



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-030

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

Appearances:

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by William M. Meyer, Esq.

Judy Nathan, Interim Acting General 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered their son an appropriate educational program for the 2018-19 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

At four years of age the student received "therapeutic intervention" due to delays in articulation, expressive language, and self-regulation (Dist. Ex. 5 at p. 6). The student had received the diagnoses of an autism spectrum disorder (Asperger's), an attention deficit hyperactivity disorder (ADHD), transient tic disorder, depression, and a mood disorder (Dist. Ex. 3 at p. 1).

Reportedly, a CSE determined that the student was eligible to receive special education as a student with an other health impairment and for first through third grade he attended an

ASD/NEST program in a district school (Dist. Exs. 3 at pp. 1-2; 5 at pp. 6-7).¹ The parents reported that the student exhibited behavioral difficulties in that program and they did not feel that the program was meeting his academic and social/emotional needs (Dist. Ex. 3 at p. 2). The student attended the Summit School (Summit) for fourth grade (2015-16 school year) and fifth grade (2016-17 school year) where he also received related services (id. at pp. 1-2).²

In winter/spring 2017 the district conducted a classroom observation, a social history update, and a comprehensive psychoeducational evaluation (Dist. Exs. 2 at pp. 1-2; 3 at pp. 1-2; 4 at pp. 1-6). Reportedly, in September 2017 the CSE changed the student's eligibility classification to speech or language impaired (Dist. Ex. 5 at pp. 6-7).

Also in September 2017, the parents referred the student for an updated neuropsychological evaluation to gain a better understanding of the student's learning profile and needs as the parents believed the student was not properly placed at Summit (Dist. Ex. 5 at pp. 1-43). The parents explained that several staff members had told them informally that the student was far more neurotypical than his schoolmates and that he was performing academically and behaviorally at the top of his peer group (id. at p. 6). In addition, it was reported that the student had expressed a desire for greater academic challenges, peers that shared similar interests, and a more well-rounded curriculum that included art and sports (id.). Within the 2017 neuropsychological evaluation report the neuropsychologist stated that the student did not meet the criteria for an autism spectrum disorder but rather that his subtle challenges with nonverbal social cue perception and expressive language formulation were more accurately seen as reflective of an expressive language/pragmatic communication disorder (id. at p. 30).

For the 2017-18 school year the student attended a "bridged" sixth/seventh grade class at Summit for homeroom and science, and seventh grade classes for math, English language arts (ELA) and literacy, and received related services of one session per week of individual counseling, one session per week of counseling in a group of three, and two sessions per week of speech-language therapy in a group of three (Dist. Exs. 5 at p. 6; 8 at p. 1; 10 at p. 1).

In February 2018 the parents executed an enrollment contract at York Preparatory School (York Prep) for the 2018-19 school year (Parent Ex. C at pp. 1-4).³

In June 2018 the CSE convened to conduct an annual review and develop the student's IEP for the 2018-19 school year (Dist. Exs. 13 at pp. 1-22; 14 at pp. 1-3). Finding the student continued to be eligible to receive special education and related services as a student with a speech or language impairment the CSE recommended five periods per week of integrated co-teaching (ICT)

¹ According to the district school psychologist, the ASD/NEST program was for students with "average to high IQ", who had diagnoses of an autism spectrum disorder, and had social/emotional needs but exhibited strengths in academics and did not demonstrate aggressive behaviors (Tr. p. 90).

² The Commissioner of Education has approved Summit as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

³ The Commissioner of Education has not approved York Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

services for math, social studies, and science; ten periods per week of ICT services for ELA; and related services of one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group of three, and two 30-minute session of speech-language therapy in a group of three (Dist. Ex. 13 at pp. 1, 15, 19-20).⁴

In a school location letter dated June 28, 2018, the district informed the parents of the particular public school site to which the student was assigned to attend for the 2018-19 school year (Dist. Ex. 17 at p. 1).

In August 2018, the parents notified the district of their intent to unilaterally place the student at York Prep for the 2018-19 school year and seek public funding for that placement (Parent Ex. B at pp. 1-3).

A. Due Process Complaint Notice

In a due process complaint notice dated August 22, 2019, the parents alleged that the district failed to offer the student a FAPE for the 2018-19 school year (Parent Ex. A at p. 1). First, the parents argued that the recommended ICT program and related services were not consistent with or supported by the weight of the information provided and available to the CSE (*id.* at p. 2). They argued that the ICT program failed to provide a setting suitably structured and supportive to meet the student's needs (especially in light of his most recent educational setting), failed to address the student's need for a small class setting, and did not include adequate supports to address the student's management needs or achieve the recommended annual goals (*id.*). Next, the parents alleged that the IEP's present levels of performance section did not adequately describe the student's strengths and weaknesses or the results of evaluations and State tests and did not adequately note the concerns of the parent (*id.*). Also, the parents alleged that the management needs section did not address all of the student's issues discussed at the CSE meeting and was insufficient to adequately support the student in the recommended program (*id.*). The parents further alleged that the annual goals and objectives were impermissibly vague, failed to address every area of the student's deficits, and failed to specify a baseline of functioning or actual targets to be achieved or detail by what means the goal would be considered achieved (*id.*). Lastly, the parents alleged that the CSE failed to offer a placement suitable to implement the student's IEP and able to provide the student with an appropriate peer grouping or that was reasonably calculated to provide the student of FAPE (*id.*).

The parents argued that their unilateral placement of the student at York Prep for the 2018-19 school year was appropriate to meet the student's academic and social/emotional needs, and was reasonably calculated to enable the student to receive educational benefits, and that there were no equitable considerations which would bar funding as the parents cooperated in the CSE review and placement process (Parent Ex. A at p. 3).

⁴ The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute on appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

B. Impartial Hearing Officer Decision

On July 10, 2020, August 12, 2020, and August 20, 2020, the parties participated in status conferences and proceeded to an impartial hearing on September 21, 2020 and November 6, 2020 (see Tr. pp. 1-196). In a decision dated November 25, 2020, the IHO found that the program recommended by the district in the June 2018 IEP was reasonably calculated to meet the student's needs and denied the parents' request for tuition reimbursement (IHO Decision at pp. 13, 14). In the decision, the IHO reiterated the parents' procedural and substantive claims and stated that the hearing request did not raise issues related to the composition of the CSE (id. at p. 10). After describing the student's needs at the time of the CSE meeting and the neuropsychologist's recommendations, the IHO determined that while the management needs identified on the June 2018 IEP did not specifically track the "very specific" recommendations in the September 2017 neuropsychological evaluation report, the IEP did include scaffolding, chunking, and the breaking down of lessons and assignments, and in conjunction with certain annual goals, "all the recommendations by the neuropsychologist were essentially included in the IEP" (id. at pp. 11-12). The IHO further noted that the strategies included on the IEP were the "very ones" mentioned by the York Prep Jump Start program director (id. at p. 12). The IHO found that the annual goals included in the June 2018 IEP, which related to answering inferential comprehension questions and verbally reporting on a topic, would have prompted teachers to work closely with the student and that they provided sufficient information for the teachers to work appropriately with the student on his writing (id.). Next, the IHO determined that the recommended speech-language therapy "would have allowed the [s]tudent to progress in areas of deficit in language, which underlie many of the areas of academic deficits" and that the recommended counseling and social/emotional annual goals would have supported the student's emotional functioning and progress in maintaining his behaviors and social interactions, as well as his ability to function in a setting with a larger student to teacher ratio (id. at pp. 12-13).

Turning to the placement issue, the IHO found that the recommended ICT services would have included a class with two teachers and a maximum of 32 students for a staffing ratio of 16:1, which she noted was "a relatively small ratio" (IHO Decision at p. 13). In addition, the IHO found that within that group, if needed, the student would "have had the opportunity for even smaller group instruction with a teacher" and stated that she found "no reason to suppose this would have been insufficient to meet [the student's] needs" (id.). The IHO determined that "[t]he recommended program site had a class to meet the [s]tudent's needs and would have implemented the IEP as written" (id.). The IHO noted that while there was one uncertainty as to whether the CSE mandated the number of ELA hours the student needed or the number of hours that ELA was typically provided, the IHO concluded "it was clear that the school would do whatever was needed to provide the services that were mandated on the IEP" (id.).

Although not necessary to her findings, the IHO found that the program at York Prep was appropriate and that there was no evidence that the parents failed to cooperate with the district (IHO Decision at p. 14).

IV. Appeal for State-Level Review

The parents appeal the IHO's findings, first arguing that the June 2018 CSE was not properly composed and that this contributed to the team's failure to recommend an appropriate

program due the CSE's "lack of experience with the recommended setting." According to the parents, although the IHO observed that the due process complaint notice did not explicitly challenge the composition of the CSE, they assert that those "allegations were included in the [p]arents' notice of unilateral placement . . . , which was incorporated by reference in the due process complaint." Additionally, the parents assert that the district representative "opened the door to this issue by addressing the question of team composition" during direct questioning of a district witness, and did not object to the parents' extensive cross examination of that witness on this topic. The parents next allege that the evidence was "clear" that the CSE did not include a general education teacher who was familiar with the "operation of a [district] general education classroom." The parents also argue that "[t]he individual who signed as the special education teacher was not an actual special education teacher at the time," but rather, "just someone holding that credential whose full time job it was to sit on IEP meetings" and that "[t]here was no evidence that she had any experience at the high school level."

Next the parents argue that the IHO erred in finding that the recommended program and accommodations were adequate. Specifically, the parents allege the IHO erred in finding that the ICT services recommended for the student met the recommendations from the 2017 neuropsychological evaluation and were appropriate to meet the student's needs. The parents argue that the IHO's finding avoids acknowledging the enormity of the change in program and reduction in supports with the move from a class of 12 students in a special education school specifically designed for behavioral support to a general education community high school with a class almost three times as large. The parents argue that the June 2018 IEP failed to make any recommendation that the student receive small group instruction and thus there was no assurance of if or how the student would receive small group instruction or to what degree he would have access to a teacher during that time. Additionally, the parents contend that the student previously had the support of a school-wide structured behavior program and that his proposed IEP failed to formally endorse the student's need for a behavioral intervention plan (BIP) or positive behavioral interventions. According to the parents, the district's ICT services recommendation "resulted from a process of elimination of less appropriate options such as a special class in a community school," and the district "simply did not offer any smaller integrated settings for students who required that modification."

The parents also allege that the IHO erred in finding that the public school site for the 2018-19 school year was prepared to implement the student's IEP mandate and erred in finding credible the testimony of the district witness on this subject. Specifically, the parents argue that the hearing record shows that the configuration of ICT services included within the June 2018 IEP were not offered under the assigned school's model.

In an answer, the district responds to the parents' allegations with denials and asserts in a cross-appeal that the IHO erred in finding that York Prep was an appropriate unilateral placement as the school did not provide the necessary related services to the student.

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 Andrew 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]).⁵

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

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

VI. Discussion

A. Scope of the Impartial Hearing and Review

The parents argue that the June 2018 CSE was not properly composed and that this contributed to the team's failure to recommend an appropriate program due to the CSE's lack of a regular education teacher within the district who was familiar with the operation of a district

⁵ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

general education classroom. The parents also argue that the individual, who signed as the special education teacher, was not an actual special education teacher at the time but "just someone holding that credential whose full time job was to sit on IEP meetings" and that there was no evidence that she had any experience at the high school level.

While in the decision the IHO observed that the parents' due process complaint notice did not explicitly challenge the composition of the CSE, the parents contend that those allegations were included in their notice of unilateral placement, which was incorporated by reference in the due process complaint. The parents further argue that the district representative opened the door to this issue and did not object to the parents' extensive cross examination on this topic.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original 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[i][7][i][a]; [j][1][ii]), or the original 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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

First, the IHO correctly found that the parents did not raise the issue of CSE composition in their hearing request (see Parent Ex. A at pp. 1-3) and the parents cite no authority for the proposition that a due process complaint notice may be read to incorporate allegations from the parents' ten-day notice. Also, there is no indication that the parents sought to amend the due process complaint notice during the impartial hearing or that the district agreed to expand the scope of the impartial hearing (see Tr. pp. 1-196).

Further, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]), here the hearing record reveals that during direct examination the district's attorney questioned the school psychologist regarding who was involved in the development of a particular annual goal during the June 2018 CSE meeting (Tr. pp. 36, 55). The school psychologist responded that she remembered that in addition to herself, the Summit staff, the parent, and the district special education teacher "were there" (Tr. p. 55). In this case, as the question posed to the school psychologist was factual in nature and not about the participants credentials or the appropriateness of a particular member's role at the meeting, the hearing record does not support the parents' claim that the district opened the door to

the issue of CSE composition (see A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9). Therefore, there is no reason to disturb the IHO's determination that the parents' claim with regard to composition of the CSE was not sufficiently raised in the due process complaint notice.

In addition, regarding the issues properly before me on appeal, State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). To the extent that the IHO made findings regarding the June 2018 IEP's management needs, annual goals, and present levels of performance (see IHO Decision pp. 10-12), since the parents did not raise any argument regarding these issues on appeal, the IHO's determinations have become final and binding and will not be further discussed (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

B. ICT Services

Next, the parents contend that the IHO erred in finding that the recommended program and accommodations in the June 2018 IEP were adequate. The parents argue that the IHO's finding failed to acknowledge the enormity of the change in program and reduction in supports with the move from a class of 12 students in a special education school specifically designed for behavioral support to a general education community high school with a class almost three times as large. The parents also assert that the student had been in small class settings for years where his program consisted principally of a 12:1+1 classroom placement and that the June 2018 IEP failed to make any recommendation that the student receive small group instruction and thus there was no assurance that the student would receive small group instruction or to what degree he would have access to a teacher during that time.

During the 2017-18 school year (sixth grade) the student attended Summit and received instruction in "bridged" sixth/seventh grade classes for homeroom and science, seventh-grade classes for math, ELA, and literacy, and received one session per week of individual counseling, one session per week of counseling in a group of three, and two sessions per week of speech-language therapy in a group of three (Dist. Exs. 5 at p. 6; 8 at p. 1; 9 at p. 1; 10 at p. 1). The evidence in the hearing record indicates that during the 2017-18 school year the student attended classes with a student-to-adult ratio of 12:1+1 (Tr. p. 68; Parent Ex. H at p. 2).

In June 2018, the CSE convened to develop the student's IEP for the 2018-19 school year (Dist. Ex. 13 at pp. 1-22). CSE meeting minutes from the June 2018 meeting reflect that the CSE reviewed a social history, a student progress report, a "[t]esting report," proposed IEP goals, an IEP present levels of performance report, a counseling report, a privately-obtained

neuropsychological evaluation report, and a district psychoeducational evaluation report (Dist. Ex. 14 at p. 1; see Dist. Exs. 3-5, 8-11, 15).⁶

The 2017-18 Summit present levels of performance report indicated that the student was a sixth grader who was reading above grade level, possessed a grade level written vocabulary, and demonstrated above grade level skills in solving math problems (Dist. Ex. 9 at p. 1). A 2017-18 Summit testing report reflected that the student was performing above grade level in the areas of reading comprehension, decoding, spelling, and math applications and computations and reported that the student received a performance level of "3" on 2016-17 New York State "ELA 5" and "Math 5" assessments (Dist. Ex. 11).

The student's third period 2017-18 progress report prepared in June 2018 revealed that the student received performance and effort designations of "[e]xcellent" with respect to participation, homework, assessments, and behavior in literature, ELA, math, science, social studies, art, swim, physical education, and health with the exception of science (homework) and social studies (behavior) in which the student received "[s]atisfactory" designations (Dist. Ex. 15 at pp. 2-6, 8). The student received designations of excellent or satisfactory in all social/emotional areas including resolves conflict, accepts responsibility, demonstrates self-control, and shows respect (id. at p. 7). Review of the progress report shows that it included many positive comments, including that the student's mastery of the material and concepts was consistent, he continued to be an enthusiastic participant, he consistently produced excellent work in literature, and that he excelled at writing and math (id. at pp. 2-7).

According to the 2017-18 counseling report, the student's counseling sessions included discussion, play and activity therapy, social skills training, self-esteem building, cognitive-behavioral therapy, and supportive play (Dist. Ex. 8 at p. 2). The counseling report also indicated that the student participated in the school-wide behavior management program and weekly character education classes (id.). According to the report, the student responded well to consistent verbal encouragement, and was beginning to develop strategies to improve his mood, frustration, problem solving, self-regulation, social skills, and self-esteem (id. at p. 3). With respect to speech-language therapy, the 2017-18 speech report stated that expressive therapy focused on improving the organization and structure of the student's verbal and written language and that "[p]ragmatic intervention emphasized the various responsibilities attributed to listener and speaker when they enter into the dynamic union of conversational-discourse" (Dist. Ex. 10 at p. 2). The report indicated that the student continued to develop word-finding strategies and was encouraged to monitor his conversational behavior during guided discussions (id. at pp. 2-3).

The 2017-18 reports included the recommendations that the student remain in his current academic setting at Summit in order to him provide with continued structure and academic support and continue to receive group and individual counseling and group speech-language therapy (Dist. Exs. 8 at pp. 1, 3; 10 at pp. 1, 3). As detailed above, the evidence in the hearing record shows that the student performed well and made progress in a 12:1+1 setting with the support of speech-language therapy, counseling services, and a school-wide behavior management program.

⁶ The school psychologist who participated in the June 2018 CSE meeting testimony suggested that the June 2018 CSE also had available the student's speech-language progress report (see Tr. pp. 37, 42-44).

Turning to the June 2018 IEP, the present levels of performance reflected information from the student's 2017-18 report card, test results from Summit, the March 2017 district psychoeducational evaluation report, and the 2017 neuropsychological evaluation report (compare Dist. Ex. 13 at pp. 1-2, 5, 6, with Dist. Exs. 4; 5; 11). The June 2018 IEP noted that the student required clarification of inferential story elements and struggled with concepts that were not stated clearly in the text (Dist. Ex. 13 at p. 2). Additionally, the IEP stated that the student was a sixth-grade student reading above grade level with above grade level fluency and understanding on the literal level and a strong verbal vocabulary (id.). According to the IEP, the student struggled with vocabulary words presented out of context and that vocabulary games were effective as support for learning (id.). It was further noted that distractibility issues impeded the student's ability to remain focused on assigned tasks and activities (id.).

With respect to writing, the June 2018 IEP indicated that the student possessed a grade level written vocabulary, was a creative thinker, and demonstrated the proper use of topic, detail, and summary sentences (Dist. Ex. 13 at p. 2). The IEP stated that with guidance and a word processor the student was able to write a three-paragraph essay about a variety of nonfiction topics but regularly required prompting to include additional detail (id.). Also, the IEP stated that the student rushed through the writing process; that his finished product required editing for capitalization, punctuation, and grammar; and that he was open to accepting editing help (id.). Further, the June 2018 IEP indicated the student required support in the form of a word processor, a notebook planner, and an organizational period (id.).

Regarding math, the June 2018 IEP stated that the student was a sixth grader in a mathematics class on the seventh-grade level; was solving problems involving integers, rational numbers, rates, proportions, and percentages; while using a calculator was able to perform operations accurately including exponents and percentages; and was able to adequately perform operations with integers (Dist. Ex. 13 at p. 2). According to the IEP, the student struggled at times to recall and demonstrate multi-step algebraic math strategies, particularly in word problems, but could do so with assistance (id.). Additionally, the IEP stated that the student required practice and repetition along with small group instruction to perform algebra at that grade level and that he benefited from refocusing during lessons to improve his participation (id.).

With respect to speech-language development, the June 2018 IEP stated that the student presented with difficulties in the areas of expressive and pragmatic language and that graphic organizers, which included graphs and diagrams that organize ideas visually, were used for brainstorming, classifying ideas, and communicating effectively (Dist. Ex. 13 at p. 3).

According to the June 2018 IEP, the student could be easily distracted by his peers, could often lose focus during lessons, and benefited from prompts and redirection in order to maintain his focus on assignments (Dist. Ex. 13 at p. 2). The IEP included parent concerns regarding the student's ability to stay on task, need for constant individualized attention, impulsivity, and pragmatic language skills (id. at p. 3).

Regarding social development, the June 2018 IEP's present levels of performance stated the student could be less effective at perceiving nonverbal social cues, could have difficulties inhibiting his impulses, integrating many details, recognizing implicit patterns, generating problem solving ideas, planning and organizing his approach to complex multi-detailed activities, and could

be inflexible to changing his approach based on feedback (Dist. Ex. 13 at p. 4). The IEP stated that the student found it challenging to regulate his moods and emotional reactions and interpret subtle expressions of affect; that reportedly the student had shown progress in his ability to feel more comfortable, to seek support, and ask for help when needed; and that his ability to efficiently use language to express his thoughts and feelings had improved (id.). With increased amounts of positive reinforcement, the student appeared more relaxed and focused during his school day and had demonstrated the ability to take risks in areas where he may face a challenge (id.). With encouragement and feedback the student had become more flexible in his thinking and was better able to cope with things when they did not go his way (id.). Reportedly the student had a tendency to view things as all or nothing and could be perfectionistic during tasks (id.). According to the IEP, the student continued to work on improving his social skills and ability to successfully interact with peers, and with support, demonstrated progress in his social judgement, impulsivity, and gaining peers' attention in more adaptive and mature ways (id.). The IEP stated that the student continued to develop his awareness of how his behavior affected others and made efforts to adjust his behavior accordingly (id.). At times the student could become engaged in off task behaviors and benefited from cues and prompts to stay focused and comply with what was expected of him (id.). The IEP included information from the parents that the student exhibited behavioral difficulties and their view that the student's current school program addressed such difficulties and that he required a small class size to meet his social/emotional needs (id. at p. 5).

The June 2018 CSE identified for the student the following management needs: preferential seating to eliminate distractions and help him attend closely to instruction, frequent teacher check-ins, chunking of materials/assignments/lessons in manageable units, structured class environment that relies on routine, clear and visible expectations that are frequently reviewed, printed list of important rules, positive reinforcement, utilization of a token economy with negative and positive consequences, verbally provided steps necessary to complete assignments, scaffolding of instruction, copies of lecture notes, writing organizers, list of materials needed for each class activity, visual schedule, and organizational checklists (Dist. Ex. 13 at p. 6). Additionally, the CSE determined that the student did not require positive behavioral interventions and supports, nor did he require a BIP (id. at p. 7).

The June 2018 IEP included ten annual goals which targeted inferential comprehension questions; out-of-context vocabulary; essay writing with focus on punctuation, capitalization, organization and grammar; proofreading and editing; maintaining focus; identifying behavioral triggers; appropriate social responses; verbally reporting on a topic; improving expressive language; and maintaining a topic of another's choosing (Dist. Ex. 13 at pp. 7-13).

For the 2018-19 school year, the June 2018 CSE recommended that the student receive five periods per week of ICT services for math, social studies, and science; ten periods per week of ICT services for ELA; and related services of one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group of three, and two 30-minute sessions per week of speech-language therapy in a group of three (Dist. Ex. 13 at pp. 1, 15, 19-20).

Turning to the parents' contentions on appeal, they assert that the student had become largely successful at regulating himself within a 12:1+1 class within a specialized nonpublic special education program focused on the needs of students with emotional and regulatory

struggles with a school-wide behavior management system and argue that the student continued to need a "small class size" to meet his social/emotional needs. The parents argue that the IHO's finding that the student had made progress and was able to control his behaviors quite well in school as support for her determination that ICT services with the recommended accommodations could have adequately met the student's needs was not supported by the hearing record. Additionally, the parents contend that the student previously had the support of a school-wide structured behavior program and that his proposed IEP failed to formally endorse the student's need for a BIP or positive behavioral interventions.

The school psychologist who attended the June 2018 CSE meeting acknowledged that the June 2018 IEP did not include the need for interventions or supports to address behaviors that interfered with the student's learning or that of others or the need for an individualized BIP (Tr. pp. 79-81; Dist. Ex. 13 at pp. 7, 22). According to the school psychologist, during the June 2018 CSE meeting the CSE discussed that, although the student was easily distracted and at times had negative thoughts about himself, he was easily redirected and did not exhibit behaviors such as aggression or property damage that required a behavior plan (see Tr. pp. 80-81). She testified that it was her understanding that Summit did not have an individual behavior plan for the student and that Summit staff indicated at the June 2018 CSE meeting that at Summit they had a classroom behavior management system and a school-wide system that they believed was working for the student (Tr. pp. 72-73, 78). Additionally, review of the 2017-18 Summit reports shows they did not include recommendation for an individualized behavior plan (see Dist. Ex. 8 at pp. 1-4; 9 at pp. 1-4; 10 at pp. 1-3). The school psychologist further stated that she thought all classrooms providing ICT services had behavior management plans in the classroom (Tr. p. 77). She testified that the June 2018 CSE discussed and included the strategies used by Summit within the management needs section of the student's June 2018 IEP (e.g. encouraging appropriate behavior through positive reinforcement and not reinforcing negative behavior) and addressed the needs through the student's counseling annual goals (Tr. pp. 72-73, 78-79; see Dist. Ex. 13 at pp. 6, 10-11).

According to the school psychologist, the student exhibited needs including that he was easily distracted and had difficulty focusing, and exhibited anxiety, mood swings and at times behavioral outbursts or defiant behavior (Tr. p. 46). The school psychologist explained that one of the student's counseling annual goals in the June 2018 IEP included the use of a point card system in which the student could collect points for remaining focused for a period of time and then exchange the points for a privilege or gift (Tr. pp. 92-93; see Dist. Ex. 13 at p. 10). Another annual goal was for the student to identify and discuss behavioral triggers, explain how those triggers affected his behavior, and strategies for dealing with those triggers (Dist. Ex. 13 at pp. 10-11). Additionally, the CSE developed an annual goal for the student to identify and discuss appropriate social responses and conduct in a classroom setting involving interaction with peers and staff (*id.* at p. 11). The June 2018 IEP also indicated that the student would benefit from the use of a token economy with negative and positive consequences and a number of behavioral supports such as frequent teacher check-ins, structured class environment with routines, clear and visible expectations, and a printed list of rules (*id.* at p. 6).

Lastly, regarding the appropriate student to teacher ratio, the parents further allege the IHO erred in finding that the ICT services recommended for the student met the recommendations from the 2017 neuropsychological evaluation and were appropriate to meet the student's needs.

Specifically, the neuropsychologist stated within the 2017 neuropsychological evaluation report that a small student to teacher ratio was "critical" for the student (Dist. Ex. 5 at p. 34).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

A CSE must also consider IEEs obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakasic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., Mr. P., 885 F.3d at 753; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

Here, the parties disagree on whether the ICT setting provided the small student to teacher ratio recommended by the neuropsychologist, however, I note, as did the IHO, that the evaluator did not specify a ratio (IHO Decision at p. 9). ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

The June 2018 IEP reflected and the school psychologist stated that the June 2018 CSE considered a general education setting, related services only, and special education teacher support services, but felt those services would not provide sufficient support for the student to meet his needs (Tr. p. 103; Dist. Exs. 13 at pp. 20-21; 16 at p. 2). The hearing record shows that the CSE also considered a 12:1+1 special class in a community school, a "District 75 school in the smaller setting," and a State-approved nonpublic school; however, the CSE determined that those settings

were too restrictive, and would not provide the student with access to nondisabled students (Tr. pp. 61, 103-04; see Dist. Exs. 13 at pp. 20-21; 16 at p. 2). According to the school psychologist, the CSE believed that ICT services was the least restrictive and most appropriate placement that could address all of the student's needs (Tr. pp. 61, 103-04; see Dist. Exs. 13 at pp. 20-21; 16 at p. 2).

The school psychologist testified that she did recognize the neuropsychologist's recommendation for a small student-to-teacher ratio; however, she explained that the CSE looked at all the reports and considered the student's strengths and weaknesses and the fact that the student had previously briefly attended "general ed," and that in the end she felt that the recommendation of ICT services was a "small setting" compared to general education (Tr. pp. 59-60). The school psychologist further explained that while ICT services were provided in a general education setting which allowed for a maximum of 32 students, the setting had two teachers (one general education and one special education teacher); she also explained that within the ICT setting the ratio was 60 percent general education student population and 40 percent special education student population (Tr. pp. 59-60, 74-75, 86-87).

In addition, the school psychologist disagreed that the June 2018 IEP made no recommendation for the student to receive instruction in a small group (Tr. pp. 109-10). The school psychologist noted that within the ICT setting the teachers usually broke into small groups and that it was her understanding that for ELA, social studies, science, and math the student would be working with the special education teacher in a smaller group (40 percent of the students who received special education instruction or up to 12 students) (Tr. pp. 75-76, 88-89, 103, 106-07, 110).⁷

The neuropsychologist made additional recommendations including a number of accommodations and supports such as clarification of material, scaffolding of written work, concepts repeated slowly, details repeated and emphasized, pre-lecture discussions, post-lecture review, copy of lecture notes, additional time and cues, outlines, graphic organizers, checklists, frequent positive feedback, self-reward for task completion, computer with spell check, a standard routine, chunking of long term projects, and a planner for tracking assignments (Dist. Ex. 5 at pp. 34-36). As detailed above the supports identified in the June 2018 IEP's management needs follow these recommendations closely (compare Dist. Ex. 13 at p. 6, with Dist. Ex. 5 at pp. 34-35). The neuropsychologist also recommended the initiation of language therapy focusing on nonverbal pragmatic communication, oral language formulation and written expression as well as continued psychotherapeutic support outside of school with a professional knowledgeable in cognitive behavior therapy (Dist. Ex. 5 at p. 36). A review of the June 2018 IEP shows that the CSE recommended speech-language therapy along with annual goals targeting verbal reporting on a topic, expressive language, identifying appropriate social responses, maintaining a topic of another's choosing and asking partner-focused questions, and written expression (Dist. Ex. 13 at pp. 9, 11-13, 15, 20).

⁷ State regulations provide that the maximum number of special education students instructed by a special education teacher providing ICT services is 12, unless a variance for one additional student is granted by the Commissioner of Education for the classroom (8 NYCRR 200.6[g][1]).

Therefore, as discussed above, the evidence in the hearing record does not provide a reason to disturb the IHO's findings with respect to the appropriateness of the special education program recommended in the June 2018 IEP.

C. Assigned School – Implementation

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (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]).⁸ However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept.

⁸ The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

The parents allege that the IHO erred in finding that the public school the student was assigned to attend for the 2018-19 school year was prepared to implement the student's IEP mandates and erred in finding credible the testimony of the district witness on this subject. Specifically, the parents argue that the hearing record shows that the configuration of ICT services included within the June 2018 IEP were not offered under the assigned school's model and that the principal explained that an IEP meeting would have been immediately convened for the student to re-examine the recommended program with an eye toward a significant reduction and modification of services to conform with the offering at the middle school. The parents further argue that the principal freely indicated that the middle school had no intention of implementing the student's IEP as written and did not indicate a plan or the ability to do so. However, a closer examination of the principal's testimony does not support the parents' arguments.

The principal stated that the middle school program provided ICT services for math five times per week and ELA five times per week and stated that during "that year" (2018-19) the students in the seventh grade received five periods of ICT services for ELA (Tr. pp. 122-23). The principal explained that they offered a "full-time ICT program" to the students who had that recommendation on their IEP but explained that the "trouble with the IEP period mandate" was that the number of periods in a school day at her middle school was different than that of the elementary schools and that sometimes the number of periods on an IEP needed to be changed to reflect what "full-time ICT look[ed] like" (*id.*). The principal stated that elementary schools ran on an eight-period day while the middle school ran on less periods because the periods were longer (nearly 55 minutes) (Tr. pp. 123, 138-39).

The principal explained that school-wide the students only had five periods of ELA per week, so in order to provide ten periods of ICT services for ELA she would have had to meet with the families and the school-based support team and explain the middle school program and take a look at the IEP and determine if the IEP was written in a way to provide full-time ELA ICT services or if it was about the frequency (Tr. pp. 137-38). She explained that if it was determined that the frequency of ICT services for ELA was required, then that was something the school would have to put into place and that the school would individually program the student for additional ELA time with the special educator (Tr. pp. 137-38). The principal further noted that the middle school could have provided the recommended program and that it was something the school had done for students in the past (Tr. pp. 138, 142-44).

The principal stated that the number of periods of ICT social studies and science that her school offered during the 2018-19 school year matched what the students had on their IEPs, which for "that year" was three periods (Tr. pp. 129-30, 146). She explained that in order to provide five periods of ICT services for the student for social studies and science the middle school would have had to increase the special educator's teaching periods and she testified that that was something they would have been able to do (Tr. pp. 140-42).

In addition, the principal testified at hearing that the middle school had students currently and in the past with management needs similar to those included on the student's June 2018 IEP and that the middle school classes could have implemented the required supports (Tr. pp. 127-28; see Dist. Ex. 13 at p. 6).

As detailed above, the hearing record supports the IHO's finding that the assigned school would adapt to meet the student's needs if needed and would have been capable of providing the services mandated on the student's IEP.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student an appropriate educational program for the 2018-19 school year, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
April 5, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER