The University of the State of New York

The State Education Department
State Review Officer
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No. 18-084

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 New York City Department of Education

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail M. Eckstein, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2017-18 school year was appropriate. 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

The student began receiving special education and related services through the Committee on Preschool Special Education (CPSE) as a preschool student with a disability during the 2015-16 school year, including special education itinerant teacher (SEIT) services, speech-language therapy, and occupational therapy (OT) (see Parent Ex. C at pp. 1, 3, 8, 11). At that time, the student was reported to be bilingual in English and his native language; while the IEP indicated English was "his expressive language of preference," contemporaneous evaluative information indicated his language skills were stronger in his native language (id. at p. 3; see Parent Exs. G at p. 3; I at p. 4). The IEP indicated that the student was recommended to receive a bilingual program in English and his native language (Parent Ex. C at p. 1).

The student attended preschool in a 14:1+2 general education classroom for the 2016-17 school year and received speech-language therapy in his native language, as well as OT, in the classroom, and he also received SEIT services in his native language both in school and at home (Dist. Ex. 6 at p. 1; see May 8, 2018 Tr. pp. 120-21; Dist. Exs. 4 at p. 1; 5 at p. 1; 8 at pp. 1, 4).[1]

On March 17, 2017, a CSE convened and determined the student was eligible for special education programs and related services as a student with autism (Dist. Ex. 8 at pp. 1, 13).[2] The CSE recommended a general education placement with integrated co-teaching (ICT) services for math, English language arts (ELA), social studies, and science; the CSE also recommended the following related services: one 30-minute session of individual OT per week, one 30-minute session of OT per week in a group, two 30-minute sessions of speech-language therapy per week in a group, and one 30-minute session of individual speech-language therapy per week (id. at p. 10). The March 2017 IEP reflected that the student's language abilities were "better developed in" his native language, and that he was still an English language learner (ELL) but that his English vocabulary and receptive and expressive language skills in English had increased since the beginning of the school year (id. at pp. 1-2, 4). The IEP indicated that the student required a special education service to address his language needs as they related to the IEP as a result of his limited English proficiency (id. at p. 5). The speech-language therapy services were recommended to be delivered in the student's native language; all other services were recommended to be delivered in English (id. at p. 10).

By due process complaint notice dated September 7, 2017, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year (Parent Ex. A). For relief, the parent requested that the student receive small group counseling, an "[i]ndirect autism behavioral consultant," home-based special education teacher support services (SETSS), and independent evaluations (id.).

At the beginning of the 2017-18 school year, school staff noticed that the student was struggling with inattention and distractibility and collected antecedent, behavior, and consequence (ABC) data from mid-September through November 2017 (May 8, 2018 Tr. pp. 56-57, 59-60, 73; see Dist. Ex. 14). District staff determined the student performed better when peers translated for him, and when provided with a visual schedule and sensory diet (May 8, 2018 Tr. p. 57). In addition, a district school psychologist conducted a classroom observation on October 30, 2017 (Dist. Ex. 12). Based on the data collected, the district completed a functional behavioral assessment (FBA) on November 1, 2017 (Dist. Ex. 15; see May 8, 2018 Tr. p. 59). A CSE convened on November 1, 2017 to discuss the student's needs and modify the student's IEP as necessary (see Dist. Exs. 13 at p. 1; 16).

At the November 2017 CSE meeting, the CSE recommended a general education placement with ICT services and the same related services as reflected in the March 2017 IEP (compare Dist. Ex. 8 at p. 10, with Dist. Ex. 16 at pp. 7-8). The IEP indicated that the student's

[1] As the transcript of the impartial hearing is not consecutively paginated across all hearing dates, transcript citations are to both the day the hearing took place and the transcript pagination.

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute (34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

classroom teachers and speech providers reported that the student would benefit from prompting and redirection from a paraprofessional who spoke his native language and the CSE recommended the services of a full-time individual paraprofessional for the student (Dist. Ex. 16 at pp. 2-3, 8). The IEP also indicated as a service delivery recommendation that the student's ICT services be provided in the student's native language; however, the IEP also indicated that the student "should be placed in an interim monolingual class" "pending availability of a bilingual provider" (id. at pp. 7, 11). The CSE also determined that the student required positive behavioral interventions, including a behavioral intervention plan (BIP), to address the student's needs for "constant one to one support in order to remain attentive and focus[ed]" and for movement and sensory breaks, which was completed on November 13, 2017 (Dist. Exs. 16 at p. 4; 18).

In an amended due process complaint notice dated November 29, 2017, the parent continued to allege that the district failed to offer the student a FAPE for the 2017-18 school year and requested relief including home-based SETSS from a provider who spoke the student's native language and ICT services from a bilingual provider (Parent Ex. T).

The CSE reconvened again on January 9, 2018 to follow up with regard to the FBA and BIP (May 8, 2018 Tr. p. 63; see Dist. Exs. 20 at p. 1; 21). The CSE continued to recommend a general education placement with ICT services and the same related services as recommended in the March 2017 and November 2017 IEPs (compare Dist. Ex. 8 at p. 10 and Dist. Ex. 16 at pp. 7-8, with Dist. Ex. 21 at pp. 13-14). The CSE also recommended initiation of one 30-minute session of counseling per week in a group and five 60-minute sessions of parent counseling and training in a group (Dist. Ex. 21 at p. 13). In addition, the CSE "discussed strategies used at school that have diminished the touching of other people," and suggested that the parent could use these strategies in the home (id. at p. 2). The IEP indicated that the parent requested services from a special education teacher who spoke the student's native language, as well as home-based SETSS from a provider who spoke the student's native language; however, while the CSE continued to recommend that ICT services be provided in the student's native language, the IEP also indicated that the student "should be placed in an interim monolingual class" (id. at pp. 2, 13, 17). The CSE also recommended that the student be provided 12-month services (id. at p. 14).

A. Due Process Complaint Notice

In a second amended due process complaint notice dated January 29, 2018, the parent alleged that the district failed to offer the student a FAPE for the 2017-18 school year (Parent Ex. L). The parent asserted that she "disagree[d]" with the "placement, program and related services" recommended in the March 2017, November 2017, and January 2018 IEPs, as well as the annual goals developed for the 2017-18 school year (id. at pp. 2, 6). The parent also asserted that the district had failed to provide ICT services in the student's native language as required by the January 2018 IEP (Parent Ex. L at pp. 2-4). In addition, the parent contended that the 1:1 paraprofessional who spoke the student's native language was not an adequate substitute for a special education teacher who spoke the student's native language and that the paraprofessional did not always collaborate with the student's special education teacher (id. at pp. 2-3). The parent further argued that the student had extensive management needs and that he required 1:1 instruction in his native language and a substantial number of prompts throughout the school day, and that he required home-based SETSS from a provider who spoke the student's native language to address his needs related to safety and behavioral concerns and executive functioning (id. at pp.

3-4, 6). The parent also claimed that she only received the January 2018 IEP in English (id. at p. 6).[3] The parent requested relief consisting of home-based SETSS from a provider who spoke the student's native language and ICT services from a bilingual provider (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on October 10, 2017, which concluded on May 8, 2018, after six days of proceedings (Oct. 10, 2017 Tr. pp. 1-19; Oct. 23, 2017 Tr. pp. 20-33; Nov. 20, 2017 Tr. pp. 34-58; Jan. 5, 2018 Tr. pp. 1-14; Mar. 9, 2018 Tr. p. 15-22; May 8, 2018 Tr. pp. 23-128). In an interim order on pendency, dated October 24, 2017, the IHO determined that the student's pendency placement consisted of 10 hours of bilingual 1:1 SEIT services "to be provided at school and home," three 30-minute sessions of 1:1 bilingual speech-language therapy, and two 30-minute sessions of 1:1 OT (IHO Ex. II at p. 2).

By decision dated June 15, 2018, the IHO determined that the IEPs developed by the CSE were reasonably calculated to enable the student to make meaningful educational progress, except that the March 2017 IEP did not provide "sufficient bilingual support" (IHO Decision at p. 6). However, the IHO found that this deficiency was "corrected in the November 2017 IEP," which continued the student's placement in a monolingual class but provided a bilingual paraprofessional to assist the student (id.). Additionally, the IHO noted that the CSE continued to reevaluate the student and "adapted and changed his IEP during the course of the 2017-2018 school year as his needs developed and changed" (id.).

The IHO also found that home-based SETSS, "while undoubtedly helpful to the [s]tudent," was not necessary for the student to make meaningful progress (IHO Decision at p. 6). The IHO noted that the SETSS provider primarily assisted the student with homework, had not coordinated with the student's school program, and it was not clear from the hearing record how much benefit the student derived from SETSS (id. at pp. 6-7). The IHO also determined that even if she found "that the [s]tudent required ten hours per week of bilingual SETSS services to make up for the lack of bilingual ICT services, it would have been more appropriate to provide those services as either push-in or pull-out services in school" (id. at p. 7). The IHO further found that there was no evidence in the hearing record to support the parent's claim that the student might regress without SETSS and the January 2018 IEP recommended 12-month services, the purpose of which was to "avoid regression during the summer vacation" (id.). Finally, the IHO noted that the student had received most of the relief requested by the parent pursuant to the provision of pendency (id.).

IV. Appeal for State-Level Review

Through her advocate, the parent appeals and asserts that the student was not offered a FAPE for the 2017-18 school year. The parent claims the IHO failed to consider that the student did not have a BIP or a paraprofessional or special education teacher who spoke his native language when he started kindergarten in September 2017, and that the student had difficulty transitioning at the beginning of the 2017-18 school year and "regressed substantially by November 2017."

[3] In her prior due process complaint notices, the parent asserted that she did not receive the March 2017 or November 2017 IEPs in her native language, and that she did not receive certain documents in either English or her native language (Parent Exs. A at p. 3; T at p. 5).

Moreover, the parent asserts the March 2017 IEP did not provide sufficient supports, noting that the student requires support during all academic activities and has sensory and attention issues and substantial management needs. The parent argues that the student did not make meaningful progress and asserts that the IHO erred in determining the student was performing at grade level academically. Finally, the parent claims that the January 2018 IEP is "complicated" and indicated the student needed a substantial amount of support, and the IHO did not consider that the student would not interact with his peers without adult support.

The parent also asserts the IHO erred in determining that home-based SETSS was not necessary for the student to make meaningful progress. The parent argues the IHO erred in determining that SETSS was primarily for homework; the parent contends that the student requires home-based SETSS to make progress and "maintain the progress he is currently receiving at school." The parent asserts that the student required home-based SETSS to address his sensory, attention, and focusing needs. The parent argues that due to the student's sensory needs, the student can become "overly stimulated and ha[ve] difficulty staying focused on an activity."

The district, in an answer, generally denies the parent's allegations and argues to uphold the IHO's determination that the district provided the student a FAPE for the 2017-18 school year. The district asserts that the parent is not challenging the appropriateness of the IEPs developed for the student but is seeking services in excess of what the student needs to receive a FAPE. The district also contends that the parent's argument that home-based SETSS is necessary to prevent regression was not raised in any of her due process complaint notices, is not supported by the hearing record, and that 12-month services were recommended by the January 2018 CSE to prevent regression. As a defense, the district asserts that the parent's request for review should be dismissed because it fails to comply with the practice regulations.

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]).[4]

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. Preliminary Matters

1. Compliance with Practice Regulations

The district argues that the request for review fails to comply with the practice regulations as the parent only identifies general disagreement with the IHO's findings and does not provide any legal analysis or allegations that the IHO's ruling was improper. In addition, the district argues that the parent failed to properly cite or identify relevant portions of the hearing record.

State regulations require 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]; see 8 NYCRR 279.8[c]).

In general, 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]-[c]; 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.

[4] 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).

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]).

While the district correctly contends that the parent only generally disagrees with the IHO's findings, the parent identified the rulings issued by the IHO with relative precision, specifically noting her disagreement with the IHO's determinations that SETSS was "not necessary for the student to make meaningful progress" and that the recommended program "was reasonably calculated to enable the student to make meaningful education progress." However, the request for review does not appropriately identify the issues presented for review "with each issue numbered and set forth separately" as required by State regulation (8 NYCRR 279.4[a]; 279.8[c][3]). Further, the parent does not identify specific grounds for reversal or modification of the IHO's decision, does not provide citations to the hearing transcript despite referencing witness testimony, and only cites to the hearing record on two occasions (see 8 NYCRR 279.8[c][2-3]). In addition, the request for review does not identify the relief sought in this proceeding (8 NYCRR 279.8[c][1]). Finally, the request for review does not comply with the requirement to number the pages of the request for review (8 NYCRR 279.8[a][3]).

However, while the parent's allegations were tersely stated and asserted general disagreement with the IHO's decision, the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058). Accordingly, I decline to dismiss the request for review based on the parent's failure to fully comply with the practice regulations. While the parent's lay advocate has been previously warned by the Office of State Review about the possibility of dismissal for failure to comply with the practice regulations for the same reasons raised by the district in its answer (see Application of a Student with a Disability, Appeal No. 18-039; Application of a Student with a Disability, Appeal No. 18-012; Application of a Student with a Disability, Appeal No. 17-103), in this instance, the parent's lay advocate has provided a sufficient statement of the issues presented for review and has identified the findings of the IHO to which exception is taken.

Nonetheless, as indicated above, the request for review is not fully compliant with State regulation governing practice before the Office of State Review. The parent's lay advocate has previously been warned that in assisting a parent in filing a request for review, the advocate takes on the responsibility of understanding and complying with the practice regulations and that if the advocate continues to fail to comply with the practice regulations, outright dismissal of future nonconforming pleadings, without a decision on the merits, may result (see Application of a Student with a Disability, Appeal No. 17-103). Although the request for review will not be dismissed in this matter, the parent's lay advocate is again cautioned that an SRO may be more inclined to dismiss a future non-complying request for review, considering the lay advocate's repeated failures to comply with the practice requirements (see e.g., Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-103; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a

Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).[5]

2. Scope of Review

Before turning to the merits of the parent's appeal, it is necessary to note the limited scope of the issues presented on appeal, as the parent raised a number of issues in her due process complaint notices which are not raised on appeal. Specifically, the parent does not reassert on appeal: her claims relating to the adequacy of the annual goals or related services; the district's failure to provide the parent with copies of the IEPs in her native language or with any copies of certain documents; or her claims regarding the language of service on the IEPs (Parent Exs. A at pp. 2-3; L at p. 6; T at pp. 2-3, 5). The parent has also not raised her request for relief in the form of counseling, an autism behavioral consultant, and independent evaluations (Parent Ex. A at p. 3). Although the IHO did not address these claims in her decision, the parent does not allege that the IHO failed to address the issues described above or attempt to advance these issues in the request for review. In addition, the parent does not raise her claims relating to the student's need for 1:1 instruction from a bilingual provider during academic activities or the district's failure to implement the recommendation for ICT services to be provided in the student's native language (Parent Exs. L at pp. 2-4, 6; T at pp. 2-3, 5). As a result, these claims have been abandoned and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 8 NYCRR 279.8[c][4] ["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"]).

The parent also disagrees with the IHO's decision that the student was academically at grade level. The IHO specifically found that the student was performing in the average range academically (IHO Decision at p. 6). While the reason the parent disagrees with the IHO's finding is not explained in the request for review, to the extent that the IHO recounted information included in the present levels of performance that the student was performing satisfactorily, the parent did not raise claims with respect to the student's present levels of performance in her due process complaint notices. It is well settled that a party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). Accordingly, as this issue is raised for the first time on appeal, it is outside the scope of the impartial hearing and will not be considered (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

[5] Although not raised by the district, the form requirements also provide that all pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). However, the request for review in this matter was signed by the parent's lay advocate, consistent with the lay advocate's practice in prior proceedings and despite earlier notifications of the requirement of State regulation (see Application of a Student with a Disability, Appeal No. 18-039; Application of a Student with a Disability, Appeal No. 18-012; Application of a Student with a Disability, Appeal No. 17-103).

opposing party]]"; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]).

Finally, the parent asserts that the January 2018 IEP is "complicated." Without further elaboration as to what the parent means by complicated, or what claim she intends to raise thereby, this contention cannot be meaningfully addressed.[6]

B. March 2017 IEP

Turning to the merits of the parent's claims, the parent asserts the student was not provided a FAPE for the 2017-18 school year. Initially, the parent contends that the IHO failed to consider that the student did not have a BIP or a paraprofessional or special education teacher who spoke the student's native language when he started kindergarten in September 2017, and as a result, the student "regressed substantially by November 2017." Moreover, the parent claims the March 2017 IEP did not provide the supports necessary for the student to make meaningful progress, noting that the student has sensory issues and substantial management needs.

According to the evidence in the hearing record, the March 2017 CSE relied upon a January 17, 2017 social history update and the March 15, 2017 report of the February 2017 classroom observation (see May 8, 2018 Tr. p. 53; Dist. Exs. 8 at pp. 1-4; 9 at p. 1). The school psychologist also testified that the district "reviewed the progress reports" to prepare for the March 2017 CSE meeting (see May 8, 2018 Tr. pp. 48, 53).[7] With respect to the student's present levels of performance and individual needs, the March 2017 CSE primarily relied upon the February 2017 classroom observation to describe the student (compare Dist. Ex. 6, with Dist. Ex. 8 at pp. 1-4). Consistent with the February 2017 classroom observation, the March 2017 CSE used nearly identical language to describe the student's academic achievement, functional performance, and learning characteristics (id.). The March 2017 IEP also noted that the student has received a diagnosis of an autism spectrum disorder, and that an administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) determined that the student had a

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[6] I remind the parent that it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [indicating that appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752 [3d Cir. Nov. 4, 2009] [noting that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [finding that a generalized assertion of error on appeal is insufficient to preserve a specific challenge]; N.L.R.B. v. McClain of Georgia, Inc., 138 F.3d 1418, 1422 [11th Cir. 1998] [noting that "[i]ssues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived"]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [noting that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

[7] The March 2017 IEP indicates that a February 2017 progress report and a February 2017 speech-language progress report were also considered (Dist. Exs. 8 at p. 2; 4; 5). However, a review of the February 2017 classroom observation and March 2017 IEP indicates that information from the February 2017 progress reports was largely summarized in the classroom observation and then inserted into the IEP (compare Dist. Ex. 8 at pp. 1-4, with Dist. Exs. 6 at pp. 2-3; 4 at pp. 1-3; 5 at pp. 1-2).

full scale IQ in the borderline range and working memory scores in the extremely low range (Dist. Ex. 8 at p. 3; see Parent Ex. G at pp. 1, 3-4; Dist. Ex. 6 at p. 4).

Regarding the parent's claim that the recommended program was not appropriate because the student did not have a paraprofessional or special education teacher who spoke his native language when he started kindergarten in September 2017, the evidence in the hearing record supports the IHO's determination that, in retrospect, the March 2017 IEP failed to provide sufficient supports in the student's native language. However, under these circumstances, even if this failure rose to the level of a denial of a FAPE, it would not support an award of compensatory relief as the hearing record supports the IHO's ultimate determination that the CSE continued to reevaluate the student and "adapted and changed his IEP . . . as his needs developed and changed" and that overall the district provided services to the student for the 2017-18 school year that were appropriate to meet his needs (see IHO Decision at p. 6).

Federal and State Regulations provide that a CSE must consider special factors including, in the case of a student with limited English proficiency, how the student's language needs relate to the student's IEP (34 CFR 300.324[a][2][ii]; 8 NYCRR 200.4[d][3][ii]). Pursuant to State guidance, when developing an IEP for a limited English proficient student with a disability, the CSE must consider "the special education supports and services a student needs to address his or her disability and to support the student's participation and progress in the general education curriculum" ("Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/English Language Learners (ELLs) who are Students with Disabilities," at pp. 1-2, Office of Special Educ. [Mar. 2011], available at http://www.p12.nysed.gov/specialed/publications/bilingualservices-311.pdf). Such considerations include, but are not limited to: the student's need for "special education programs and services to support the student's participation and progress in English language arts instruction, content area instruction in English and ESL instruction; and whether the student needs bilingual special education and/or related services" (id. at p. 2).

Here, the evaluative information available to the March 2017 CSE showed that although the student was more proficient in his native language, his ability to comprehend English had improved over the 2016-17 school year (Dist. Ex. 8 at pp. 1-2). The student's SEIT services provider opined that the student was bilingual in his native language and English, but his vocabulary was more developed in his native language; additionally, the student sometimes had "difficulty understanding some words in English" (compare Dist. Ex. 6 at pp. 1-3, with Dist. Ex. 8 at pp. 2, 4). The March 2017 IEP also noted that the student required special education services to address his language needs as they relate to the IEP (Dist. Ex. 8 at pp. 4-5).

The March 2017 CSE recommended the student receive speech-language therapy services in his native language and goals to address his difficulties with expressive and receptive language (Dist. Ex. 8 at pp. 7-8, 10). However, the school psychologist testified that once the district began observing the student and collecting data his teachers noticed that "he had . . . skills in [his native language] because there was a [native language-]speaking . . . paraprofessional . . . in the classroom" and further testified that the student "respond[ed] better when peers . . . translated for him" (May 8, 2018 Tr. pp. 56-57). Accordingly, when the CSE reconvened in November 2017, the CSE determined the student would benefit from the support of a 1:1 paraprofessional who

spoke his native language to provide redirection and help the student remain attentive and focused (Dist. Ex. 16 at pp. 2-4).

The November 2017 IEP reflected the October 2017 classroom observation which established that the student "require[d] constant one to one support" from a paraprofessional who spoke his native language to function appropriately in his ICT class and to remain "attentive and focus[ed]" (Dist. Ex. 16 at pp. 2-4, 8). The school psychologist testified that the paraprofessional's function was to provide the student with redirection and support to prevent sensory seeking behaviors that distracted him from the classroom, to act as his translator, and to ensure that the student understood and followed directions (May 8, 2018 Tr. pp. 60, 68-69). As a result, consistent with the IHO's findings, any failure on the district's part to include such services in the March 2017 IEP was rectified by the November 2017 IEP, within a reasonable time after the need for such services became known to the district.[8]

Regarding the parent's claims that the student did not have a BIP at the beginning of the 2017-18 school year, the parent asserts that the student had difficulty transitioning to kindergarten and that the student required prompting and was unable to focus without prompts. To support this claim, the parent references a December 2017 prompt chart that was developed after the March 2017 CSE meeting and appears to be based on data collected during the beginning of the 2017-18 school year (see Parent Exs. P; R; Dist. Ex. 14). To the extent that the parent intends for this information to support her claims relating to the appropriateness of the March 2017 IEP, such evidence would constitute retrospective evidence that cannot be used to assess the CSE's recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]). The evaluative information available to the March 2017 CSE did not indicate that the student exhibited behaviors that impeded his learning other than a need for prompting and redirection (Dist. Ex. 8 at pp. 3-4). Moreover, as discussed below, the March 2017 CSE adequately

[8] With respect to the parent's argument that the student "regressed substantially by November 2017" as a result of the district's failure to sufficiently address his needs in the March 2017 IEP, the parent points to no evidence in the hearing record to support her assertion and independent review does not reveal evidence to support such a conclusion. Additionally, as noted by the IHO and the district, "substantial regression" is defined in State regulation as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). It does not appear that the parent is asserting regression as a term of art, but instead is arguing that the student did not make sufficient progress at the beginning of the 2017-18 school year because he did not have a BIP or 1:1 support from someone who spoke his native language. However, the parent does not identify a specific area where the student failed to make progress, and otherwise asserts that the student is making progress at school (see Req. for Rev. ¶¶3-5).

addressed the student's behaviors with respect to attention, focus, and distractibility at that time (id. at pp. 3-4, 6, 8-9).

The district also acknowledged the student's behaviors became more intense after the beginning of the 2017-18 school year, necessitating completion of an FBA and a reconvene of the CSE. According to the district school psychologist, when the student began kindergarten in September 2017, he presented with increased needs, and so his teachers and therapists began gathering information to determine if the student required other or increased supports, modifications, and/or services to meet his needs (May 8, 2018 Tr. pp. 56-58). Furthermore, the district gathered data from September 2017 to November 2017, and completed an October 2017 classroom observation and a November 2017 FBA in preparation for the November 2017 CSE meeting (May 8, 2018 Tr. pp. 56-57; Dist. Exs. 12; 14; 15). During the November 2017 meeting, the CSE determined that the student required a BIP, which was completed on November 13, 2017 and implemented by November 29, 2017 (May 8, 2018 Tr. p. 76; Dist. Exs. 16 at p. 4; 18).[9]

Turning to the parent's concerns regarding the student's attention and focus, the March 2017 IEP indicated that the student required constant verbal prompting to remain focused and sustain attention (Dist. Ex. 8 at pp. 1-3). The IEP reflected that the student responded appropriately to redirection and prompting and responded well to consistent structure and routine (Dist. Ex. 8 at pp. 3-4). To address the student's needs related to attention and focus, the March 2017 CSE recommended the following goals: the student would improve his ability to refocus his attention during instruction and would utilize visual reminders and verbal prompting, supported by a teacher first and then "faded into independent self-monitoring skills"; the student would increase his attention span "by remaining seated during structured classroom activities for 10 minutes without adult support"; the student would develop sensory integration skills by developing techniques that support his ability to increase his attention to instruction and utilize appropriate materials to improve functioning in the classroom; and the student would improve class related behaviors by raising his hand, waiting for his turn, and playing cooperatively (id. at pp. 6, 8-9).

With respect to the student's difficulties maintaining attention and staying focused, in addition to the above-referenced goals, the March 2017 IEP provided the student with strategies to address the student's management needs including the use of visuals, providing the student with consistent structure and routine, preview and anticipation of changes in his routine, and prompting and redirecting in order to sit during activities (Dist. Ex. 8 at pp. 4-5, 8, 10). The November 2017 CSE added a recommendation for a full time 1:1 paraprofessional to address his need for "constant one to one support" and to remain focused and attentive (Dist. Ex. 16 at pp. 4, 8). The November 2017 IEP also included seating options to best "support his stamina for sitting and attending to whole class lessons," and included three revised goals with respect to attention, focus, redirection,

[9] The student's ICT teacher testified that the paraprofessional began implementing the BIP by approximately November 29th (May 8, 2018 Tr. p. 76).

and prompting (id. at pp. 3, 5-7).[10] Furthermore, the January 2018 IEP included parent counseling and training and a goal for parent counseling and training that indicated the parent would work on increasing the student's flexibility through the use of a visual schedule and a timer to increase his independence and attention skills (Dist. Ex. 21 at pp. 10, 13).

With respect to the student's social development, the present levels of academic performance indicated that while the student had begun to initiate socialization with other students, the student's ability to initiate games and play with peers was delayed, and he required prompting and modeling in order to take turns and play cooperatively with other students (Dist. Ex. 8 at p. 3). Furthermore, the IEP noted that the student preferred playing with adults rather than with his peers and had difficulty sustaining eye contact (id.). The March 2017 IEP also indicated that the student's ability to initiate and play games with his peers was delayed and further, the student required prompts and cues when sharing toys, playing cooperatively, or taking turns with his peers (id. at pp. 2-3). The IEP included as a management need that the student use social stories to increase his social skills (id. at p. 4). The IEP included an annual goal that the student would "increase appropriate social interactions by communicating his needs with increasing frequency and reduction of cues and prompting from adults" (id. at p. 9).

The November 2017 IEP identified that the student would rather play by himself, did not make eye contact, and did not understand social cues and may inappropriately touch adults or students by accident (Dist. Ex. 16 at p. 3). The IEP included a goal to "improve expressive and communication skills by responding verbally to questions posed by peers and adults and engaging in interactive play with peer or adult for at least 3-4 exchanges" (id. at p. 6). At the January 2018 CSE meeting, the district discussed strategies the parent could utilize at home to diminish the student's touching of other people's faces (Dist. Ex. 21 at p. 2). The January 2018 CSE also recommended counseling services for the student, which the school psychologist testified was added to the January 2018 IEP for the student to start working on "pragmatics and the social skills" (May 8, 2018 Tr. p. 64; Dist. Ex. 21 at p. 13). The IEP also included annual goals for counseling to increase the student's social skills including during play activities, to increase appropriate social interactions, and to increase his ability to express his feelings (Dist. Ex. 21 at pp. 10-11).

To the extent that the parent argues the student had substantial management needs that went unaddressed in the March 2017 IEP, the parent neither specifies the management needs that were not identified or addressed nor does she explain how the district's failure to address those needs may have rendered the March 2017 IEP inappropriate. The March 2017 CSE addressed the student's management needs by recommending the following strategies: use of visuals; consistent structure and routine; preview and anticipation of changes in his routine; a visual schedule that the student would manage independently; prompting and redirection in order to sit during activities; and social stories to increase his social skills (Dist. Ex. 8 at p. 4). A review of the evaluative information available to the March 2017 CSE reflects that the CSE appropriately addressed the

[10] Specifically, these goals called for the following: the student would increase his attention on task and remain focused for a minimum of 15-20 minutes with visual reminders and verbal prompting from his paraprofessional; the student would be able to initiate and finish an independent work activity with the support of his paraprofessional's redirection and prompting; and the student would utilize a visual schedule to transition independently between activities with redirection and prompting of his paraprofessional (Dist. Ex. 16 at pp. 5-7).

student's management needs to enable him to receive educational benefit from his classroom placement.

In addition, to the extent the parent argues that the student had sensory needs that impacted his ability to attend, as discussed above, the March 2017 IEP explicitly addressed the student's needs related to attention and focus and included goals to address these difficulties, including a goal to address his difficulty sitting; moreover, to address the student's management needs, the IEP identified that the student required consistent structure and routine, and prompting and redirection in order to sit during activities (Dist. Ex. 8 at pp. 4-5, 8, 10). With respect to the student's sensory seeking behaviors, the March 2017 IEP, referencing a psychoeducational report, indicated that the student had "sensory issues" and that he was mandated to receive OT (Dist. Ex. 8 at pp. 3-4). The CSE at that time recommended a visual schedule for the student to address management needs and indicated that the student utilized a "squishy ball to help him pay attention or to help him manage frustration" (id.). The March 2017 IEP also included a goal to develop sensory integration skills by "developing a repertoire of techniques that support his ability to increase his attention to instruction and . . . to improve general functioning in the classroom," including use of a "squeezing ball," a visual schedule and cushions for sitting (id. at p. 8). Further, the student's occupational therapist began using a sensory diet for the student at the beginning of the 2017-18 school year; the student's sensory diet included "movement breaks," and the sensory diet was provided to the parent to utilize at home (May 8, 2018 Tr. p. 57; see Dist. Ex. 19). The school psychologist also testified that the paraprofessional monitored the student's sensory diet (May 8, 2018 Tr. pp. 68-69).

The November 2017 IEP further identified that the student could get "overly stimulated and ha[d] difficulty staying focus[ed] on an activity" (Dist. Ex. 16 at p. 4). The IEP noted that the student displayed sensory seeking behaviors and that he required sensory and movement breaks due to these needs (id. at pp. 2-4). To address his sensory needs, the November 2017 CSE recommended multiple seating options, a visual schedule and a "first then chart to help him prepare for his day," and a sensory break schedule to ensure that he did not "overload his senses throughout the day" (id. at p. 3). It was also noted that the student benefitted from other breaks and walks to help keep him engaged throughout the day (id.). The parent was also invited to an OT session so that "she [could] also practice at home due to [the student's] sensory needs" (id. at p. 2). The January 2018 IEP reflected that the student utilized a sensory diet in the classroom to help him remain on task and focused, and the paraprofessional led the student's "sensory break schedule starting with sensory input routine while he is sitting through [the] morning meeting" (Dist. Ex. 21 at p. 3). In addition to the supports included above, the January 2018 CSE also recommended "[m]ulti-sensory instruction and small group support," and the support of his paraprofessional "in order to use his visual tools and visuals" (id. at p. 4). The January 2018 IEP also included a goal that the student would implement self-regulation strategies as needed to help him focus throughout the day, including movement breaks, water breaks, and change of position, with "no more than [one] verbal reminder, timer and/or visual aid" (id. at p. 9).

C. Home-Based SETSS

Turning to whether it was necessary for the district to recommend 10 hours per week of individual home-based SETSS to provide the student a FAPE for the 2017-18 school year, upon review the evidence in the hearing record does not support such a finding.

The parent contends that the student requires home-based SETSS to make and "maintain the progress he is currently receiving at school." The parent also disagrees with the IHO that SETSS was primarily for homework; the parent asserts that the IHO failed to consider the SETSS provider's testimony that she addressed the student's difficulties with maintaining attention and staying focused, sharing and taking turns, making eye contact, sensory seeking behaviors, understanding social cues, and "inappropriate touching."

As an initial matter, the IHO's interim order on pendency directed that the student receive SEIT services during the pendency of this proceeding (IHO Ex. II at p. 2). The district and parent referred to the student's home-based special education provider as his SEIT provider and as his SETSS provider interchangeably during the impartial hearing (Nov. 20, 2017 Tr. p. 45; Mar. 9, 2018 Tr. p. 17; May 8, 2018 Tr. pp. 37, 40-41). Further confusing the matter, the same provider delivered services to the student from September 2016 through the pendency of the impartial hearing, as both SEIT services and SETSS (Tr. pp. 120-21; Parent Ex. K; Dist. Ex. 4).

SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6) and it is not defined in the hearing record in this case.[11] State law defines SEIT services as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]).[12] Thus, to the extent that the parent believes the student should have continued to receive SEIT services under his school-aged IEP in September of the 2017-18 school year, it is inconsistent with State regulation and policy for a school district to deliver a service designed exclusively for pre-school students to a school-aged student. Whether the parent believes that SETSS is similar

[11] As has been noted by SROs in previous cases, in a case such as this where SETSS is the central form of relief sought by the parent, it is not helpful that there is not more testimony or evidence that clearly defines the contours and features of SETSS as understood by the parties.

[12] It is not uncommon for SEIT services to be provided to preschool children with a disability in the home because, as a purely practical matter, preschool students have not yet reached the age at which students are entitled to attend the public schools of a district (see Educ. Law § 3202[1]) and, therefore, are offered by the public agency wherever they can be most practically delivered to the child. It is also not uncommon for SEIT services to be provided on a 1:1 basis in the home as a purely practical matter because most parents would not be comfortable with the idea of allowing public agencies to enter their homes and set up group instructional programs involving other disabled children.

to or differs substantially from the SEIT services that the student received prior to the start of the 2016-17 school year is unclear from the hearing record.[13]

Although there is little evidence in the hearing record regarding the specific services provided to the student at home, the parent and the SETSS provider highlighted some of the provider's responsibilities. The parent testified that 10 hours of home-based SETSS per week was necessary to help the student understand his homework and that it also would be beneficial to have someone sit "beside him [and] teach him how to finish all the homework" (see May 8, 2018 Tr. pp. 94, 96). The parent also testified that the student needed someone to "help him aside, otherwise, he cannot concentrate . . . and he's easy to distract by other stuff" (May 8, 2018 Tr. p. 94). The parent noted that the SETSS provider assisted the student with translations "because [the student] can't speak English as well" (May 8, 2018 Tr. p. 94). The parent further testified that, at "a back to school night meeting" in November 2017, the student's teacher told her that home-based services were a "good idea . . . to help [the student] to improve everything about his attention and to help him to finish . . . homework" (May 8, 2018 Tr. p. 95).

The student's SETSS provider testified that in September 2017 she "noticed . . . difference[s] in [the student's] behaviors," including a shorter attention span, inappropriate touching, and that he "started to be . . . everywhere at home" (May 8, 2018 Tr. pp. 104-05). She testified that the student started to exhibit concerning safety issues such as "climb[ing] up the bunkbed, the window . . . play[ing] with the door, [and] put[ting] his hand by the door" (May 8, 2018 Tr. pp. 105, 111).[14] The SETSS provider further testified that the student wandered frequently, stared at the ceiling and surroundings, and did not focus on the tasks he needed to complete "without behavioral intervention" (May 8, 2018 Tr. p. 111). The SETSS provider identified that it was her goal to help the student become a "more independent learner at the school," and to "help him to build those-self-regulation skills, to . . . learn independently at school" (May 8, 2018 Tr. p. 122). She also testified that she worked on redirection because the student was "off the topic a lot," and that she worked on the student's vocabulary to improve his writing skills and reading comprehension (May 8, 2018 Tr. p. 115). She stated that she also worked on some of the goals contained in the January 2018 IEP, including increasing the student's attention and remaining focused with visual reminders, increasing his ability to represent mathematical thinking, using knowledge and letter-sound correspondence to read sight words, gaining meaning from texts by retelling an experience or a story, and recalling details of a story read by the teacher (May 8, 2018 Tr. pp. 112-14, 122-23; see Parent Ex. S; Dist. Ex. 21 at pp. 6-8). The SETSS provider testified that she attended a "parent/teacher conference" in November where the student's teachers stated that they hoped the student could "continue . . . home service in" his native language

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[13] When asked the difference between SEIT services and SETSS, the SETSS provider testified that "SEIT is from three to five, like preschoolers," and SETSS "is for kindergarten to 12th grade for school-aged students with special needs" (May 8, 2018 Tr. p. 122).

[14] The only indication in the hearing record that the student engaged in behaviors at school that could be described as potentially unsafe are references to the student wandering around the classroom when he did not have 1:1 support, and repeatedly opening and closing the door (see Dist. Exs. 12; 16 at pp. 2-3; 21 at p. 3). These behaviors were characterized as relating to the student's sensory or attentional needs (id.).

(May 8, 2018 Tr. pp. 107-08).[15] She also expressed her view that the student should continue to receive home-based services because he "needs a lot of support in [his native language] to help him to improve his behavior, reading comprehension, [and] writing skills" (May 8, 2018 Tr. pp. 115-16). However, despite indicating that she worked on the January 2018 IEP goals with the student, the SETSS provider testified that she had not spoken with school staff except during the November 2017 parent/teacher conference (May 8, 2018 Tr. pp. 116-18). She also testified that she last spoke with school staff before the student's BIP was completed, and she had no knowledge about what had happened at school since the BIP was developed (May 8, 2018 Tr. p. 118). The SETSS provider indicated that she used the same behavioral techniques at home as were used by the student's teachers in school (May 8, 2018 Tr. pp. 119).

The testimony provided by the parent and the SETSS provider suggests that the student received home-based services for a variety of reasons. It is unclear why the parent and SETSS provider believe these services to be necessary to enable the student to receive educational benefit, either in addition to or in lieu of the services recommended by the CSE to address the student's needs. While it appears that the SETSS provider may have worked with the student as a translator and assisted the student with his homework, the parent testified that she was capable of assisting the student with his homework and that he was previously able to complete his homework with her help (see May 8, 2018 Tr. pp. 97-98). Additionally, the evidence in the hearing record, as discussed above, establishes that the student's needs with respect to maintaining attention and staying focused, sharing and taking turns, making eye contact, sensory seeking behaviors, understanding social cues, and inappropriate touching were acknowledged by the CSE and sufficiently addressed through the IEPs developed for the student.

In light of the above, the hearing record supports the IHO's determination that the student did not require 10 hours per week of individual, home-based SETSS in order to receive a FAPE. Instead—and consistent with the IHO's decision—the evidence in the hearing record reveals that the special education program provided to the student in the 2017-18 school year addressed the student's identified needs such that home-based SETSS was not required.

Moreover, the evidence included in the hearing record speaks to the parent's desire for the student to receive greater educational benefits through the provision of home-based SETSS; however, a district is not obligated to provide services to maximize a student's educational opportunity (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Accordingly, to the extent that the home-based SETSS sought in this proceeding are for the purposes of maximization of the student's potential, this is not a basis for the provision of such services.

Even if I were to find that the student required 10 hours of home-based SETSS per week to receive a FAPE, the parent has failed to identify any requested relief on appeal. Furthermore, the student received 10 hours of home-based SETSS per week for the 2017-18 school year pursuant to the IHO's interim order on pendency (IHO Ex. II at p. 2). To that extent, the relief requested by the parent at the conclusion of the impartial hearing, that "10 hours of SETSS at home continue

[15] The SETTS provider also testified that, although she tries to "explain everything in English first," 40 percent of the time she spoke to the student in English, while 60 percent of the time she spoke to the student in his native language (May 8, 2018 Tr. p. 109).

for the remain[der] of the 2017/2018 school year" has already been fully provided (see IHO Ex. V at p. 2).

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2017-18 school year, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 17, 2018

STEVEN KROLAK
STATE REVIEW OFFICER