The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-155

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Nathaniel R. Luken, Esq.

Law Offices of Bonnie Spiro Schinagle, attorneys for respondent, by Bonnie Spiro Schinagle, 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 respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Manhattan Star Academy for the 2020-21 school year. The appeal must be sustained in part and, for the reasons set forth below, the matter must be 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 student attended a 12:1 special class for preschool (Parent Ex. F at p. 2). For the 2017-18 and 2018-19 school years (kindergarten and first grade), the student attended a dual-language general education classroom and received integrated co-teaching (ICT) services, as well as related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (id. at pp. 1-2). Reportedly, June 2018 diagnostic evaluation results confirmed that the student met the criteria for a diagnosis of autism spectrum disorder (ASD) (id. at p. 2). In addition, the student reportedly had "complex medical needs" related to a weak immune system, seasonal and food

allergies, as well as diagnoses of asthma, Crohn's disease, and celiac disease (Parent Ex. F at p. 1; Dist. Exs. 2 at p. 2; 6 at p. 1).

On May 3, 2019 a CSE convened to conduct an annual review and developed an IEP for the student with a projected implementation date of May 17, 2019 (Dist. Ex. 5 at pp. 1, 22). Finding the student eligible for special education as a student with autism, the CSE recommended a 12-month program of ICT services, along with related services (id. at pp. 1, 16-18). The May 2019 IEP indicated that the parent had submitted an application for the ASD specialized programs available through the district and that, if the "Central ASD Team" identified the student as an appropriate candidate for the program, the CSE would reconvene (id. at p. 23).

The parent requested a re-evaluation of the student "in order to determine whether or not [she] require[d] more intensive special education services at th[at] time" (Dist. Ex. 6 at p. 1). On May 6, 2019, the district conducted a psychological evaluation of the student (id.).

A CSE reconvened on June 14, 2019 and, for the 10-month portion of the school year, recommended that the student attend general education classes in a district non-specialized school and receive ICT services for math, English language arts (ELA), social studies, sciences, art, music, dance, and computer classes, and attend adapted physical education (Dist. Ex. 11 at pp. 20, 26). For related services, the June 2019 CSE recommended the following on a weekly basis: counseling (one 30-munite session individual); OT (one 30-minute session individual, one 30-minute session in a group of two, and one 45-minute session in a group of four in the classroom); PT (one 30-minute session individual pushed in to gym class and one 30-minute session in a group of two); speech-language therapy (one 30-minute session individual, one 30-minute session in a group of two, and three 45-minute sessions in a group of four); and school nurse services (individual as needed) (id. at p. 21). The CSE also recommended parent counseling and training (one 60-minute session per month in a group) and pre- and in-service training on autism spectrum disorders for school personnel (id. at pp. 21, 22). For extended school year (ESY) services, the CSE recommended one 45-minute session per week of OT in a group of four and three 45-minute sessions per week of speech-language therapy in a group of four (id. at pp. 22-23). The June 2019 IEP stated that a 12:1 special class in a community school was considered and rejected because the student's needs could be met in a less restrictive environment and since she benefitted from learning alongside non-disabled peers who served as good models of social skills and the use of pragmatic language (id. at p. 28). The June 2019 IEP indicated that an ASD specialized program in a community school in an integrated setting would meet the student's needs (id.).

For the 2019-20 school year, the student repeated the first grade and was enrolled in the ASD Nest program in a district public school (Parent Ex. F at pp. 1-2). The ASD Nest program was described in the hearing record as "a specialized program that serves students with autism" by providing ICT services in general education classrooms of "reduced size," which is available in some district public schools in a partnership between the district and the New York University's . . . ASD Nest Support Project" (Dist. Ex. 25 ¶¶ 6-8).

The parent obtained a private psychological evaluation in March 2020 to assess the student's behavioral and academic progress since the parent was concerned that, while the student was in her second year of the first grade, she was not keeping up academically and was having several difficulties in her interactions with peers and teachers (Parent Ex. F at p. 1). In addition to

confirming that the student met the criteria for a diagnosis of autism, the psychologist offered a diagnosis of a developmental disability of scholastic skill (id. at p. 4). The psychologist opined that the ASD Nest program was "not designed to provide appropriate educational interventions for children with learning disability[ies]" and that the student "likely" would require placement in a nonpublic school specializing in education of students with ASD and learning disabilities (id.).

On June 26, 2020, a CSE convened to conduct an annual review and developed an IEP for the student with a projected implementation date of June 26, 2020 (Dist. Exs. 21 at pp. 1, 21). Finding the student continued to be eligible for special education as a student with autism, the CSE recommended the continuation of ICT services and adapted physical education, the same related services with some changes in delivery frequency and group sizes, and the same ESY related services (compare Dist. Ex. 11 at pp. 20-23, with Dist. Ex. 21 at pp. 19-21).[1]

On July 28, 2020, the parent executed a contract for the student's enrollment at Manhattan Star Academy for the 2020-21 school year (Parent Ex. C).

In a letter to the district, dated August 21, 2020, the parent noted her objection to the program recommended by the CSE at the time of the meeting and indicated that the placement recommended was the same school the student attended for the 2019-20 school year and that the parent had "made it known that she d[id] not feel that the school [wa]s appropriate" (Parent Ex. B).[2] The parent advised the district of her intent to enroll the student at Manhattan Star Academy for the 2020-21 school year and seek public funding for the costs thereof (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 9, 2020, the parent argued that the district denied the student a FAPE for the 2019-20 and 2020-21 school years (Parent Ex. A at pp. 1-5). First, regarding the 2019-20 school year, the parent alleged that the district failed to consider the May 2019 psychological evaluation, the instructional and functional levels reported in the June 2019 IEP showed the student had not made progress, the IEP did not contain annual goals appropriate to the student's unique learning and functional needs, the June 2019 IEP failed to address the student's sensory needs, behavioral interventions were not included on the June 2019 IEP, the related services recommended for the summer term were not reasonably calculated to allow the student to maintain progress, and the IEP was not reasonably calculated to allow the student to make meaningful progress (id. at pp. 2-3). The parent asserted that, over the course of the 2019-20 school year, she "became increasingly dissatisfied with her daughter's education" and came to doubt that the student was making progress despite reports from the school (id. at p. 3). The parent further argued that the developmental pediatrician, who conducted an evaluation of the

[1] The ICT services were updated to reflect different classes (i.e., technology and library classes in place of art and computer classes) (compare Dist. Ex. 11 at p. 20, with Dist. Ex. 21 at pp. 19-20). Related services were modified to provide that the student would receive counseling in a group of two instead of on an individual basis; individual sessions of PT and speech-language therapy and the 45-minute session of push-in OT in a group were removed from the student's programming (compare Dist. Ex. 11 at p. 21, with Dist. Ex. 21 at p. 20).

[2] The parent's letter referenced a March 2020 CSE meeting; however, as set forth above, the evidence in the hearing record indicates that the CSE meeting that developed the student's IEP for the 2020-21 school year took place in June 2020 (see Tr. pp. 1-248; Dist. Ex. 21).

student in March 2020, reported that the ASD Nest program, in which the student was enrolled, did not have the capacity to deliver the academic interventions the student needed and that the student likely should have been attending a nonpublic school specializing in educating students with autism and learning disabilities (id.).

Next, regarding the 2020-21 school year, the parent argued that the June 2020 IEP inaccurately stated the student's "functional/instructional levels in ELA and math," the IEP did not contain annual goals appropriate to her unique learning and functional needs, the IEP did not address the student's sensory needs, behavioral interventions were not indicated in the June 2020 IEP, the summer related services—identical to the previous summer—were not reasonably calculated to allow the student to maintain progress, the student's needs were not being met in the then-current setting, and the program recommended for the 2020-21 school year was not reasonably calculated to allow the student to make meaningful progress considering her unique needs (Parent Ex. A at pp. 2, 3-4). The parent indicated that, at the June 2020 CSE meeting, she informed the CSE that she was not "satisfied by the special educations services" that the student had been receiving and that she felt the student could not access the curriculum (id. at p. 3).

The parent argued that the Manhattan Star Academy program was reasonably calculated to allow the student to progress in all functional areas and that the parent timely notified the district that she was withdrawing the student (Parent Ex. A at p. 5).

The parent sought a determination that the district denied the student a FAPE for the 2019-20 and 2020-21 school years, that Manhattan Star Academy was an appropriate unilateral placement for the student for the 2020-21 school year, and that equitable considerations weighed in favor of an award of district funding of the student's tuition for the 2020-21 school year (Parent Ex. A at p. 5). As relief the parent requested that the district be required to fund the costs of the student's attendance at Manhattan Star Academy for the 2020-21 school year, including transportation (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 7, 2021 and concluded on June 2, 2021 after three days of proceedings (Tr. pp. 1-248). In a decision dated June 2, 2021, the IHO found that the student was not appropriately placed by the district and that the district failed to meet its burden to prove that it offered the student a FAPE (IHO Decision at pp. 44-46). Specifically, the IHO found that the district witnesses described the Nest program as being for students with average to above average intelligence with consistent development including verbal and nonverbal abilities, working memory, language, and attention and that based on the documentation available to the CSE the student did not meet the Nest admissions criteria (id. at pp. 44-45). The IHO took issue with the "selective admissions process" for the program and its functioning separate from the CSE (id. at p. 45). In addition, the IHO noted the student's lack of success during the 2018-19 school year with ICT services such that the student was required to repeat first grade for the 2019-20 school year (id. at p. 45). The IHO held that the district could not address the student's lack of success with ICT services during the 2018-19 school year by again recommending ICT services, notwithstanding that the particular program/school that the district assigned the student to attend (i.e., the Nest program) was a "distinctively different and potentially more supportive 'shadow' ICT program," given that the student did not meet the admission criteria for the program (id.). Based

on the foregoing, the IHO concluded that neither the CSEs' recommendations for ICT services, nor the placement of the student at the Nest program, were appropriate (id. at p. 46).

Turning to the unilateral placement, the IHO found that the parent met her burden to demonstrate that Manhattan Star Academy was appropriate (IHO Decision at p. 46). The IHO found that documentary and testimonial evidence supported this finding and, in particular, that the testimony of the school witnesses detailed the close individual attention the student received, the availability of BCBA supervision, the utilization of ABA methodology, and the specific efforts undertaken to address the student's learning deficits (IHO Decision at p. 46).

For relief, the IHO ordered the district to place the student at Manhattan Star Academy for the remainder of the 2020-21 school year, reimburse the parent for the costs for the student's placement (including related services, augmentative equipment, and special education transportation), and directly pay any outstanding amount for the program or services (IHO Decision at pp. 46-47).

IV. Appeal for State-Level Review

The district appeals and contends that the IHO erred in finding that the district deprived the student of a FAPE. The district argues that the IHO's findings were "completely devoid" of any analysis as to whether or not the district's programming was reasonably calculated to meet the student's special education needs and enable the student to make progress and that the testimony of the district's witnesses and the documentary evidence established that the program the district offered the student during both the 2019-20 and 2020-21 school years was individualized to meet the student's needs, responsive to the parent's concerns, and provided the student with the opportunity to make meaningful progress. The district notes that the IHO focused on the Nest program's admissions criteria, the fact that the student repeated first grade for the 2019-20 school year, and the independent evaluation submitted by the parent. The district argues that the record did not support the IHO's finding that the student was admitted into the Nest program in contravention of the Nest criteria. The district further contends that it was impossible to determine the relevancy of the student having to repeat the first grade and so the IHO erred in using this fact to support his finding that the student was inappropriately placed during the 2019-20 and 2020-21 school years. The district also alleges that the IHO erred in placing an emphasis on the private evaluation's finding that the Nest program was not designed to provide appropriate educational interventions for children with learning disabilities as there was no indication in the record if or how the evaluator was familiar with the Nest program. The district contends that the hearing record supports a finding that the recommended program set forth in the June 2020 IEP was appropriate. Lastly, the district argues that the parent's "general allegation" within her 10-day notice letter to the district did not put the district on notice of the alleged deficiencies in its program and, therefore, it was not given the opportunity to address them.

In an answer, the parent contends that the IHO correctly found that the district deprived the student of a FAPE and that the IHO expressly detailed his reasoning with respect to burdens of proof and explained the lens through which he viewed the facts. In addition, the parent argues that the IHO properly determined that Manhattan Star Academy was appropriate. The parent asserts that the district has waived any objection on the issue of equities as the matter was not addressed at the impartial hearing through evidence or witnesses or in the closing briefs and further the parent

argues that equitable considerations support the IHO's award of district funding of the student's tuition at Manhattan Star Academy. The parent requests that the IHO's decision be affirmed in its entirety or, in the alternative, that the matter be remanded to the IHO for further consideration.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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

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

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

Initially, I note that although the IHO found that the district failed to offer the student a FAPE, he did not specify if his finding applied to both the 2019-20 and 2020-21 school years or if it was confined to the 2020-21 school year (see IHO Decision at pp. 44-46). The district appeals as if the IHO made the finding for both school years. Ultimately, however, in the underlying proceeding in this matter, the parent did not seek any relief relating to the 2019-20 school year and sought reimbursement after placing the student in Manhattan Star Academy there after a subsequent IEP for the next school year had been developed (see Parent Ex. A at p. 5). The IHO made a passing finding about the student's lack of progress during the 2018-19 school year and, apparently, this influenced the IHO's decision about the CSE's recommendations for one or both school years at issue (see IHO Decision at p. 45); however, it is unclear what weight, if any, the student's struggles during the 2018-19 school year should be accorded in evaluating the appropriateness of the program offered for the 2020-21 school year—the time period for which the parent seeks relief in this matter given the intervening school year during which the student received ICT services while attending the ASD Nest program.[4] The IHO did not evaluate the student's progress or lack thereof during the 2019-20 school year to examine whether the IEP for the 2020-21 school year, which set forth a similar program, was reasonably calculated to enable the student to achieve educational benefit in light of her circumstances for the 2020-21 school year. Indeed, the IHO did not address any of the claims in the parent's due process complaint notice relating to the 2020-21 school year, including those regarding the statement of the student's functional levels in the June 2020 IEP, the appropriateness of the annual goals, the degree to which the IEP addressed the student's sensory or behavioral needs, the appropriateness of ICT services in light of the student's progress or lack thereof during the 2019-20 school year, or the sufficiency

[4] A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/ iepguidance/IEPguideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

of extended school year services (compare Parent Ex. A at pp. 2, 3-4, with IHO Decision at pp. 44-46). Moreover, in reviewing the June 2020 CSE's recommendations for ICT services, the IHO also failed to weigh considerations related to the CSE's obligation to identify the student's least restrictive environment (LRE) (see 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]).

Also problematic in this proceeding was the IHO's FAPE determination in this matter which rested almost exclusively on an overly narrow point of questionable relevance and weight—the admission criteria for the ASD Nest program—rather than focusing on the core issues that were challenged with respect to the student's written June 2020 IEP and the parent's allegations set forth in the due process complaint notice related thereto (IHO Decision at pp. 44-45). Whether the Nest program was willing to accept the student or other students is less important than whether the IEP was appropriate and whether the Nest program was capable of carry out the terms of the written IEP.

The Second Circuit has held that, generally, a district's assignment of a student to a particular public school site is an administrative decision within the discretion of the school district provided that it is made in conformance with the CSE's educational placement recommendation (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]). Here, even if the parent was entitled to participate in the selection of the ASD Nest program, the evidence in the hearing record does not support the IHO's finding that the selection of a specialized ASD program took place outside of the CSE process (see IHO Decision at p. 45). The evidence in the hearing record reflects that the parent applied to the program and, when the CSE met in May 2019, it was discussed that the CSE would reconvene if the student was found to be a good candidate for a specialized ASD program (Dist. Ex. 5 at p. 23). According to the district school psychologist, the district consulted with the "Central ASD Nest intake team" and that the team agreed that the CSE could consider the ASD Nest program for the student (Tr. p. 27). When the CSE reconvened in June 2019, it was determined that a specialized ASD program could meet the student's needs (Dist. Ex. 11 at p. 28). At the time, the parent agreed with the student attending the ASD Nest program (see Tr. pp. 127-28).[5] A representative from the ASD Nest program—an ASD Nest coach—attended the June 2020 CSE (Dist. Ex. 21 at p. 29; see Dist. Ex. 25 at p. 1). The June 2020 CSE recommended that the student continue in the program for the 2020-21 school year.

Whether the student met the admissions criteria for the particular program—criteria which are not set forth in law or regulation—is of less relevance or weight if the IEP was appropriately designed to address the student's unique needs and the particular program and public school site had the capacity to implement the IEP. The Supreme Court and the Second Circuit have continually reminded litigants that "[t]he IEP is 'the centerpiece of the [IDEA's] education delivery system for disabled children (Endrew F., 137 S. Ct. 988, 994 [2017]; see D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 157 [2d Cir. 2020]). However, the IHO's determinations skirted the IEP

[5] The parent testified that she did not understand that the student would be in a classroom with nondisabled peers in the ASD Nest program (see Tr. p. 210).

issues in favor of his interest in the admissions criteria and attempts to relate them to concerns about the capacity of the ASD Nest program to implement the IEP. However, the IHO's findings were based on his own presumption that the student's needs would differ from those of the other students in the program or because the student would be unable to access the curriculum given his level of need, but those presumptions were not rooted in evidence in the hearing record.

It may be that the IHO was suggesting that the district could not carry out the terms of the IEP because of the ASD Nest program's admission policy, but I find that without an analysis of the IEP itself that filament of reasoning was far too tenuous. 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]).[6] 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.

[6] 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]).

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. 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]).

Once again although unclear, it may have been that the IHO believed that the student was not being grouped appropriately with other students with similar learning profiles. However, any such reasoning would be flawed because. The question of whether the student's functioning levels would be too dissimilar from the general profile of students receiving ICT services while attending the ASD Nest program, initially, there is no requirement that students be so grouped. That is, unlike State regulations which require that in special classes students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3], there is no such requirement for students attending general education class placements with ICT services. Moreover, claims alleging deficiencies in functional grouping when a student has not yet attended the proposed classroom at issue tend to be speculative in nature (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K., 12 F. Supp. 3d at 371; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013]). Thus an analysis of the student's IEP viewed through the lens of the parents challenges as raised in the due process complaint notice was critical, but left unaddressed in this matter. An analysis of the district's proposed programming by the parties and IHO should also include careful consideration of the fact that the district was proposing placement in an ICT setting with nondisabled peers and the mandate placed upon the programming proposed by the CSE that the student must be placed in the LRE in accordance with the factors set forth in P. v. Newington Bd. of Ed. (546 F.3d 111, 120).

Even if IHO's admissions criteria concerns were not a speculative inquiry, the evidence in the hearing record does not support a finding that the student's needs were so divergent from the profile of students that tended to attend the ASD Nest program such that this alone would support a finding that the district denied the student a FAPE.

In her affidavit testimony the ASD Nest coach stated that the ASD Nest program served students with autism in an integrated classroom with the general education students and that the Nest class was an ICT model of reduced class size with one special education teacher and one regular education teacher both trained in working with students with autism (Dist. Ex. 25 at ¶ 7).[7] The ASD Nest coach stated that the general profile of a student admitted to the Nest program was

[7] The Nest coach explained that the ASD Nest teachers were trained in specialized teaching strategies for students with autism including a special social curriculum called Social Development Intervention (SDI) which she described as an evidence-based program that supports social/emotional development (Dist. Ex. 25 ¶ 8). The Nest coach stated that the related service providers use SDI to help students improve social functioning in that this social language curriculum was taught in smaller groups (id.).

a student with autism that had average to above average intelligence, mild to moderate delays in social skills, and mild to moderate language difficulties (Dist. Ex. 25 at ¶ 10). The ASD Nest coach testified that, in reviewing students' profiles for admission to the Nest program, the team does not just look at student's cognitive scores but instead looks at students' full profile, including their actual functioning and abilities (see Tr. pp. 170-72). The Nest coach conceded that the program had not admitted many students with borderline IQs but indicated that there had been "a few" (Tr. p. 173). He explained that a student with a borderline IQ might be deemed appropriate for the program if his or her language development or academic achievement did not reflect the cognitive scores and/or if a classroom observation reflected participation and independence (Tr. pp. 173-74).

The Nest coach also indicated that the student's profile was consistent with the typical student who attended Nest (Tr. p. 26). Likewise, the district school psychologist testified that she was trained to partake in the ASD Nest program intake process and that the student had the type of profile expected for a student in the Nest program (Tr. p. 26).

To conclude that the student's profile was divergent from that of the typical student who attended Nest, the IHO relied on the district's determination that the student should repeat first grade for the 2019-20 school year and the conclusions set forth in the private psychological evaluation that the student met the criteria for a learning disability that contributed to her delays (IHO Decision at p. 45). However, as set forth above, the student's lack of progress during the 2018-19 school year is of limited relevance in examining the appropriateness of either the written IEP recommendations or the assigned public school placement for the 2020-21 school year, especially when the student actually attended the ASD Nest program during the intervening 2019-20 school year. One of the critical questions left unaddressed is how the student was progressing after switching into the ASD Nest program for the 2019-20 school year. Further, the district's decision that the student should repeat the first grade does not, without more, describe the student's functioning levels so that they might be compared to other students in a proposed classroom. As for the learning disability diagnosis offered by the private psychologist in the March 2020 private psychological evaluation report (see Parent Ex. F at pp. 2-3), while perhaps it was descriptive of some areas of the student's needs, there is no evidence in the hearing record that the ASD Nest program could not meet the needs of a student who had received such a diagnosis.[8]

To the extent the IHO's concern about the student's participation in the Nest program related to her ability to access the curriculum, district witnesses explained that that the program followed State Common Core learning standards but that instructors used modifications and methodologies to help students to achieve the learning standards (Tr. p. 31; Dist. Ex. 25 at ¶ 11). The district school psychologist elaborated that the curriculum was made accessible by providing learning opportunities using the Social Development Intervention (SDI) methodology (Tr. pp. 31-32).[9] Moreover, she referenced the student's IEP to show the modifications that would allow the

[8] Its not clear to me how the private psychologist reached that conclusion based on the information she reportedly had available to her, but I leave it to the parties and the IHO to appropriately develop the hearing record upon remand.

[9] The Nest coach explained that the ASD Nest teachers were trained in specialized teaching strategies for students with autism including SDI, a special social curriculum, which she described as an evidence-based program that

student to access the curriculum (Tr. pp. 51-53).[10] There is no allegation that the ASD Nest program did not have the capacity to implement the supports set forth in the written June 2020 IEP in order to allow the student to access the IEP. To the extent the modifications and accommodations in the IEP were insufficient for that purpose, that is an issue that the IHO did not address, and which may be further explored on remand.[11]

Based on the foregoing, the IHO erred in relying on irrelevant, unchallenged, and speculative grounds to find that the district failed to offer the student a FAPE and in failing to directly address the parent's claims set forth in the due process complaint notice. 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]).

VII. Conclusion

Having found that the IHO erred in his determination that the district failed to offer the student a FAPE on grounds related to the admissions criteria of the ASD Nest program, the IHO's decision regarding a FAPE must be reversed and the matter must be remanded for reconsideration by the IHO upon further development of the hearing record if necessary and in accordance with this decision. As the district did not appeal the IHO's determination that Manhattan Star Academy was an appropriate unilateral placement for the student for the 2020-21 school year, it shall be unnecessary for the IHO to reach this issue on remand should the IHO again find that the district failed to offer the student a FAPE for the 2020-21 school year. However, the IHO may weigh equitable considerations raised by the parties in evaluating whether the district should be required

supports social/emotional development (Dist. Ex. 25 at p. 2). The Nest coach stated that the related service providers use SDI to help students improve social functioning in that this social language curriculum was taught in smaller groups (id.).

[10] Supports for the student's management needs included in the June 2020 IEP included seating that provides 90 degrees at her knee and ankles and slant board for writing with an adjustable incline, small group work, visuals for academic organization and completion, rewards/checklists, manipulatives, sitting close to the teacher during whole group lessons, yellow line on paper to help her write on the line, and access to instructional technology as needed (e.g., computer, tablet, etc.) (Dist. Ex. 21 at p. 8).

[11] To be sure, in her affidavit testimony, the parent indicated that the student could not access the curriculum delivered to the student while attending the ASD Nest program during the 2019-20 school year but the parent does not reference the specific modifications or accommodations mandated in the IEP that were not implemented or which she believed the program would not have the capacity to implement for the 2020-21 school year (see Parent Ex. M at ¶¶ 4-9). As the IHO rested on whether the student met the admissions criteria for the Nest program as the basis for his decision, the appropriateness of the written IEP is not reviewed at this time, and the student's progress or lack thereof does not factor into an examination of whether the Nest program had the capacity to implement the student's IEP. As noted above, since the IHO failed to sufficiently examine the written IEP plan, he may revisit this evidence upon remand.

to fund the student's tuition at Manhattan Star Academy for the 2020-21 school year, including the district's argument that the parent's notice of unilateral placement did not sufficiently put the district on notice of the parent's concerns about the June 2020 IEP.[12]

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated June 2, 2021 is modified by reversing that portion that concluded the district failed to offer the student a FAPE for the 2019-20 and/or 2020-21 school years; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to reconvene the impartial hearing and issue a new determination regarding whether the district offered the student a FAPE for the 2020-21 school year by analyzing the parents IEP claims raised in the due process complaint notice and, if necessary, whether equitable considerations favor the parent.

Dated: **Albany, New York**
August 11, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).