The University of the State of New York

The State Education Department
State Review Officer
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No. 19-008

Application of the BOARD OF EDUCATION OF THE KATONAH-LEWISBORO UNION FREE SCHOOL DISTRCT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Daniel Petigrow, Esq., and Steven L. Banks, Esq.

The Law Offices of Gerry McMahon, LLC, attorneys for respondents, by Geraldine A. McMahon, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Fusion Academy (Fusion) for a portion of the 2016-17 school year, the entire 2017-18 school year, and for future school years. The appeal must be sustained in part, and, for reasons explained more fully below, the matter is remanded for further administrative proceedings.

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 hearing record shows that a CSE initially found the student eligible for special education as a student with an intellectual disability during the 2008-09 school year (first grade) (Parent Ex. H at p. 1). Throughout elementary and middle school, the student remained eligible for special education as a student with an intellectual disability and attended a special class (12:1+1

or 12:1+2) for a portion of the school day in a district public school and received speech-language therapy; further, for some of her elementary school years, the CSEs recommended counseling services, 12-month school year services, the support of a teaching assistant in an integrated class, and/or parent counseling and training (see Parent Exs. H at p. 1; L at pp. 1-2; M at pp. 1-2; P at pp. 1, 11-12, 14; W at pp. 1, 11-13; GG at pp. 1, 13-16; JJ at pp. 1, 15-17; Dist. Exs. 1 at pp. 1, 11, 13; 3 at pp. 1, 11-13; 5 at pp. 10-11, 13; see also Dist. Ex. 21 at p. 1).

During the 2015-16 school year, the parents were in contact with staff from the district high school for the purposes of learning about the high school and preparing for the student's transition to ninth grade (see Dist. Ex. 77; 79; 81; 82). After the parents visited the district high school and observed the class that the district anticipated the student would attend, they notified the district that they had concerns about the students in the class, in particular that the class was composed of students ranging in age from 18 to 21 years old (Dist. Exs. 81 at p. 1; 82 at p. 2; see Dist. Ex. 58 at p. 2).

The CSE convened on May 18, 2016 to conduct the student's annual review and develop an IEP for the 2016-17 school year (Dist. Ex. 8 at p. 3; see Parent Ex. WW). According to the CSE meeting information summary, the parents expressed their concern to the CSE that the draft annual goals provided by the district "were too generic" and indicated their intent to obtain private testing of the student, which they wanted the goals to be based upon (Dist. Ex. 8 at p. 3). The parents further "expressed concern about the current high school special education class having students of age 18-21," to which the chairperson responded that "the student w[ould] not be in instruction with these students next year" (id.). The CSE adjourned the meeting and agreed to reconvene to discuss goals and recommendations for the student (id.). According to the meeting summary, the parents requested that the reconvened "meeting be held with the high school team" (id.).

On June 8, 2016, the parents provided the district with a proposed agenda for the reconvene of the CSE, which included review of a private multidisciplinary evaluation of the student conducted in May 2016, discussion of the student's annual goals, discussion of the ratio of the recommended class placement, review of the classroom environment, review of the proposed "daily and weekly schedule" for the student, and a request for a date for the parents to visit the high school with the student (Dist. Ex. 83 at p. 1; see Dist. Ex. 23). In addition, the parents requested documentation on the IEP that the student would not be in a classroom with students ages 18 to 21 years old (Dist. Ex. 83 at p. 1).

The CSE reconvened on June 9, 2016 (Dist. Ex. 8 at p. 1). Upon finding that the student remained eligible for special education as a student with an intellectual disability,[1] the CSE recommended that the student attend a 12:1+2 special class placement for English language arts (ELA) (twice daily), math (once daily), social sciences (once daily), and a support and skills class (once on alternating days) (id. at pp. 1, 17). The CSE also recommended that the student receive related services consisting of counseling once per week in a group (5:1) and once per week individually for 30 minutes per session and three sessions per week of individual speech-language therapy and two sessions per week in a group (3:1) for 40 minutes per session (id. at p. 17). For

[1] For all school years at issue in this matter, the student's eligibility for special education as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

summer 2016, the CSE recommended that the student receive speech-language therapy twice per week individually and once per week in a group (3:1) for 30 minutes per session (id. at pp. 17-18). According to the meeting information summary, the CSE addressed many of the items set forth on the parents' proposed agenda (compare Dist. Ex. 8 at pp. 1-3, with Dist. Ex. 83 at pp. 1-2). Regarding the older students in the "high school life skills program," the meeting information summary indicated that the chairperson informed the CSE "that students older than age 18 w[ould] not be in instruction with the student" (Dist. Ex. 8 at p. 3).

The CSE reconvened at the parents' request on August 25, 2016 in order to review additional testing conducted by a private speech-language pathologist and to review the student's goals (Dist. Exs. 11 at p. l; 86).[2] As a result of this meeting, the CSE added five two-hour assistive technology consultation sessions per year, in order "to identify software/hardware necessary to support [the student's] reading and writing needs," as well as to provide training for the student, parents, and teachers (Dist. Ex. 11 at p. 17).

The student attended the district high school starting on September 7, 2016 (see Tr. p. 1273; see also Dist. Ex. 136). The parents attended a "campus night" on September 14, 2016, which was an event to allow parents to see their child's classrooms and talk to teachers and providers about the programs and activities at the high school (Tr. pp. 1274-75). In a letter to the superintendent dated September 16, 2016, the parents described their observations of the hallway outside the "main classroom" to which the district assigned the student to attend for the 2016-17 school year (Parent Ex. III at p. 1). Specifically, the parents indicated that the hallway was filled with "excess boxes, storage, garbage, scaffolding, copy paper, etc." and they included photographs of the hallway with their letter (id. at pp. 1, 3-4). The parents also noted that "[i]t [wa]s unfortunate enough" that the student's classroom was located on the lower level of the school without the condition of the area (id. at p. 1). The superintendent responded to the parents' letter and indicated that the condition of the hallway was a "priority" and that it would be "addressed absolutely as soon as possible" (id. at p. 2).[3]

The CSE reconvened again on November 11, 2016 at the parents' request to review the student's goals (Dist. Exs. 13 at p. 1; 87 at pp. 1-2). The November 2016 CSE removed the once per week individual counseling services that was recommended on the August 2016 IEP and added access to a computing device at school and home (compare Dist. Ex. 13 at p. 19, with Dist. Ex. 11 at p. 17). The November 2016 CSE also made changes to the student's present levels of performance and annual goals (compare Dist. Ex. 13 at pp. 6-18, with Dist. Ex. 11 at pp. 5-10, 12-16).

During December 2016, the student attended a "trial week" at Fusion (Dist. Exs. 144-46).[4]

[2] The parents shared a proposed meeting agenda with committee members at the beginning of the August 2016 CSE meeting (Dist. Ex. 11 at p. 1; see Parent Ex. EEEEEE).

[3] The parents also met with the superintendent on September 29, 2016 (Tr. pp. 1586-88; Parent Ex. EEEEE).

[4] The Fusion school that the student attended is an out-of-state, nonpublic school, which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with

On February 2, 2017, the CSE reconvened at parent request (Dist. Ex. 15 at p. 1).[5] The meeting information summary attached to the February 2017 IEP notes the parents' concerns about the student's progress, issues with specific annual goals, the benchmarks for determining goal achievement, and the strategies being utilized by district staff to help the student overcome learning difficulties, as well as the sufficiency of the student's integration into the high school community (id. at pp. 1-2). The CSE did not make any changes to the recommended program and related services (compare Dist. Ex. 15 at pp. 1, 20-21, with Dist. Ex. 13 at pp. 1, 19-20).

Before the meeting adjourned, the parents presented the February 2017 CSE with a letter dated February 2, 2017, in which the parents notified the district that they were rejecting the November 2016 IEP, including any proposed amendments made during the February 2017 CSE meeting, and that they were withdrawing the student from the district and unilaterally placing her at Fusion, starting February 6, 2017 (Parent Ex. TTT; Dist. Ex. 15 at p. 2). In the letter, the parents stated their concerns about the substance of the student's IEP and "the lack of consistent implementation of all the elements of the IEP" (Parent Ex. TTT). The parents further indicated that, since attending the district high school, the student had "regressed based, in part, on the District's own reporting of her levels of performance when she entered high school and her levels of performance" during the 2016-17 school year (id.).

On February 3, 2017, the parents executed an enrollment contract for the student's attendance at Fusion for the remainder of the 2016-17 school year (Dist. Ex. 147; see Parent Ex. IIIIIII). The student began attending Fusion on February 6, 2017 (see Parent Ex. AAAAAAAA at p. 1).

The CSE convened on March 27, 2017 to conduct the student's annual review and to develop her IEP for the 2017-18 school year (Dist. Ex. 17 at p. 1). Finding that the student remained eligible for special education as a student with an intellectual disability, the March 2017 CSE recommended that she attend a 12:1+2 special class placement for ELA (twice daily), math (once daily), social sciences (once daily), and support and skills (once on alternating days) (id. at pp. 1, 17). The CSE recommended that the student receive the related services of counseling once per week for 30 minutes in a group and three individual and two group speech-language therapy sessions per week for 40 minutes per session (id. at p. 17). The CSE also continued its recommendation that the student and parent receive assistive technology services and access to a computing device at school and home (id.). For summer 2017, the CSE recommended that the student receive speech-language therapy twice per week individually and once per week in a group, for 30 minutes per session (id. at p. 18). According to the meeting information summary attached to the March 2017 IEP, the parents raised questions about, among other topics, the "location of the special education room for next year," and the parents were informed that the location had not yet been determined (id. at p. 2).

disabilities (see Tr. pp. 2659, 2817-18; Dist. Exs. 144-45; see also 8 NYCRR 200.1[d]; 200.7).

[5] The parents shared a proposed meeting agenda with committee members at the beginning of the February 2017 CSE meeting (Dist. Ex. 15 at p. 1; see Dist. Ex. 16).

On June 2, 2017, the parents executed an enrollment contract for 25 sessions of "[t]utoring and [m]entoring" services to be delivered during summer 2017 (Parent Ex. OOOOO).

The CSE reconvened on June 9, 2017, for a program review and to discuss the student's progress at Fusion (Dist. Ex. 19 at p. 1). The IEP present levels of performance were updated to reflect the information gathered during the June 2017 CSE meeting (compare Dist. Ex. 19 at pp. 5-11, with Dist. Ex. 17 at pp. 4-10).

On July 7, 2017, the parents executed an enrollment contract for the student's attendance at Fusion for the first semester of the 2017-18 school year (Parent Ex. PPPPP).[6]

By letter dated August 21, 2017, the parents notified the district that they disagreed with the program recommended in the June 2017 IEP, "in part," based on information provided by staff from Fusion during the CSE meeting, including that the student required a program "that provide[d] intensive, 1:1 instruction" and which "cater[ed] to her learning style at a pace that enable[d] her to access her education" (Parent Ex. DDDD at p. 1). Accordingly, the parents notified the district of their intent to place the student at Fusion for the 2017-18 school year and seek tuition reimbursement and related expenses from the district (id.).[7]

A. Due Process Complaint Notice

By due process complaint notice dated August 30, 2017, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16, 2016-17, and the 2017-18 school years (see Due Process Compl. Notice at p. 21).

Regarding the 2015-16 school year, the parents alleged that the April 2015 IEP failed to provide for "evidence-based reading instruction" and "failed to increase the intensity of [the student's] literacy instruction," despite the student's lack of meaningful progress (Due Process Compl. Notice at p. 10). Additionally, the parents asserted that the CSE decreased the student's special class for math from twice daily to once daily but did not provide the parents with math assessments to document the student's purported progress in math (id. at pp. 10-11). Since the

[6] A subsequent agreement, signed by the parents on November 3, 2017, modified the student's math course for the first semester (Parent Ex. YYYYYYY). Also, on November 3, 2017, the parents signed an enrollment agreement for the student's attendance at Fusion for the second semester of the 2017-18 school year (Parent Ex. QQQQQ). On December 13, 2017, the parents signed a contract with Fusion for tutoring and mentoring services (Parent Ex. KKKKKKK).

[7] In addition to the student's program at Fusion, during the 2017-18 school year, a speech-language pathologist from the Southfield Center came to Fusion two days per week to deliver visualization and verbalization instruction; in addition, the student attended the Southfield Center one morning per week where she received social skills instruction with a psychologist and visualization and verbalization instruction with a speech-language pathologist (Tr. pp. 1645-46, 2175-76; 2020; Parent Ex. KKKKKK; OOOOOOO at pp. 33-34, 37-38, 47, 50-51, 55-58, 61-63, 65-66, 69-70, 73, 77; see also LLLLLL at p. 19). It appears that the student also received some services form the psychologist at the Southfield Center during summer 2017 (Parent Ex. OOOOOOO at p. 24). According to the hearing record, the visualization and verbalization program is an evidence-based reading comprehension program developed by Lindamood Bell that provides structure and strategies to support a student's needs relating to reading comprehension and oral and written expression (Tr. pp. 2130-31, 2185, 2196-97; Dist. Ex. 23 at p. 15).

CSE did not recommend a 12-month school year, the parents asserted that they "had no choice" but to enroll the student at Winston Prep for summer 2015 (id. at p. 11). The parents asserted that, although the April 2015 IEP offered an increase in services in some areas, the student did not make meaningful progress during the 2015-16 school year (id.).

With respect to the 2016-17 school year, the parents asserted that, as early as April 2016, they raised concerns about the students in the proposed high school classroom because the students ranged in age from 18 to 21 and functioned "at a different level" than the student (Due Process Compl. Notice at pp. 11-12). Turning to the June 2016 CSE, the parents asserted that the district did not use "evidence based assessments and data to measure [the student's] reading level" and noted that the district's assessment of the student's reading and academic performance was in contrast to the results reported in the May 2016 private multidisciplinary evaluation (id. at p. 13).[8] As for the resultant IEP, the parents took issue with the lack of annual goals targeting the student's memory skills (id.). The parents alleged that, despite the students' lack of progress, the CSE "failed to change the nature or intensity of services" (id. at pp. 13, 14). Specific to the November 2016 CSE meeting, the parents also objected to the district's failure to provide them with the results of the October 5, 2016 assistive technology consultation report until the November 2016 CSE meeting, depriving them of an opportunity to meaningfully participate in that meeting (id. at pp. 15, 21). The parents point to the description of the student's needs and abilities in the November 2016 IEP and highlight that the IEP described the student as functioning, in reading, writing, and math, at levels below those described in the student's earlier IEP(s) (id. at pp. 15-16). As for the February 2017 CSE meeting, the parents asserted that they raised concerns about the student's lack of progress, the district's use of low benchmarks for the student, and the lack of services and supports to allow the student "to be integrated into the high school community," and the CSE responded by blaming the student, focusing on a perception that the student had a tendency to regress, had difficulty remembering, and was inconsistent (id. at pp. 17-18). The parents asserted that the February 2017 CSE failed to explore different strategies, modify the student's IEP, or offer an appropriate educational program that would allow the student to make meaningful educational progress (id. at p. 18).

As for the district's implementation of the student's program during the 2016-17 school year, the parents alleged that the district failed to regularly monitor the student's progress and provide the parents with the progress monitoring data, despite repeated requests (Due Process Compl. Notice at p. 15). The parents also alleged that the district's own testing revealed that the student was not making meaningful progress (id. at p. 17). The parents asserted that the district failed to provide the student with a working assistive technology device (microphone) for over three months, failed to otherwise implement assistive technology recommendations for the student, and failed to provide the parents with the necessary information and training on assistive technology web sites identified by the assistive technology consultant (id. at pp. 15-17, 21).

[8] The parents also asserted that at the May 2016 CSE meeting they raised concerns about the annual goals and with "placing [the student] in a classroom with students 7 years older than her" (Due Process Compl. Notice at p. 12). With respect to the annual goals, the parents asserted that there was a lack of a speech-language goal and that there was only a single goal in each of the areas of math, study skills, social/emotional, reading, and writing (id.).

Next, the parents asserted that the student's classroom was located in the basement of the school building, isolated from the general student population, off a hallway that was used for storage (Due Process Compl. Notice at p. 15). The parents also asserted that the district committed a procedural violation by inappropriately grouping the student in a class with older students (id. at p. 12).

Turning to the 2017-18 school year, the parents asserted that the March 2017 CSE remained unwilling to change the student's recommended program (Due Process Compl. Notice at p. 18). The parents also asserted that district members of the March 2017 CSE inexplicably reported the students' progress in areas (speech-language) that prior CSEs had documented as areas of regression (id. at pp. 18-19).

The parents asserted that Fusion was an appropriate unilateral placement for the student and highlighted the techniques and teaching model used, as well as the progress achieved by the student (Due Process Compl. Notice at p. 20). In addition, the parents noted that the district acknowledged the student's progress at Fusion during the June 2017 CSE meeting (id. at p. 19).

As for relief, the parents sought compensatory education services and supports to remedy the district's failure to offer the student a FAPE during the 2015-16 and 2016-17 school years (Due Process Compl. Notice at pp. 21-22). The parents also requested reimbursement of the costs of the student's attendance at Fusion for the 2016-17 school year beginning February 6, 2017 and for the 2017-18 school year (id. at p. 21). In addition, the parents requested reimbursement of the costs of supplementary tutoring and related expenses for social skills instruction and visualization and verbalization programming delivered to the student by the Southfield Center during the 2017-18 school year including summer 2017 (id. at p. 22). Finally, the parents sought the student's "[p]lacement at Fusion" for the 2017-18 school year, as well as "subsequent school years necessary to bring [the student] to the level of functioning she would have achieved had the District provided appropriate services and supports" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 13, 2017 and concluded on September 13, 2018 after 19 days of hearing (see Tr. pp. 1-3277). In an interim decision dated December 29, 2017, the IHO granted the parents' request that the district be required to delay its reevaluation of the student until the record of the impartial hearing closed (IHO Interim Decision at p. 4).[9]

In a decision dated December 14, 2018 the IHO determined that: the parents' claims regarding the 2015-16 school year were barred by the statute of limitations;[10, 11] the district failed

[9] Neither the IHO's interim decision nor his final decision is paginated. For purposes of this decision, citations to the IHO's decisions shall refer to the consecutive pages, with each of the cover pages as page one (see IHO Decision at pp. 1-29; Interim IHO Decision at pp. 1-4).

[10] The IHO also denied the parents' request to be reimbursed for a private evaluation, "since it occurred in the 2015-16 school year" (IHO Decision at p. 28).

[11] The parents have not appealed the IHO's determination that their claims concerning the 2015-16 school year were barred by the statute of limitations, which was a finding adverse to the parents; as such, that determination

to offered the student a FAPE in the least restrictive environment (LRE) for the 2016-17 and 2017-18 school years; Fusion Academy was an appropriate unilateral placement for the student; and equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 20-29).

Specifically, the IHO found that, due to the location of the student's classroom, the district violated its obligation to offer the student a FAPE in the LRE (IHO Decision at p. 22).[12] The IHO noted the stark difference between the middle school classroom, which was situated "upstairs in the classroom wing" of the middle school, surrounded by general education classrooms, whereas the high school classroom was the only classroom located in the basement/lower level, segregated from all other students and their classrooms (id. at p. 20). The IHO also noted that the evidence in the hearing record showed that, in the beginning of the 2016-17 school year, the hallway outside the student's classroom in the high school was "cluttered with building material and equipment" (id.). The IHO opined about the possible emotional or psychological consequences of the location of the high school classroom from the perspectives of the student, the parents, the special education teacher, and the regular education students attending the high school (id. at pp. 20-22). The IHO concluded that the location of the classroom was not appropriate in light of the purpose of the LRE provision "to promote the idea that special education students should spend as much time as possible with peers who do not receive special education" (id. at p. 22).

The IHO also determined that, in the event of an emergency, the classroom in the district high school was in an unsafe location as, when he visited the location (and subsequently "check[ed] . . . on the condition" of the area during the course of the impartial hearing), he observed that the area leading to the exit near the classroom was "used as a long-term storage area" and was "crammed with building supplies, material and equipment" (IHO Decision at pp. 23-24). The IHO also noted with skepticism that the special class was assigned to the classroom in the basement/lower level of the high school on a temporary basis, noting that the special class had been located in the lower level classroom since the 2008-09 school year and that, despite a drop in the number of students enrolled in the district as a whole and in the high school in particular over the years, the special class still remained located in the lower level classroom, "segregated" from the general education environment (id. at pp. 24-25). The IHO also opined about the whether the architect of the building intended the room to function as a classroom or whether the room may have originally been intended as a storage room (id. at p. 25).

is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, the parents' claims pertaining to the 2015-16 school year will not be further discussed.

[12] At the onset of the third day of the hearing, on January 8, 2018, pursuant to the parents' request and without objection from the district, the IHO visited the location of the classroom that the student attended in the district high school during the beginning of the 2016-17 school year, which was situated in the basement/lower level of the school building (Tr. pp. 335-42; see IHO Decision at p. 18). In his decision, the IHO described his observations of the location of the classroom (IHO Decision at pp. 17-18). The parties and the IHO also agreed that the IHO would later visit the interior of the classroom in the high school, as well as the classroom the student attended in middle school during the 2015-16 school year (Tr. pp. 336-40; see IHO Decision at p. 18); as the IHO describes his observations of the middle school classroom in his decision, it appears that this occurred (see IHO Decision at p. 20).

With respect to the age range of the students assigned to the classroom that the student attended in the district high school during the 2016-17 school year and to which the district assigned the student to attend for the 2017-18 school year, the IHO determined that the age range of six or seven years between the students violated State regulation (IHO Decision at p. 23). In so finding, the IHO found no merit to the district's arguments that the district did not violate State regulation because: 1) the older students were not in the same room with the younger students for the full day; 2) the older students were taught in different parts of the classroom; and 3) the older students were taught by different staff members (id.).

Turning to the appropriateness of Fusion, the IHO found the witnesses from Fusion who testified at the impartial hearing to be "credible and impressive" (IHO Decision at p. 26). Among other things, the IHO found that the student made progress at Fusion and that Fusion provided the student with one-on-one instruction, direct speech-language therapy services, and opportunities to participate in social and academic clubs alongside typically-developing peers (id.).

With respect to equitable considerations, the IHO found that the parents provided the district with sufficient notice of their disagreements on key issues but that the district failed to act on those concerns (IHO Decision at p. 27). In particular, on the "key issues," the IHO found that the parents complained to the district about the location of the student's classroom, as well as the age range of the students assigned to the student's class, as early as April 2017 (id.).[13] The IHO also noted that, although the congestion in front of the classroom was cleared in response to the parents' complaints, it appeared that the clutter was "simply crammed into the EXIT vestibule," thereby creating "even greater danger" (id.). Further, the IHO noted that the parents' pursuit of a nonpublic school for the student was not a ground for a denial of tuition reimbursement (id.). The IHO also found that the parents cooperated with the district in the formation of the student's IEPs (id.).

As relief, the IHO ordered the district to reimburse the parents for the costs of tuition and related expenses for the student's placement at Fusion Academy, for the period beginning February 6, 2017 through the 2017-2018 school year, as well as through "subsequent years [limited by graduation or age 21] necessary to bring [the student] to the functioning she would have achieved had the District provided appropriate services and supports" (IHO Decision at p. 29). However, the IHO denied the parents' request to be reimbursed for speech-language therapy services (visualization and verbalization instruction), finding insufficient "substantiation to order the District to pay for these services" (id. at p. 28).

IV. Appeal for State-Level Review

The district appeals, asserting the IHO erroneously found: (a) that the district failed to offer the student a FAPE in the LRE for both the 2016-17 and 2017-18 school years; (b) that Fusion was an appropriate unilateral placement for the student; and (c) that equitable factors favored the

[13] While the IHO Decision states that the parents raised complaints regarding the classroom location and grouping as early as "April 2017," as noted above, the hearing record indicates that the parents first raised concerns regarding grouping in April 2016 and regarding the hallway in September 2016 (see Parent Ex. III at p. 1; Dist. Exs. 58; 81). As the IHO did not cite to the hearing record it is not clear of the use of the April 2017 date was intentional or was the result of a typographical error.

parents' request for tuition reimbursement. The district also asserts that the IHO exceeded his legal authority in prospectively awarding tuition reimbursement beyond the 2017-18 school year.

With respect to the IHO's finding that the district denied the student a FAPE in the LRE for both school years, the district asserts that the IHO failed to evaluate the district's recommended program and related services as set forth in the student's IEPs and, as such, "the IHO's decision should be reversed as a matter of law." Further, the district asserts that the evidence in the hearing record did not support the IHO's findings relating to the physical location of the classroom and the age differences in the makeup of the students assigned to the classroom. Specifically, the district asserts that the student was not grouped with the older students for instructional purposes, the student received instruction in classrooms other than the classroom located on the lower level of the building, and she received instruction with nondisabled peers in certain classes. The district also asserts that the hearing record lacks evidence supporting the proposition that the location of or conditions surrounding the classroom or the transitory presence of older students in the classroom "adversely affected the educational services received by [the student] or otherwise deprived [the student] of a FAPE."

With respect to the appropriateness of Fusion, the district asserts that the parents failed to meet their burden of proof, noting that they presented no testimony from any of the student's teachers or evidence that the instruction at Fusion was modified to meet the student's unique needs. In addition, the district points to evidence that the student only received instruction four days per week, received no speech-language therapy during the 2016-17 school year and only two individual sessions per week during the 2017-18 school year, received no counseling services, had no access to nondisabled peers in a classroom setting, and required additional tutoring and mentoring sessions and a less rigorous math class due to her struggles with the academics taught at Fusion. The district further alleges that none of the evidence of the student's progress cited by the IHO was objective evidence. As for equitable considerations, the district asserts that the IHO erred by disregarding evidence that the parents failed to provide the district with timely notice of their intent to unilaterally place the student.

In their answer, the parents generally respond to the district's allegations and argue that the IHO correctly determined that the district failed to offer the student a FAPE in the LRE for both the 2016-17 and 2017-18 school years, that Fusion Academy was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief. With regard to the grounds for the IHO's finding that the district denied the student a FAPE in the LRE, the parents argue that the IHO was not required to consider the substantive adequacy of the student's IEPs in light of the district's LRE violations. However, the parents assert that, should an SRO find an analysis of the IEPs necessary, for the reasons outlined in their post-hearing brief, the IEPs were not reasonably calculated to enable the student to make meaningful educational progress.[14] The parents further assert that the IHO properly ordered the district to fund the student's placement at Fusion for future school years as a form of compensatory education.

[14] In the memorandum of law accompanying their answer, the parents also briefly discuss their arguments about the district's failure to offer the student a FAPE on substantive grounds, focusing on the student's alleged lack of progress in the district and the CSEs' failure to consider evidence-based programs or new methodologies for the student (see Parent Mem. of Law at pp. 17-18).

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]).[15]

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).

[15] 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).

VI. Discussion

A. Physical Location of the Classroom

Turing first to the IHO's findings regarding the physical location of the classroom on the lower level of the high school building, it is necessary to consider the legal standards applicable to the analysis. The IHO examined the matter under the LRE provisions of the IDEA (see IHO Decision at pp. 20, 22). The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

> (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[16]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this case, there is no dispute that the educational program and services as outlined in the student's IEPs for the 2016-17 and 2017-18 school years set forth the student's LRE. Rather, the issue pertains to whether the IEPs were (during the 2016-17 school year) or could be (during the 2017-18 school year) implemented in a manner consistent with LRE principals. However, implementation standards require a material or substantial deviation from the student's IEP in order to constitute a denial of a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]). And for purposes of the 2017-18 school year, during which the student did not attend the recommended classroom, the Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]) but that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir. 2015]; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York

[16] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington,546 F.3d at 120 n.4).

City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5).

Here, as the student's IEPs did not require the student to attend a classroom located on a particular floor or within a particular distance from other classrooms (see generally Dist. Exs. 8; 11; 13; 15; 17; 19), the district did not fail to implement the IEPs during the 2016-17 school year or otherwise lack the capacity to implement the student's IEP during the 2017-18 school year. To be sure, the optics of the special class being situated in a classroom located alone on a lower level are disconcerting and the IHO's reaction to this circumstance is understandable. Indeed, there may be instances where this type of physical location may form the basis of an LRE violation outside of what is outlined in the student's IEP.[17] However, in this instance, there being no dispute that the student's IEPs set forth the LRE and there being no requirement in the IEPs for the student to attend a classroom on a certain floor, the IHO's determinations were legally flawed.

Moreover, even assuming that the IHO's analysis under the LRE provisions was appropriate, the evidence in the hearing record does not support the IHO's factual determinations underlying his finding that the district violated its obligation to provide the student with a FAPE in the LRE.

The hearing record shows that, pursuant to the CSEs' recommendations, the student was to receive instruction in a special class for academics, specifically ELA, math, social sciences and a "support and skills" class; however, she attended general education classes with nondisabled peers for physical education and studio art and design (Tr. pp. 783-84, 788; Dist. Exs. 11 at pp. 3, 17, 20; 13 at pp. 19, 22; see Dist. Ex. 136).[18] The IEPs that were in place for that period of time after

[17] For example, in addition to the LRE provisions under the IDEA, districts are also required to ensure that children with disabilities be educated in the LRE under section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a). The regulations implementing section 504 mirror the IDEA's provision requiring education in the LRE (34 CFR 104.34[a]) but require, further, that students with disabilities be educated in comparable facilities (34 CFR 104.34[c]). "[U]nlike FAPE under the IDEA, FAPE under [section] 504 is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met" (Mark H. v. Lemahieu, 513 F.3d 922, 933 [9th Cir 2008]). These other LRE protections are referenced for the purpose of highlighting that the dispute over the classroom location may fall more neatly in the framework of a 504 claim. Ultimately, however, the parents did not raise a claim under the section 504 scheme (see generally Due Process Compl. Notice) and, in any event, State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and Article 89 of the Education Law (Application of a Student with a Disability, Appeal No. 09-056; Application of a Student with a Disability, Appeal No. 09-044; 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"]; 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"], aff'd, Moody v. New York City Dep't of Educ., 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

[18] While the June 2017 IEP included a recommendation for 12-month services, that recommendation was limited to speech-language therapy (Dist, Ex. 8 at pp. 17-18). Accordingly, questions concerning LRE do not arise until the start of the 10-month school year in September and the focus of this part of the LRE analysis is on the August 2016 IEP and November 2016 IEP as they are the IEPs in effect for the 10-month portion of the 2016-17 school

the parents removed the student from the district, including the whole 2017-18 school year, contain similar recommendations in terms of special classes for academics and general education classes for non-core classes (Dist. Exs. 15 at pp. 20, 23; 19 at pp. 17, 20). The IEPs for both school years state that the student would "not participate in general education academic programs and require[d] special instruction in an environment with a smaller student-to-teacher ratio and minimal distractions in order to progress in achieving the learning standards" (Dist. Exs. 11 at p. 20; 13 at p. 22; 15 at p. 23; 19 at p. 20). Although it would have been better practice for the CSEs to have documented in the section of the IEPs designated for describing the recommendations for the student's participation with students without disabilities "the extent, if any, to which the student w[ould] participate in regular class, extracurricular and other nonacademic activities (e.g., percent of the school day and/or specify particular activities)" (Dist. Exs. 11 at pp. 19-20; 13 at pp. 21-22; 15 at pp. 22-23; 19 at p. 20), the meeting information summaries describe the CSEs' discussions regarding social opportunities and opportunities for interactions with nondisabled peers, as well as a discussion about the student's schedule (Dist. Exs. 11 at pp. 1, 3; 13 at pp. 1-2; 17 at pp. 2-3). Specifically, the evidence in the hearing record shows that the CSEs discussed social opportunities with peers and that, when the student attended the district high school during the 2016-17 school year, she ate lunch with the general education population and was further provided with the opportunity to be involved with general education students through the "teen lounge" after-school program, a "peer group," field trips, and in-house special events (Tr. pp. 828-30; 853; Dist. Ex. 11 at p. 3; 13 at p. 2).[19]

For the 2016-17 school year, with respect to the physical location of the classroom, it is undisputed that for a portion of the school day the student did attend a special class, which was located in a classroom on the lower level of the high school and that no other classrooms were located on that level (Tr. pp. 157-58, 773; Parent Ex. YYYY). Despite its location on the lower level, the student's special education teacher described the classroom as being "a large class," with "lots of windows" and "a lot of sunlight" (Tr. pp. 773-74).

Further, the student's schedule reflects that she did not remain in the lower level classroom for her entire school day (see Dist. Ex. 136). The student's special education teacher testified that the parents had requested for the student to have "more of a high school schedule where she would move from one class to the other" and, in response, the student was assigned to different classrooms throughout the day, enabling the student to transit between classes alongside the other students (Tr. pp. 786-88, 849, 1301-03). In particular, the student's schedule reflects that for one period of ELA, and for math, social sciences, and art, as well as for physical education on odd days of the six-day cycle, the student was assigned to receive instruction in rooms situated on the main level of the high school building (Dist. Ex. 136; see Parent Ex. YYYY). The student was assigned to attend the classroom on the lower level for a second period of ELA each day, as well as for "learning lab" for two periods per day (Dist. Ex. 136). The student's schedule reflected her

year prior to the parent removing the student from the district (see Dist. Exs. 11; 13).

[19] The student's special education teacher testified that the "peer group" was a group of about 10 students, with the "leaders" being a tenth or eleventh grader and the remaining students being ninth graders, not all of whom were students with IEPs (Tr. p. 854). According to the evidence in the hearing record, the teen lounge was an after-school club, which at the time of the June 2016 CSE was anticipated to include "approximately" 10 regular education students and 4 students from the special class for the 2016-17 school year (Dist. Ex. 11 at p. 3).

assignment to the lower level classroom for a third period on alternating days of the six-day cycle, but the special education teacher testified that the student attended speech-language therapy during that period in the "area of the main office for the high school" (Tr. pp. 842-43; Dist. Ex. 136). The special education teacher indicated that the student also sometimes received speech-language therapy during second period, which was another period during which the student was assigned to the lower level classroom (Tr. pp. 843, 847). Further, the student ate lunch in the cafeteria (but usually sat with other special education students) and, on the sixth day of the six-day cycle, attended peer group, which was held in a room off "the main hallway" (Tr. pp. 830, 853, 1298-99, 1444; Dist. Ex. 136). The special education teacher further testified that she wanted to give the student more independence, so once the student was able to independently navigate the route to and from classes, she would often have the student meet her in the classrooms (Tr. pp. 848-49). The teacher described that "[t]he bell would ring and [the student] would go to class like all the other students," allowing the student to "socialize" and "be out in the hallways like everyone else" (Tr. pp. 849-50).

For the 2017-18 school year, when the parents inquired during the March 2017 CSE meeting about the "location of the special education room for next year," the parents were informed that the location had not yet been determined (Dist. Ex. 17 at p. 2). While evidence in the hearing record indicates that the special class was again located in the lower level classroom (see Tr. p. 2733), the Second Circuit has emphasized the importance of limiting a FAPE analysis to include a review only of the information "reasonably known to the parties at the time of the [parents'] placement decision" (R.E., 694 F.3d at 187; see J.C., 643 Fed. App'x at 33; M.O., 793 F.3d at 244; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 220 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 81 [2d Cir. 2014]). The hearing record does not indicate that, prior to the parents' August 21, 2017 letter to the district notifying it of their intention to unilaterally place the student for the 2017-18 school year, that the location of the classroom was determined and communicated to the parents (see Parent Ex. DDDD at p. 1).

Based on the hearing record, despite the IHO's reasonable reservation that the physical location of the lower level classroom created a negative impression on the student and her parents, the hearing records shows that the student was provided with opportunities to be mainstreamed throughout the school day and she spent a large portion of her day in locations other than the lower level classroom. Accordingly, the hearing record does not support the IHO's ultimate conclusion that the location of the classroom caused the student to be isolated from her nondisabled peers.

Finally, with respect to the IHO's apparent dissatisfaction with the student's classroom being physically located on the lower level, and also its suitability as a classroom and the safety of the exits located near the classroom—i.e., the IHO hypothesized about the likelihood a design which contemplated having a classroom on the lower level would have been approved and opined about the area near the exit being used for storage—it appears that these concerns played a significant role in the IHO's determination that the district failed to offer the student a FAPE in the LRE (see IHO Decision at pp. 23-25).[20] An impartial hearing under the IDEA is limited to issues

[20] Although the parties agreed to the IHO visiting the physical location of the classroom in the high school (see Tr. pp. 335-42), the IHO's repeated visits to the area to "check" on the conditions of the exit went beyond that agreement (see IHO Decision at p. 24). Further, the IHO's observations during his subsequent visits to the location were, in any event, of questionable relevance since information about the changing conditions of the purported

"relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 CFR 300.507[a][1]; see 20 U.S.C. § 1415[b][6]). 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]). Enforcement of fire and safety codes and approval of architectural designs fall under different statutory and regulatory schemes and are beyond the IDEA and the scope of an IHO's jurisdiction (8 NYCRR 200.5[j][4]; see 8 NYCRR 200.1[x][4][iv]). This is especially troublesome since the IHO cited no evidence or legal authority pertaining to the egress requirements or architectural standards that informed his opinion.

In sum, while the concerns about the segregation of the special education class are not without basis, under the LRE provision, the evidence in the hearing record shows that the location of the classroom did not undermine the district's provision of a FAPE in the LRE.

B. Grouping—36-Month Age Range

The IHO further determined that the district violated State regulation by placing the student in a special class with students ages 18 to 21 years old (IHO Decision at p. 23). On appeal, the district asserts that the student was not instructionally grouped with the older students in her classroom and that they were only in the classroom for a short period of time.

The IDEA does not expressly require students to be grouped in accordance with age; however, State regulation provides that the "chronological age range within special classes of students with disabilities who are less than 16 years of age shall not exceed 36 months" (8 NYCRR 200.6[h][5]). As with the issue of the physical location of the classroom, the issue of the age range of students in the class is one of implementation and, as such, requires a review of whether any departure from the chronological age range requirement during the 2016-17 school year represented a material or substantial deviation from the student's IEP in order to constitute a denial of a FAPE (see A.P., 370 Fed. App'x at 205; M.L., 2015 WL 1439698, at *11-*12) or, in the case of the 2017-18 school year, whether the district had the capacity to implement the student's IEP in a manner consistent with the chronological age range requirements (see M.O., 793 F.3d at 245).[21]

According to the high school special education teacher, at the beginning of the 2016-17 school year, the student's special class consisted of six students, three of whom were in ninth grade

storage situation (as opposed to the physical location of the classroom—a more static concept) could not be used to retrospectively assess the conditions of the area during the disputed timeframes in the 2016-17 or 2017-18 school years (cf. R.E., 694 F.3d at 186-88; 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"]).

[21] In their memorandum of law on appeal, the parents frame the chronological age range requirement of State regulation as an element of the district's obligation to deliver a FAPE in the LRE; however, the age range of the students in the special class presents no difference in the degree of the student's access to nondisabled peers and, therefore, does not implicate LRE considerations (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]).

and three "super seniors" (Tr. pp. 771, 773, 776).[22] One of the ninth grade students moved out of the school district in September or October 2016, and the other ninth grade student left each morning at 9:30 a.m. to attend a Board of Cooperative Educational Services (BOCES) culinary class, returning at 12:30 p.m. (Tr. pp. 780-81, 841-42). The special education teacher testified that "the majority of [the super seniors'] time was spent outside of the classroom," or approximately six and a half to seven hours each day (Tr. pp. 776-77). The "super seniors" were in the special class for approximately 10 to 20 minutes for homeroom—prior to the first period class—as they prepared to leave for their off-site classes (Tr. pp. 777, 839-40). The special education teacher testified that the "super seniors" returned from their community work to the special class for the final 15 minutes of each day (Tr. pp. 776-778, 834-35, 840-41). The teacher testified that the student only received group instruction with the other ninth grade students and that she was separated for instructional purposes from the older students in the classroom when they were in the classroom at the same time (Tr. pp. 776-78, 840-41). Specifically, the special education teacher stated that she worked with the student and an aide or assistant worked with the "super seniors" (Tr. pp. 777-78).

Even assuming that the composition of the classroom during the 2016-17 school year represented a violation of State regulation—notwithstanding the limited timeframe during which the student was in the classroom with the older students and the teacher's testimony about the separate delivery of instruction to the older students—these factors weigh against a finding that the class composition amounted to a material or substantial deviation from the special class recommendation in the IEP and the regulatory grouping requirement attendant thereto.[23, 24] Moreover, for the 2017-18 school year, there is no evidence in the hearing record that the parents had information about the composition of the particular classroom the district assigned the student to attend; therefore, the parents challenge to the composition of the class for the 2017-18 school year was impermissibly speculative. Based on the foregoing, the IHO erred in basing his determination that the district denied the student a FAPE in the LRE for the 2016-17 and 2017-18 school years on the composition of the special class.

C. Remand

Having found that the IHO erred in his rationale for determining that the district failed to offer the student a FAPE in the LRE for both the 2016-17 and 2017-18 school years—due to the physical location of the classroom and the composition of the special class—it is necessary to

[22] According to the special education teacher, "super seniors" were students who had "walked" at graduation the year prior but would continue to be educated in the district until age 21 (Tr. pp. 776-80).

[23] State regulation defines special class as "a class of students with disabilities who have been grouped together because of similar individual needs for the purposes of being provided specially designed instruction" (8 NYCRR 200.1[uu][emphasis added]). Accordingly, having older students in the same classroom with the student for short periods of time when the student is not receiving instruction or is receiving instruction separately does not appear to violate the State regulation regarding age grouping as that regulation applies to the "chronological age range within special classes" (see 8 NYCRR 200.6[h][5]).

[24] Given that this matter is being remanded, I offer no opinion on the parents' argument, in the alternative, that the delivery of instruction to the student for much of the day in a 1:1 ratio constituted a violation of LRE requirements or violated the mandate on the student's IEPs for a 12:1+2 special class ratio.

remand this case back to an IHO to render substantive determinations regarding the appropriateness of the student's IEPs.

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).[25]

The parents' due process complaint notice contains several claims, upon which the parents elaborated in their post hearing brief, that the IHO failed to address. Of particular note, review of the parents' due process complaint notice and post-hearing brief shows that many of the parents' claims relate to a particular theme: that the district failed to monitor the student's progress or lack thereof and, therefore, continued to offer the same inappropriate special education program from year to year. The parents point to discrepancies between the student's academic abilities—as indicated in the May 2016 private multidisciplinary evaluation report, reported by the eighth grade special education teacher in June 2016, and reflected in the November 2016 IEP—as examples of the district's failure to monitor the student's performance and adjust her program accordingly. More specifically, in the due process complaint notice the parents asserted that the May 2016 private multidisciplinary reading assessment results (which showed the student achieved scores in the second to third grade equivalent range) were in "direct contrast" with the June 2016 special education teacher's report that the student was reading up to a fifth grade level text with support, which was further contrasted by the November 2016 IEP present levels of performance that indicated the student was reading at a first grade to early second grade level (see Due Process Compl. Notice at pp. 13-15; compare Dist. Ex. 13 at p. 10, with Dist. Ex. 23 at p. 8; see also Tr. p. 48). Review of the evidence in the hearing record reveals similarly contrasting information about the student's math skills. For example, in June 2016 the IEP present levels of performance indicated that the student could add multi-digit numbers with regrouping using a number line and mental math, subtract with regrouping using graph paper and with verbal cues, multiply double digit numbers by a single digit, and divide single digit numbers using a fact sheet (Dist. Ex. 8 at p.

[25] Although the parents did not explicitly present for review on appeal the IHO's failures to rule on the other claims set forth in their due process complaint notice as alternative grounds for a finding that the district denied the student a FAPE (8 NYCRR 279.8[c][2], [4]; see also 8 NYCRR 279.4[f]), the district alleges that the IHO erred by failing to examine the substance of the IEPs and the parents respond by asserting that, should an SRO find an analysis of the IEPs necessary, for the reasons outlined in their post-hearing briefs, the IEPs were not reasonably calculated to enable the student to make meaningful educational progress. While the parents' attempt to incorporate by reference the arguments in their post-haring brief may not have been sufficient to secure review of the IEP issues on appeal (see 8 NYCRR 279.8[b]), under the circumstances, additional findings from the IHO are necessary as it unclear from the IHO's decision whether he understood the parents' remaining claims or whether he simply chose the parents' claims which he found to have the most merit and, as a result, declined to the consider the rest (see A.M.V. v. Lake Forest High Sch. Dist. No. 115, 2019 WL 479999, at *11 [remanding a case to a hearing officer where it was unclear whether the hearing officer afforded certain evidence no weight or simply overlooked it]). Given the extensive testimony and documentary evidence offered by the parties in this matter, further consideration of the issues by the IHO is necessary in the first instance, and I exercise my discretion to remand the matter for further determinations (8 NYCRR 279.10[c]).

9). However, the November 2016 IEP present levels of math performance indicated that the student's math skills were in the kindergarten to first grade range, and that regression was noted in her basic math skills (Dist. Ex. 13 at p. 9). Among other issues, on remand the IHO should assess the evidence in the hearing record regarding the student's progress or lack thereof and the appropriateness of the CSEs' recommendations to meet her special education needs.

Upon remand, the IHO is strongly encouraged to conduct a prehearing conference for the purpose of clarifying the issues that remain outstanding (8 NYCRR 200.5[j][3][xi]). Furthermore, it is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the outstanding issues and/or whether the parties should submit further evidence to otherwise fully develop the hearing record.

If either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf. D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

VII. Conclusion

For the reasons stated above, this matter is remanded back to an IHO to determine whether the district offered the student a FAPE for the 2016-17 and 2017-18 school years based on the issues raised in the parents' August 30, 2017 due process complaint notice that remain unaddressed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 14, 2018, is hereby modified by reversing that portion which found that the district failed to offer the student a FAPE in the LRE for the 2016-17 and 2017-18 school years due to the physical location of the classroom and age grouping of the students in the special class and which ordered the district to fund the costs of the student's tuition at Fusion for a portion of the 2016-17 school year, the entire 2017-18 school year, and for future school years; and

IT IS FURTHER ORDERED that the matter is hereby remanded to the same IHO who issued the December 14, 2018 decision to determine whether the district offered the student a FAPE for the 2016-17 and 2017-18 school years based on the issues raised in the parents' August 30, 2017 due process complaint notice that remain unaddressed; and

IT IS FURTHER ORDERED that, if the IHO who issued the December 14, 2018 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
March 11, 2019

STEVEN KROLAK
STATE REVIEW OFFICER