



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-029

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Massapequa Union Free School District

Appearances:

Guercio & Guercio, LLP, attorneys for respondent, by Randy Glasser, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) did not recommend an appropriate program for her son for the 2016-17 school year but denied the parent's request for compensatory education services. The district cross-appeals from that portion of the IHO's decision which found that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year. The appeal must be dismissed. The cross-appeal must be sustained.

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

On May 17, 2016 a Committee on Preschool Special Education (CPSE) convened for a "Program Review/Annual Review" and to develop the student's IEP for the remainder of the 2015-16 year (Dist. Ex. 4 at p. 1). Finding the student eligible for related services as a preschool student with a disability, the May 2016 CPSE recommended three 30-minute sessions of individual occupational therapy (OT) per week, three 30-minute sessions of individual physical therapy (PT) per week, and three 30-minute sessions of individual speech-language therapy per week to be provided until June 24, 2016 (id. at pp. 1, 3, 9, 10). According to meeting information attached to the IEP, the May 2016 CPSE also discussed providing the student with 12-month related services (id. at p. 1). On June 27, 2016, the CPSE recommended that the student receive 12-month services during summer 2016 consisting of two 30-minute sessions per week of both individual OT and

PT, and three 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 3 at p. 10). For the 2016-17 school year, the June 2016 IEP also provided the student with three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, and three 30-minute sessions per week of individual speech-language therapy (*id.* at pp. 9-10).

By due process complaint notice dated August 4, 2016, the parent alleged that the district failed to offer the student a FAPE for the 2016-17 school year (Dist. Ex. 1C at pp. 3, 16). Specifically, the parent alleged that the May 2016 CPSE recommended an insufficient level of 12-month related services (*id.* at p. 3). The parent also contended that she requested a school-based program so the student could receive his preschool education and related services from the same program (*id.*). Lastly, the parent alleged that the May 2016 IEP failed to provide the student with sufficient speech-language therapy (*id.*). As a remedy, the parent requested that the district agree to provide the student with a full-day preschool program, where the student could also receive his related services, in addition to four sessions per week of speech-language therapy (*id.* at p. 16). Furthermore, the parent requested that the district agree to provide the student with seven sessions of compensatory PT and seven sessions of compensatory OT (*id.*).

On September 14, 2016, the parents signed a stipulation of settlement and release (September 2016 stipulation) in which the district agreed to provide the student with a center-based 18:1+2 integrated program at a nonpublic preschool (NPS), five days per week from 8:30 a.m. to 1:30 p.m., along with the related services recommended in the student's IEP, for the period of September 19, 2016 through June 23, 2017 (Dist. Ex. 1B at pp. 3, 5; *see* Dist. Ex. 3 at p. 10). Further, the parent waived her right to commence any action or proceeding with respect to the student's IEP, special education program, and related services relative to the student's 2016-17 school year, unless the parent provided 10 business days written notice to the district of her intention to commence an action or proceeding (Dist. Ex. 1B at p. 2).

In mid-September 2016, the student began attending an 18:2+2 inclusion class for five hours daily at the NPS and receiving his mandated services of OT, PT, and speech-language therapy (Tr. pp. 103-04, 356).

At a November 2016 parent-teacher conference, the student's teacher at the NPS informed the parent that she created "educational goals" for the student because there were no educational goals in the student's IEP (Tr. pp. 77-78, 82, 306). The parent advised the student's teacher that she wanted to review the goals and would request a CPSE meeting in order to "create and add" goals to the student's IEP with the CPSE (Tr. pp. 371-72, 389-90). A CPSE meeting was held at the parent's request in December 2016 so that the student's preschool program and educational goals could be reflected on the student's IEP (Tr. pp. 107, 370-72). The CPSE declined to add the student's program and educational goals to the IEP because the student's placement was a result of the September 2016 stipulation and the CPSE did not recommend the placement or the goals (Tr. pp. 339-40).

The parent subsequently filed a due process complaint notice, dated December 7, 2016, in which she asserted that the December 7, 2016 CPSE improperly refused to develop an IEP for the student reflecting the NPS the student was attending pursuant to the September 2016 stipulation and adding academic goals (Dist. Ex. 1F at pp. 3-4, 17). The parent requested monetary damages

and that the district be required to develop an IEP reflecting the student's placement at the NPS and academic annual goals (id. at p. 17).

In a decision dated February 14, 2017, the IHO granted the district's motion to dismiss the December 7, 2016 due process complaint notice, finding that because the parent failed to comply with the 10-day notice set forth in the parties' September 2016 stipulation of settlement prior to initiating the proceeding, the parent waived her right to commence the proceeding (Dist. Ex. 1A at pp. 30-34).

A CPSE convened on March 22, 2017 and continued the student's eligibility for special education and related services as a preschool student with a disability (Dist. Ex. 1D at pp. 1, 3). As per the parent's request, the March 2017 IEP reflected the student's placement at the NPS in an 18:2+2 "Special Class in an Integrated Setting" along with related services of three 30-minute sessions of OT per week, three 30-minute sessions of individual PT per week, and three 30-minute sessions of individual speech-language therapy per week (id. at pp. 1, 11). In addition, academic annual goals were added to the March 2017 IEP (id. at pp. 6-7).

In an email to the district dated March 23, 2017, the parents notified the district that they intended to file a due process complaint notice and would seek compensatory education services as relief, if the district did not address or remedy the lack of the student's current placement/program and academic goals in the student's IEP for "6+ months" (Dist. Ex. 1A at p. 28).

A. Due Process Complaint Notice

By due process complaint notice dated April 6, 2017, the parent alleged that the district failed to offer the student a FAPE for the 2016-17 school year "due to a deficient IEP for a majority of the school year" (Dist. Ex. 1A at pp. 1-4, 8, 9). More specifically, the parent argued that the district prohibited her, her advocate, and other members of the CPSE from developing appropriate educational goals for the student prior to the March 2017 CPSE meeting (id. at p. 4). The parent further alleged that the student's IEP did not reflect a "placement/program" or any academic goals for the period of September 19, 2016 until March 24, 2017 (id. at pp. 3, 4). Additionally, the parent asserted that the student's IEP "was deficient in educational goals, benchmarks and objectives for more than 6 months" (id. at p. 4). According to the parent, due to the deficiencies in the IEP, the student failed to make "appropriate/sufficient/meaningful progress" (id. at p. 3).

As relief, the parent sought "626 hours of compensatory special education" (Dist. Ex. 1A at p. 8). The parent also sought monetary relief (id.). Lastly, the parent purported to give the district "10 days' notice" and "reserve [her] right to file a future due process complaint" relating to the student's lack of progress in the areas of speech-language, occupational therapy, and physical therapy (id. at p. 9).

B. Facts Post-Dating the Due Process Complaint Notice

On April 14, 2017, the district moved to dismiss the parent's April 6, 2017 due process complaint notice (Dist. Ex. 1). The district alleged that the parent failed to comply with the September 2016 stipulation because she failed to provide sufficient notice prior to bringing an action or proceeding (id. at p. 4). The district also alleged that by entering into the September

2016 stipulation, the parent agreed to the amount and duration of the student's related services and waived her right to challenge them (*id.* at pp. 4-5). The district further alleged that the IHO lacked the authority to enforce a settlement agreement and that the parent's due process complaint notice was an improper attempt to amend the September 2016 stipulation (*id.* at pp. 5-8). Lastly, the district alleged that the IHO did not have authority to award monetary damages, the parent was not entitled to an award of attorney fees for the services of her educational advocate, and the parent should not be permitted to file a complaint raising the same issues as her December 2016 due process complaint notice (*id.* at 9-13).

By interim decision dated June 5, 2017, the IHO denied the district's motion to dismiss (Dist. Ex. 15 at pp. 18-21).¹ The IHO determined that the parent was not seeking to enforce the terms of the September 2016 stipulation and that as per the stipulation the parent provided the district with the requisite notice prior to filing the due process complaint notice in her email to the district dated March 23, 2017 (*id.* at p. 20). Further, the IHO found that he had subject matter jurisdiction over the matter but determined that he lacked authority to award monetary damages or attorney's fees (*id.*).

C. Impartial Hearing Officer Decision

On May 8, 2017, a pendency hearing was conducted, after which the IHO issued an interim decision dated July 5, 2017, which determined that the student's pendency placement, by agreement of the parties, consisted of a center-based 18:1+2 integrated program at the NPS, five days per week from 8:30 a.m. to 1:30 p.m., along with the following related services provided on a weekly basis: three 30-minute sessions of individual OT, three 30-minute sessions of individual PT, and three 30-minute sessions of individual speech-language therapy, from September 19, 2016 through June 23, 2017, and transportation to and from the NPS (Dist. Ex. 17 at pp. 1-3; May 8, 2017 Tr. pp. 1-20).²

The parties proceeded to an impartial hearing on June 8, 2017, which concluded on November 7, 2017, after five days of proceedings (Tr. pp. 1-434). In a decision dated February 2, 2018, the IHO found that the district failed to offer the student a FAPE and that the student was not entitled to compensatory education (IHO Decision at pp. 7-13). More specifically, the IHO found that the student was denied a FAPE from September 2016 through March 2017 because the district failed to include academic goals in the student's IEP (*id.* at pp. 10-11). Furthermore, the IHO found that the absence of academic goals in the student's IEP was a substantive denial of a FAPE; however, even if the absence of the goals constituted a "procedural violation," it would still rise to the level of a denial of FAPE in this case (*id.* at p. 11). The IHO also found the fact that the student's teacher at the NPS drafted academic goals for the student further supported his finding

¹ In the IHO's interim decision dated June 5, 2017, the IHO refers to the parent's response to the district's motion to dismiss dated May 8, 2017 and the district's reply to the parent's response dated May 22, 2017; however, these documents were not included in the hearing record (Dist. Ex. 15 at p. 19).

² The hearing record includes transcripts for the May 8, 2017 pendency hearing and a transcript for the impartial hearing from June 8, 2017 through November 7, 2017 (May 8, 2017 Tr. pp. 1-20; Tr. pp. 1-434). Citations to the transcript for the May 8, 2017 pendency hearing will indicate the date of the hearing; citations without a prefatory date are to the consecutively paginated transcript of the impartial hearing from June 8, 2017 through November 7, 2017.

that the student required academic goals on his IEP (*id.* at pp. 10-11). Moreover, the IHO found the district's argument, that the goals prepared by the student's teacher at the NPS were typical classroom goals any general education student would be expected to achieve, was unpersuasive (*id.* at p. 11). With respect to relief, the IHO found that compensatory education was not warranted because the student obtained "meaningful educational benefit" and achieved all of the general education classroom goals by the end of the school year (*id.* at pp. 11-12). Based upon the foregoing, the IHO dismissed the parent's due process complaint notice with prejudice (*id.* at p. 12).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred by dismissing the parent's due process complaint notice with prejudice and by not awarding compensatory education after finding a denial of FAPE. Initially, the parent alleges that the student "did not have an IEP that reflected his placement/program goals and services until March 24th 2017" and that she is seeking relief for "the district[']s refus[al] to allow the creation of a proper IEP for over 6 months." The parent asserts that the IHO erred in not considering that the student continued to receive special education after the alleged denial of FAPE and that the student was provided with 12-month services "because he was not at the level expected." She also asserts that the IHO erred in finding the student had achieved all of his goals. The parent contends that the academic goals created by the student's teacher at the NPS were not appropriate because they were developed without her participation and outside of a CPSE meeting. The parent further contends that the student's teacher created academic goals for the student, in order to rectify a deficient IEP. In addition, the parent argues that the December 2017 CPSE refused to discuss the student's academic goals.

The parent contends that the IHO erred by not addressing her claim that the student to teacher ratio reflected in the student's IEP did not match the ratio set forth in the parties' settlement agreement. She further asserts that she has a breach of contract claim against the district and "asserts and reserves her right to assert possible action under Section 504 of the Rehabilitation [A]ct of 1973" (section 504). The parent further asserts that if an SRO does not have jurisdiction over the parent's breach of contract or section 504 claims, she will reserve her right to bring those claims to court.

The parent also asserts procedural errors by the IHO. She argues that the IHO failed to include a case number on the IHO decision or any other document and that the IHO erred by allowing counsel for the district to submit "an additional response after our closing statements were directed to be sent simultaneously."^{3, 4}

³ Although not explicitly required by State regulation, the IHO is expected to "render and write decisions in accordance with appropriate standard legal practice," which includes identifying certain basic elements such as the case number of the impartial hearing (8 NYCRR 200.1[x][4][v]).

⁴ Although the parent argues that the district was improperly permitted to submit additional papers after the parties' submission of post-hearing briefs, there is no evidence in the hearing record that the IHO relied on the additional papers submitted by the district. Moreover, as the additional papers were not necessary to render this decision, they will not be considered.

The parent seeks "either 400 hrs. of compensatory one on one special educational instruction service hours as relief, or a remand back to the CSE to assess what specific negative impact the long-term denial of FAPE based on a grossly deficient IEP had on the student."

In an answer and cross-appeal, the district responds to the parent's request for review by generally denying the parent's allegations. Additionally, the district asserts that the parent's claims regarding section 504, reserving the right to pursue claims in court, the student not being offered the promise of meaningful progress, the student's attendance at the NPS over the summer, declassification, and the district's alleged coordination with the NPS, were all raised for the first time on appeal. The district also alleges that the parent's request for review should be dismissed for failure to comply with pleading requirements. Specifically, the district asserts that the parent's request for review does not contain a clear and concise statement of the issues presented and grounds for reversal, with each issue numbered and set forth properly. The district further contends that the student is not entitled to compensatory education because there is no evidence in the hearing record showing that the lack of educational goals on the student's IEP resulted in harm to the student. The district asserts that the parent's claims are also barred by the September 2016 stipulation.

In a cross-appeal, the district asserts that the IHO erred in finding that it denied the student a FAPE for failing to include academic goals in the student's IEP. The district argues that the annual goals in the student's IEP related to his identified needs. The district further contends that the student did not have academic needs requiring special education, thus the district was not required to include academic goals in the student's IEP. In addition, the district contends that assuming that the IHO did not err in finding that the IEP should have included academic goals, the IHO erred in finding this defect rose to the level of a denial of a FAPE because the student ultimately received meaningful educational benefits.

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]).⁵The 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. Preliminary Matters

1. Compliance with Practice Regulations

The district asserts that the request for review must be dismissed for failing to comply with the form requirements for pleading (see 8 NYCRR 279.8[c][2]).

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in relevant part, that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) 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 identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c][1]-[3]).

Moreover, all pleadings and papers submitted to an SRO must "be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not

⁵ 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).

represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

The district correctly contends that the parent's request for review does not comply with all of the form requirements for pleadings set forth in State regulation. First, the request for review fails to contain numbered pages or any citations to the hearing record. In addition, the request for review contains several allegations which are not numbered. However, the parent's request for review does include nine numbered issues which sufficiently specify the grounds on which the parent seeks reversal or modification of the IHO's decision. Overall, while the request for review does not adhere to all of the technical aspects of the practice requirements, it sufficiently identifies the issues raised on appeal and the district was not prevented from timely preparing and filing an answer with cross-appeal and there is no indication that it suffered any prejudice (see Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

Accordingly, in the exercise of my discretion, even taking into account that the parent has repeated deficiencies found in prior appeals, the deficiencies in this appeal are insufficient to dismiss the parent's request for review for failure to adhere to the practice requirements. However, the parent is cautioned that in preparing future appeals, an SRO may be more inclined to dismiss a request for review if a party exhibits a pattern of failing to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 17-015), or it becomes apparent that noncompliance is purposeful.

2. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. As an initial matter, the parent raises several claims on appeal that were not raised in her due process complaint notice, including reserving the right to pursue claims in court, the student not being offered the promise of meaningful progress, the student's attendance at the NPS over the summer, declassification, and the district's alleged coordination with the NPS. The parent does not assert, and the hearing record does not support, any basis upon which she may, at this late juncture, expand the scope of her due process complaint notice. Accordingly, I decline to consider these issues raised for the first time on appeal (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012][explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]).

Next, the parent raises claims outside the scope of the IDEA and the Education Law. Specifically, on appeal, the parent alleges violations of section 504. State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parent's claims regarding section 504, discrimination or retaliation (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Accordingly, the parent's claims related to section 504 shall not be reviewed on appeal.

Lastly, the parent claims that the district violated the September 2016 stipulation because the student was attending a classroom with an 18:2+2 staffing ratio, although the September 2016 stipulation provided for placement in an 18:1+2 class. To the extent that the parent seeks enforcement of or argues that the district breached the September 2016 settlement agreement, Federal and State law and regulations do not confer jurisdiction to review or enforce settlement agreements on IHOs or SROs, whose jurisdiction is limited to matters relating to the identification, evaluation, or placement of students with disabilities, or the provision of a FAPE to such students (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1][a]; 34 CFR 300.503[a], 300.507[a][1]; 8 NYCRR 200.5[i][1]; see Application of the Bd. of Educ., Appeal No. 07-043; but see Application of the Bd. of Educ., Appeal No. 04-068). While a settlement agreement may, in some instances, be admissible and relevant to the facts underlying a parties' dispute in a due process proceeding, the administrative hearing officers in due process proceedings in New York lack enforcement mechanisms of their own and the Second Circuit has held that a due process proceeding is "not the proper vehicle to enforce the settlement agreement" (H.C. v. Colton-Pierrepoint Cent. Sch. Dist., 341 Fed. App'x 687, 689-90 [2d Cir. July 20, 2009]; see A.R. v. New York City Dep't of Educ., 407 F.3d 65, 78 n.13 [2d Cir. 2005]; see also Honeoye Cent. Sch. Dist. v. S.V., 2011 WL 280989, at *3-*5 [W.D.N.Y. Jan. 26, 2011]). In the event that the parent wishes to pursue further action, she may seek enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also, A.R., 407 F.3d at 76, 78 n.13).

B. 2016-17 School Year

The district cross-appeals and asserts that the IHO erred in finding that it denied the student a FAPE for the 2016-17 school year by failing to include academic goals in the student's IEP. The parent alleges that the student's IEP did not reflect any academic goals or the student's placement from September 19, 2016 through March 24, 2017, therefore, the IHO's finding that the district failed to offer the student a FAPE from September 19, 2016 through March 24, 2017, should be upheld.⁶

⁶ As noted above, directing the district to reflect the placement set forth in the September 2016 stipulation on the student's IEP is equivalent to enforcing the September 2016 stipulation and neither the IHO nor an SRO have

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). According to State guidance:

Goals should not be a restatement of the general education curriculum (i.e., the same curriculum as for students without disabilities), or a list of everything the student is expected to learn in every curricular content area during the course of the school year or other areas not affected by the student's disability. In developing the IEP goals, the Committee needs to select goals to answer the question: "What skills does the student require to master the content of the curriculum?" rather than "What curriculum content does the student need to master?"

("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 30, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>)

The present levels of performance in the June 2016 IEP are not in dispute in this case; however, they provide a description of the student's cognitive and functional performance, and the student's weaknesses and identified needs (Dist. Ex. 3 at pp. 3-5). Accordingly, a brief discussion of them is helpful in providing context before reaching the disputed issue, whether the district denied the student a FAPE for failing to include academic goals in the student's IEP.

According to the June 2016 IEP, administration of cognitive testing to the student yielded a full-scale IQ in the average range of cognitive functioning and the student did not have cognitive or academic needs "that should be addressed through special education" (Dist. Ex. 3 at pp. 4, 5). The IEP reflected that the student pointed to body parts, followed multistep directions, and attended to books for up to 15 minutes (id. at p. 4). In addition, the IEP indicated that the student's social and emotional levels and abilities were within age expectations, and the student did not have

jurisdiction over enforcement of settlement agreements. Additionally, to the extent the parent contends that placement in an integrated class pursuant to the stipulation is an indication that the student had academic needs requiring special education and annual goals, that analysis idiomatically speaking, places the cart before the horse (see Application of the New York City Dep't of Educ., Appeal No. 14-095; see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> ["[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment"]). Accordingly, the analysis herein focuses on the student's needs and the annual goals developed to address those needs and the student's placement is not addressed further.

any management needs or behavioral needs requiring positive behavioral interventions or a behavioral intervention plan (id. at p. 5). However, the June 2016 IEP identified that the student exhibited needs in the areas of speech-language development and physical development (id. at pp. 4-5).

With respect to the student's speech-language development, the June 2016 IEP indicated that the student communicated using single words, two-word combinations, and a few simple sentences, many of which were unintelligible due to articulation errors and phonological processes (Dist. Ex. 3 at p. 4). Through formal evaluation, the student's articulation and phonological test scores were found to be two standard deviations below the mean (id. at pp. 3, 4). The IEP also stated that the student was missing several age appropriate morphological and syntactical structures in his expressive language (id. at p. 4). The IEP noted that during conversational speech several sound substitutions were observed, as well as the phonological processes of final consonant deletion, gliding, fronting, weak syllable reduction, stopping, and cluster reduction (id.). Additionally, the student reportedly often deleted consonants in multisyllabic words with the resulting word containing predominantly vowels, which decreased the student's overall speech intelligibility making him difficult to understand, especially in unknown contexts (id.).

Regarding the student's physical development, the June 2016 IEP indicated that the student presented with low muscle tone throughout his upper extremities and proximally in his trunk, and had difficulty maintaining a mature upright posture while seated at the table as he was often leaning on the table for support (Dist. Ex. 3 at p. 5). The IEP also stated that the student displayed significant motor planning difficulties; poor body and spatial awareness; and presented with deficits in muscle strength, balance, endurance, and coordination, all of which made it difficult for the student to perform age appropriate gross motor tasks (id.). For example, the June 2016 IEP indicated that the student could only jump small distances, did not ascend stairs with a step to pattern independently, and descended stairs with a step to pattern with one handrail for assistance and intermittent assistance (id.). Within the IEP, the parent reported concerns regarding the student's fine and gross motor skills and noted his need to improve his fine motor, visual motor, and sensory processing skills (id.).

To address the student's speech-language needs, the June 2016 IEP included four speech-language annual goals and associated short-term objectives which focused on eliminating the use of phonological processes such as deletion of final and initial consonants, syllable reduction, and cluster simplification in conversational speech; using grammatically correct sentence patterns in conversational speech; and expanding to four, the student's mean length of utterances and responses to questions using basic sentence patterns (Dist. Ex. 3 at p.p. 6-7). To meet the student's physical development needs in the classroom and other educational settings, the IEP included annual goals and corresponding short-term objectives which focused on increasing endurance without fatigue during physical activities, improving balance during static or dynamic activities, completing a variety of fine motor activities, completing specified left-right sided activities by consistently crossing the midline, and printing or drawing symbols, letters and/or words with no more than four errors in a variety of classroom activities (id. at pp. 7-9). The June 2016 IEP also included annual goals involving ascending and descending stairs; jumping; building, duplicating, and reproducing designs from visual models to assist visual perception skills; and throwing, catching, bouncing, dribbling, hitting, and kicking a ball (id. at pp. 8-9).

In addition to the foregoing, the June 2016 IEP further addressed the student's needs by recommending 12-month related services consisting of two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual speech-language therapy, and three 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual speech-language therapy for the 2016-17 school year commencing in September 2016 (Dist. Ex. 3 at pp. 1, 9-10).

Turning to the IHO's finding that the student's IEP should have included academic annual goals, the student's teacher at the NPS testified that she created "classroom goals" for the student upon receipt of the June 2016 IEP because the IEP did not contain "educational goals" (Tr. p. 77).⁷ The teacher explained that she developed the educational goals based on direct observation of the student and what would be "appropriate academically and developmentally" or "age appropriate" for the student (Tr. p. 79; see Dist. Ex. 6). The long-term goals and objectives the teacher developed for the student related to his ability to maintain attention to tasks without distraction for five minutes and refocus in order to complete assignments, print 10 letters of the alphabet, identify the first letter of his name, discriminate between written letters and numbers, and recognize numerals 0-5 (Tr. pp. 78-81; Dist. Ex. 6).

During the impartial hearing, the CPSE chairperson was asked why she did not reconvene a CPSE meeting in November 2016 to add the academic goals to the student's IEP when she knew that the NPS was working on such goals (Tr. p. 358). In response, the CPSE chairperson stated that, whether in a general education program or a special education program, the student would work on academic goals that were developmentally appropriate for children of that age (id.). The CPSE chairperson explained further that the educational goals created by the NPS teacher in fall 2016 were not specific to the student's area of need, but rather were "developmental goals that all preschoolers of that age are expected to achieve" (Tr. pp. 121, 361). Although the CPSE chairperson noted that educational evaluations of the student provided or conducted prior to the beginning of the 2016-17 school year did not reflect any academic needs, at the time of the December 2016 CPSE meeting, she was aware that the parent wanted educational goals added to the student's IEP (Tr. pp. 118, 339; see Dist. Ex. 3 at pp. 3-5).

The hearing record reflects that the parent attended the December 2016 CPSE meeting accompanied by her advocate (Tr. pp. 416-17). Additional attendees included the CPSE chairperson and counsel for the district, and the student's then-current teacher and his "providers" participated via telephone (Tr. pp. 107-09, 416-17; see Dist. Ex. 3 at p. 1). The parent testified that during the CPSE meeting she requested that the December 2016 CPSE "create and add academic goals" to the student's IEP; however, the district members of the CPSE were not in agreement that academic goals be created for the student (Tr. pp. 371-72, 375, 415-16). The parent further testified that she was advised by the CPSE chairperson at the December meeting that the CPSE would allow modifications to the student's related service goals, but would not add educational goals to the student's IEP (Tr. pp. 374-75). The CPSE chairperson testified that the CPSE did not add academic goals to the student's IEP at the parent's request because the student's program was a result of the September 2016 stipulation, and not the CPSE's recommendation (Tr.

⁷ Testimony refers to the additional goals the NPS teacher developed in fall 2016 as "educational," "academic" and "classroom" goals interchangeably (see e.g. Tr. pp. 77-81, 97, 118, 121-22).

pp. 339-40, 345). Additionally, the parent testified that during the CPSE meeting, the CPSE chairperson and counsel for the district advised the parent that the CPSE would "listen" to the proposed academic goals and that counsel for the district informed her that the CPSE was "open" to hearing the academic goals, but because of the September 2016 stipulation, the CPSE would not add them to the IEP (Tr. pp. 386-87).

The CPSE chairperson testified that at the December 2016 CPSE meeting, the student's teacher "relayed all progress" since September and reported that the student was an active participant in class, was working on "classroom goals that a typical developing preschooler would work on" and was progressing well (Tr. pp. 108-09). The CPSE chairperson also testified that all the student's "providers" participated in the December 2016 CPSE meeting by phone and each discussed their area, how they supported the student, and the student's progress (Tr. p. 109).

According to the CPSE chairperson's testimony, at the December 2016 CPSE meeting the NPS teacher did not specifically address whether or not the student had any academic needs at that time and did not recommend that any goals be added to the student's IEP (Tr. pp. 108-09). She also testified that the teacher reported the "things that were being worked on were classroom goals that a typical[ly] developing preschooler would work on," and that in the classroom the student did not appear to have any academic needs above that of a typically developing preschooler (Tr. pp. 108, 114).

The NPS teacher testified that when the student entered her classroom he did not exhibit academic needs that were different than general education students, and that during the 2016-17 school year the student was functioning in the classroom as a general education student (Tr. pp. 95-97). Specifically, the teacher testified that the student "was functioning at the same level as the general education population within the classroom" academically (Tr. p. 95). When asked whether the goals she developed relating to the letters of the alphabet and numbers had any relationship to the student's disability, the teacher replied that they did not, rather, the goals related to academic "needs" in the sense they reflected "where [the student] should be at this age" (Tr. pp. 79-81, 97).⁸

Therefore, based on the above, the hearing record reflects that the annual goals in the June 2016 IEP were consistent with the student's identified needs and thus, the district was not required to develop additional annual goals related to academic skills in this instance (see A.H., 394 Fed. App'x at 722 [finding that math annual goals were unnecessary in light of evaluations indicating that the subject was not a particular area of weakness]; Application of a Student with a Disability, Appeal No. 15-095; Application of a Student with a Disability, Appeal No. 15-020; Application of a Student with a Disability, Appeal No. 10-074;). The parent does not point to, nor does the hearing record demonstrate, that the student had needs that were unaddressed by the CPSE. For the aforementioned reasons, the IHO's finding that the district denied the student a FAPE based on failing to include academic goals in the student's IEP must be reversed. Additionally, even assuming that the student exhibited deficits with respect to his academic skills, every deficit area of the student's functioning need not have had a corresponding goal in the IEP in order to offer a FAPE (see, e.g., J.L. v. City Sch. Dist., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013] [the

⁸ The NPS teacher further testified that the student's management needs were the same as typically developing peers and socially he was age appropriate (Tr. p. 97).

failure to address all areas of need though goals does not necessarily constitute a denial of a FAPE]).

Lastly, it must be noted that a CPSE convened on March 22, 2017 at the parent's request and the resultant IEP reflected the student's placement at the NPS in an 18:2+2 "Special Class in an Integrated Setting" and the addition of academic goals (Dist. Ex. 1.D at pp. 1, 3, 6-11). The March 2017 CPSE added an annual goal addressing attention to task during class lessons and assignments, one reading annual goal addressing recognition and identification of letters and corresponding sounds, one listening comprehension annual goal, and two mathematics annual goals addressing counting independently and identifying numerals zero to ten (*id.* at pp. 6-7, 10-11).

According to the student's teacher at the NPS, the March 2017 CPSE added goals to the March 2017 IEP because the goals weren't "officially" on the IEP previously (Tr. pp. 85, 88). The teacher testified that in addition to adding goals and modifying goals to be more "specific," the CPSE added goals that were age appropriate for typically developing peers (Tr. p. 89). The CPSE chairperson testified that the goals added to the March 2017 IEP were generated out of parent report of what she thought the student needed to achieve by the end of the school year in conjunction with the classroom teacher (Tr. p. 119). However, the CPSE chairperson testified that she was familiar with common core standards for preschool and opined that some of the goals were "more kindergarten based," in that preschool students would not be expected to independently achieve some of the reading and math goals that were placed on the IEP (Tr. pp. 119; *see* Dist. Ex. 1.D at pp. 6-7, 10-11).

In sum, the parent's concern with respect to adding academic goals to the student's June 2016 IEP was understandable, especially given the information provided by the student's teacher at the November 2016 parent-teacher conference in which she advised the parent that she created "educational goals" for the student because there were no educational goals in the student's IEP (Tr. pp. 77-78, 82). Accordingly, although the district expressed to the parent that it intended to adhere to the September 2016 stipulation and perhaps could have better handled the parent's request to add academic goals to the student's IEP, the parent's ability to discuss the academic goals with the December 2016 CPSE and the district's willingness to "listen" to the parent, indicates that her right to participate in the development of the student's IEP was not significantly impeded (*A.P.*, 2015 WL 4597545, at *10 n.7; *E.F.*, 2013 WL 4495676, at *17). Although the district could have mitigated the parent's concerns by explaining that academic goals were not necessary because the student did not exhibit academic needs, rather than advising the parent that the goals could not be added to the student's IEP because of the September 2016 stipulation, this circumstance did not result in a denial of a FAPE. Furthermore, as discussed in detail above, a review of the hearing record and the goals added to the March 2017 IEP shows that they were age appropriate for typically developing peers in preparation for kindergarten, which further supports the fact that the absence of these goals did not render the June 2016 IEP deficient.

VII. Conclusion

In summary, the IHO's determination that the student was denied a FAPE from September 2016 through March 2017 because the district failed to include academic goals on the student's IEP, must be reversed. As discussed above, the hearing record reveals that the student did not

exhibit needs with respect to academic skills in order to be involved in and make progress in age-appropriate activities; therefore, the district was not required to create academic goals for the student.

I have considered the parties' remaining contentions and find them to be without merit or that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated February 2, 2018 is modified by reversing those portions of the decision which found that the district denied the student a FAPE for the 2016-17 school year.

**Dated: Albany, New York
April 26, 2018**

**STEVEN KROLAK
STATE REVIEW OFFICER**