The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

tour the school and, therefore, were not able to effectively evaluate whether the assigned school had the capacity to implement the IEP.

Regarding the parents' allegation that they were unable to tour the assigned public school site prior to the first day of the school year, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017] [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]). On the other hand, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Here, the school location letter, dated May 9, 2021, identified the assigned public school site and set forth the contact information for an individual that the parents could contact in order to arrange a visit to the school (Parent Ex. J at p. 4). There is no indication in the hearing record that the parents attempted to visit the school before it closed for summer. In her affidavit testimony, the student's mother indicated that she "tried to visit the school over the summer" but that "they did not offer [her] the opportunity to visit until October 2021" (Parent Ex. N ¶ 10). In their August 25, 2021 letter to the district, the parents indicated they had "attempted to contact the school to set up a tour but ha[d] not received a response" (Parent Ex. B at p. 3). The teacher from the assigned school testified that, generally, the school did not offer tours during the summer (Tr. pp. 32-33). As the parent had the opportunity to visit the assigned school, it does not appear that there is any basis for finding that the student was denied a FAPE as a result of the school not responding to her request for a visit until after school resumed in September (see E.B. v. New York City Dep't of Educ., 2016 WL 3826284, at *9 [S.D.N.Y. July 12, 2016] [student was not denied a

FAPE despite school's failure to respond to parent's emails and telephone calls as parent was able to visit assigned school after school year had started]).

Additionally, during the impartial hearing, the student's mother testified that the district had previously assigned the student to attend the same school and that she had visited it "many times in the past" and "had knowledge of the program" and that she sought a tour leading up to the 2021-22 school year in order to "do [her] due diligence" and "see if anything had changed . . . from the years prior" (Tr. pp. 66-67).

Thus, given the parents' previous opportunities to visit the assigned school site, as well as the opportunity to visit the school when school resumed for the 2021-22 school year, this is not a circumstance where the parents were unable to obtain information about the school. Accordingly, any failure by the district to arrange a tour of the school for the parents prior to the beginning of the school year does not support a finding that the district denied the student a FAPE or significantly impeded the parents' opportunity to participate in the educational decision-making process. As to the parents' ability to assess the school without a copy of the IEP, as discussed above, the evidence in the hearing record shows that the parents had knowledge of the February 2021 CSE's program and services recommendations.

In addition, the parents' concerns about the school based on the mother's visit in October 2021—that the students in the proposed class had learning profiles dissimilar to the student's, that the classroom was large and lacked individualized attention and support, and that students with disabilities "were seen receiving the same instruction as their [regular] education classmates"—are really "substantive attacks on [the] IEP . . . couched as challenges to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O., 793 F.3d at 245). In particular, the parents' concerns are really attacks on the CSE's recommendation that the student attend a general education class placement with ICT services. The parents seem to concede as much when they argue in their memorandum of law that they did not allege that the assigned school could not implement the student's IEP but instead their claim was that the assigned school was inappropriate because it lacked certain features the student required such as " Orton Gillingham or Hochman method trained teachers," small classroom instruction, and "1:1 instruction" (see Parent Mem. of Law at pp. 7-9). However, as set forth above, the parents have not appealed from the IHO's findings that the program recommended for the student in the February 2021 IEP offered the student a FAPE for the 2021-22 school year, and I will not now reformulate the entirety of the parents' appeal in an effort to discern an argument that is not present.

In light of the above, I decline to disturb the IHO's finding that the parents' assertions against the assigned school were speculative.

VII. Conclusion

Having found that the IHO correctly determined that the district offered the student a FAPE for the 2021-22 school year the necessary inquiry is at an end. I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations

herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 22, 2022

STEVEN KROLAK
STATE REVIEW OFFICER