The University of the State of New York

The State Education Department
State Review Officer
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No. 21-184

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 Mitchell L. Pashkin, Esq.

Law Offices of Neal Howard Rosenberg, attorneys for respondents, by Jenna L. Pantel, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Churchill School (Churchill) for the 2020-21 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

The parties' familiarity with the detailed facts and procedural history of this matter is presumed and will not be recited in detail here. Briefly, the student's family relocated to the United States after he attended third grade, and the student then attended a district public school until fifth grade where he was deemed to be "at risk for grade retention" (Tr. p. 248; Parent Ex. B at p. 1). The student subsequently transitioned to a nonpublic "special education school setting" where, although he made academic gains, and despite ongoing academic remediation, he continued to struggle across academic domains (Parent Ex. B at p. 1). According to a neuropsychological and

educational assessment of the student conducted in September 2017 while he was in eighth grade, the student's full-scale IQ fell within the average range, with a composite score of 102 (55th percentile rank) (Parent Ex. B at pp. 1, 28). He presented with a functional deficit in reading, a functional limitation in written expression, as well as a severe functional limitation in mathematic skills, specifically in automaticity, calculation, and problem solving (id. at pp. 17-18). The student's diagnoses at that time included attention deficit hyperactivity disorder; combined presentation, specific learning disorders in the areas of reading (accuracy, fluency, comprehension), written expression (grammar and punctuation accuracy, clarity of written expression), and mathematics (memorization of arithmetic facts, fluent calculation, accurate math reasoning); and he also met the criteria for a diagnosis of developmental coordination disorder (id. at pp. 20-21).

The date of the student's initial enrollment at Churchill was September 4, 2018, for ninth grade, and he continued to attend Churchill for the 2019-20 school year (tenth grade) (Parent Exs. D at p. 1; F; K at p. 1).[1]

A CSE meeting convened on December 11, 2019 to develop an IEP for the student for the remainder of the 2019-20 school year and a portion of the 2020-21 school year (Dist. Ex. 1 at pp. 1, 24). The CSE determined that the student was eligible to receive special education programming as a student with a learning disability and to address his needs, the December 2019 CSE recommended that he receive five periods per week of integrated co-teaching (ICT) services in the following subjects: mathematics, English language arts (ELA), social studies, and science, together with three periods per week of special education teacher support services (SETSS) for mathematics and two periods per week of SETSS for ELA (id. at pp. 19-20).[2] In addition, the CSE recommended one 40-minute session per week of counseling in a group, testing accommodations, supports for the student's management needs, post-secondary and annual goals, and a coordinated set of transition activities (id. at pp. 6, 8-22).

In a letter dated August 24, 2020, the parents notified the district that although they had attended the student's "IEP review" meeting in December 2019, they had not received a copy of the IEP to review the recommendations (Parent Ex. G at p. 1). The parents informed the district that at the meeting the "team recommended the ICT program" which the parents and Churchill staff disagreed with (id.). Further, the parents indicated that they had not received a placement for the student for the 2020-21 school year, and that they were continuing the student's placement at Churchill and would seek funding from the district (id.). The student attended Churchill during the 2020-21 school year (eleventh grade) (Parent Exs. F; M).

A. Due Process Complaint Notice

In a due process complaint notice dated October 6, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year

[1] Churchill has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The student's eligibility for special education and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

(see Parent Ex. A). Specifically, the parents asserted that the student's last IEP was developed on December 11, 2019 and the district failed to provide the parents with a copy of that IEP, which "inhibited parental participation in the process" in that they were unable to review the recommendations made during the CSE meeting, the present levels of performance, evaluative information, annual goals, management needs or "specific programming" (id. at p. 1). Further, the parents alleged that the district failed to provide them with a school location letter identifying the public school to which the district assigned the student to attend for the 2020-21 school year (id. at p. 2). Additionally, the parents contended that despite their notification to the district that they had not received a copy of the IEP or a placement recommendation for the student prior to the start of the school year, the district failed to "cure these defects" (id.). Relatedly, the parents asserted that "due to the continued pandemic and school closures," the district's programs started remotely, yet at no time since the December 2019 pre-pandemic CSE meeting did the CSE reconvene to discuss the student's special education needs in a remote setting or blended learning environment (id.). According to the parents, the district's actions prevented them from participating in the CSE process because they could not review the recommended program prior to the start of the school year and the district did not respond to the parents' concerns (id.).

The parents acknowledged their awareness that the CSE had recommend ICT services, but argued that the program was not appropriate for the student (Parent Ex. A at pp. 1-2).

The parents asserted that the student was appropriately placed at Churchill and that his program was specially designed with his needs in mind, and he was making progress (Parent Ex. A at p. 2). The parents also argued that equitable considerations favored an award of tuition reimbursement, which they sought as relief (id.).

B. Impartial Hearing Officer Decision

A prehearing conference convened on May 7, 2021 and the impartial hearing concluded on June 16, 2021 after five days of proceedings (Tr. pp. 1-274). In a decision dated July 27, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year (IHO Decision at pp. 25, 30). Specifically, the IHO found that neither the IEP nor the school location letter were provided to the parents by the start of the 2020-21 school year despite the parents' communication advising of the district's failure to do so, which resulted in a denial of a FAPE (id. at p. 25). Additionally, finding that the district provided an email to the parents with the school location letter, the IHO determined that the district failed to follow its own procedures regarding obtaining the parents' consent for email communication and failed to notify the parents of the district's intent to email the school location letter and prior written notice (id.). The IHO found this was "further compounded" by the district's failure to respond to the parents' "multiple inquiries" about the IEP and school location letter (id. at pp. 26, 27-29).[3]

Next, the IHO determined that the December 2019 IEP failed to identify and address the student's dyslexia and speech-language needs (IHO Decision at p. 26). The IHO also agreed with the parents' argument that the IEP annual goals were vague and insufficient to address the student's

[3] The IHO noted that the implementation date of the December 2019 IEP was January 2, 2020 and that, as such, the district not only failed to deliver the IEP prior to the start of the 2020-21 school year but also "failed to deliver the IEP in time for the anticipated implementation" (IHO Decision at pp. 26, 28).

special education needs (id. at p. 30). Regarding the recommended program and placement, the IHO found that the parents' argument was supported by the evidence in the hearing record, that ICT services and SETSS were "not in alignment with the reports and recommendations of the professionals who knew the [Student] and evaluated him" (id. at p. 26). According to the IHO, the district relied on information that was premised on the student's placement in a full-time special education setting, and a neuropsychological evaluation that recommended a small full-time special education setting; however, the district "removed the small class size and full-time special education without information or evidence to support this change" (id. at pp. 26-27). The IHO then determined that the district witnesses did not provide sufficient testimony for the district to meet its burden of persuasion to demonstrate that its recommendations were appropriate (id. at p. 27). Further, the IHO found that the district failed to establish that the "IEP would be properly implemented despite claiming it issued a school placement" letter, as no one from the assigned public school site testified and "no one from the IEP team had knowledge" of the assigned school (id.).

Turning to the unilateral placement, the IHO determined that Churchill provided an appropriate placement for the student for the 2020-21 school year, as it identified the student's areas of special education need, established services and supports to address those needs, and the student exhibited "success and progress" at the school (IHO Decision at pp. 30, 31). Regarding equitable considerations, the IHO found that there was no evidence presented that the parents frustrated the district's attempts to offer the student a FAPE and that the parents provided the district with an appropriate 10-day notice and "continuously communicated concerns" to the district (id. at p. 31). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Churchill for the 2020-21 school year (id.).

IV. Appeal for State-Level Review

The district appeals and assert that the IHO erred in finding that the district did not offer the student a FAPE for the 2020-21 school year. Initially, the district asserts that the IHO erred in addressing allegations that were not raised in the parents' due process complaint notice. Specifically, the district argues that while the due process complaint notice "contains several specific allegations as to why the [district] denied the student a FAPE . . . [it] d[id] not contain allegations concerning the goals, [the student's] dyslexia, or the recommended school's ability to implement the IEP." Next, the district argues that the IHO incorrectly determined that the district's failure to provide the parent with a copy of the IEP required a finding of a denial of a FAPE, as the evidence shows that the parents participated in the CSE meeting, were aware of the program recommendations, and received a prior written notice. Further, according to the district the evidence shows that the "[p]arents had an 'opportunity to participate in the decision-making process'" as they and representatives provided information for and participated in the CSE meeting. The district next appeals the IHO's finding regarding the emailing of the school location letter, asserting that the IHO erred because there is no statute requiring consent for the emailing of a school location letter.

Turning to the IHO's findings regarding the IEP, the district asserts that the IHO erred in finding that the IEP was required to and/or did not address the student's dyslexia because there was "no evidence of a need to have goals that separately addressed dyslexia" and the IEP otherwise addressed any decoding issues the student had. The district also argues that the IHO incorrectly

found that the IEP failed to adequately address the student's speech-language needs by not providing speech-language therapy and that several of the annual goals were vague and lacked measurement criteria. Regarding the recommended program and placement, the district asserts that the IHO erred in determining that the CSE's recommendation for ICT services together with SETSS was not appropriate to meet the student's needs.

In an answer the parents respond to the district's allegations and request that the undersigned dismiss the district's appeal in its entirety. Regarding the emailing of the school location letter, the parents argue that the student's mother's email address was incorrect, and the student's father was not aware of the email containing the document until after the start of the hearing. Further, the parents assert that they repeatedly notified the district that they had not received the school location letter or the December 2019 IEP.

V. Applicable Standards

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

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

§ 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

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

70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing

Before reaching the merits of the parties' appeals, the first issue to be addressed is whether the IHO erred by considering issues that the district asserts were not raised in the parents' due process complaint notice. Specifically, the district argues that the parents' due process complaint notice did not contain allegations concerning the annual goals, the student's dyslexia, or the assigned public school's ability to implement the IEP.

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]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Here, review of the parents' due process complaint notice shows that it did not specifically raise issues regarding the sufficiency of the annual goals and supports and services to address the student's reading difficulty, nor did it raise issues with the specific assigned public school's ability to implement the proposed IEP (see Parent Ex. A).[5] Although the due process complaint notice did allege that the parents were "unable to review the present levels of performance, evaluative data, goals, management needs, or specific programming" (id. at p. 1), these general allegations without any further specificity cannot be said to have given the district proper notice of the claims addressed by the IHO relating to the sufficiency of the annual goals and reading supports in the December 2019 IEP or the assigned public school.

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]), that rule does not apply in this case because, as further described below, the identified issues appear to have first been raised by either the IHO or counsel for the parents.

For example, in her opening statement, counsel for the parent asserted that the parent was prevented from reviewing the IEP to determine whether it had appropriate goals and that the IEP omitted critical goals tied to the student's special education needs (Tr. pp. 28, 35). Then at the start of the hearing, just prior to the district's first witness testifying, the IHO then went further, indicating that he was "wondering where they got the goals from for the student" (Tr. p. 39). Accordingly, the testimony then presented by the district as to the student's annual goals, appeared to be in response to this inquiry from the IHO—this is especially so as the IHO frequently took over the examination of the district witnesses as to this issue (see Tr. pp. 46, 56-60, 139-56). In terms of reading supports, this issue also first came up as part of the IHO's questioning of the district witnesses as to the recommended annual goals (Tr. pp. 57-60, 146-50). Finally, with respect to implementation of the December 2019 IEP, the transcript of the hearing does not indicate that this issue was raised separate from the claim that the district did not deliver the IEP to the parents or provide the parents with a school location letter and that the district did not provide a plan for delivering services remotely (Tr. pp. 23-24, 37-38, 87).

Based on the above, the hearing record demonstrates that the district did not open the door to issues regarding the sufficiency of the annual goals and services to address the student's reading needs, or the assigned public school's ability to implement the December 2019 IEP (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). Accordingly, these issues were not properly raised and were outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the

[5] It is not clear why the IHO reasoned that the IEP could not be implemented by district personnel due to the failure to delver a copy of the IEP to the parents. As further described below regarding the school location letter, with respect to implementation, it is more important as a practical matter to ensure that the parents know where the services can be obtained.

inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

2. Scope of Review

In a second preliminary matter, it is necessary to identify which of the parties' arguments are 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]).

Specifically, the district has not cross-appealed from the IHO's determinations that the parents' unilateral placement of the student at Churchill was appropriate for the 2020-21 school year and that equitable considerations weighed in favor of granting the parents' requested relief (see Req. for Rev.). As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Transmission of the School Location Letter

The district argues on appeal that the IHO erred in finding that the district's emailing of the school location letter to the parents did not amount to proper transmission of the school location letter.[6] However, review of the evidence in the hearing record provides support for the IHO's determination that the district's transmission of the school location letter—in this instance—resulted in a denial of a FAPE.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[7] The IDEA and State regulations also provide parents with the opportunity to offer input in

[6] On appeal the district asserts that the IHO erred by finding that the district's failure to provide the parents with a copy of the IEP required a finding of a denial of a FAPE. The hearing record shows that the district did not submit evidence that it provided the parents with the student's December 2019 IEP (Tr. pp. 189, 261) despite the procedural requirement to do so "at no cost to the parent" (see 34 CFR 300.322[f]), but courts have been reluctant to find a denial of a FAPE merely for the failure to provide a copy of the document, especially since no specific timeline is established for doing so (see Cerra, 427 F.3d at 193–94 [explaining that the parents failed to direct the court to "any statutory provision or regulation requiring that an IEP be produced at the time parents demand ... [s]chool districts must only ensure that a child's IEP is in effect by the beginning of the school year and that the parents are provided a copy"]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010] [same]).

[7] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (N.Y. Educ. Law § 2[15]).

the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 560 U.S. 904 [2010]; see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 889 [D. Ariz. 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). [13-150] Additionally, a district "must ensure that . . . [t]he child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation" (34 CFR 300.323[d][1]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *13 [S.D.N.Y. May 27, 2014]).

Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). To be clear there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x. 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

Thus, although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] ["a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe, 2008 WL 2736027, at *6 [a district's delay does not

violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented.[8]

This analysis also fits within the concept that while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

As discussed above, during the 2019-20 school year the student attended Churchill (see Parent Exs. E; F). In a letter to the district dated August 24, 2020, which was transmitted to the district by email from the parents' attorney on August 25, 2020, the parents advised the district that they had not received a copy of the student's IEP from the December 2019 CSE meeting and had "not received a placement for the 2020-21 school year" (Parent Ex. G at pp. 1-2). The email also requested that the district direct any response to the letter to counsel for the parents (id. at p. 2). In an email to the parents' attorney, dated August 25, 2020, the district indicated that the CSE was in receipt of the parents' letter (id. at p. 3). On August 31, 2020, the district sent an email to the parents stating that a copy of the prior written notice and school location letter were attached; however, in a September 17, 2020 email to the district, the parents' attorney informed the district that the parents had not received any documentation from the CSE meeting such as the IEP or the "school recommendation" and were seeking clarification from the district. (Parent Ex. I; Dist. Ex. 7 at p. 1).[9]

The student's mother testified that after the December 2019 CSE meeting, she did not receive any further communication from the CSE in relation to that CSE meeting (Tr. p. 258). She

[8] If this matter involved a school district similar to the Long Lake Central School District in rural, upstate New York, which in the 2019-20 school year had approximately 59 students enrolled in kindergarten through twelfth grade, the rule regarding the notification of the location of services might not apply with equal force, but as State-published data shows, New York City is much larger with over one million students enrolled in the public school during the same period (see https://data.nysed.gov).

[9] An August 31, 2020 SESIS log entry indicates that a prior written notice and a school location letter were emailed to the parents (Dist. Ex. 6 at p. 2).

further testified that after her August 2020 letter to the district informing the district that she did not receive the IEP or school location letter, she never received a response from the district (Tr. pp. 258-60). According to the student's mother, she first saw the December 2019 IEP and the school location letter in April 2021, during the course of the impartial hearing (Tr. p. 261). After learning that the district had sent those documents, she and her husband searched their emails but did not find anything at that time (Tr. pp. 261-62). The student's mother stated that there came a time when her husband did find the email from the district with the school location letter; however, because her husband had never been the point of contact for the district, and she had been, the email had gone into his "promotions tab" (Tr. pp. 262-63; see Tr. pp. 104-06). Further, the evidence shows that district used an incorrect email address for the student's mother and sent the student's school location letter to that incorrect email address (Tr. pp. 263-64; Dist. Ex. 7 at p. 1). Accordingly, based on the testimony, the district's attempt to deliver the school location letter to the parents via email was not successful.

The hearing record also supports the IHO's finding that the district's attempt to deliver the school location letter via email was not in accord with its own practices and was not reasonably calculated to provide the parents with notice. More specifically, the district published its own answers to frequently asked questions during remote and blended learning (Parent Ex. T). In that document, the district indicated that documents may be sent to a parent "via email after getting the parent's consent to receive documents via email" (id. at p. 4). The document further indicated steps that should be taken to obtain a parent's consent for communication via email, including attempting to reach the parent by telephone (id. at p. 5). The student's mother testified that the CSE had not communicated with the student's father to obtain his email address and consent to provide documentation by email (Tr. pp. 260, 263). The student's mother also testified that the district had not ever requested permission or consent to communicate with her via email (Tr. pp. 186-87, 258, 260). Despite the district's awareness of the parents' mailing address, and the student's mother's testimony that she had previously only received "important documents, like the IEP or school location letter" by mail, in this instance the district appears to have elected to only email those documents to the parents without even a follow-up telephone call (see Dist. Exs. 6 at p. 2; 7 at pp. 4, 6).

Based on the above, the hearing record shows that the district failed in its obligation to notify the parents, either in writing or orally, as to where or how the student could access his IEP services, despite efforts made by the parents to obtain that information from the district. This error constitutes a procedural inadequacy, which under the circumstances presented resulted in the parents being provided with too little information as to how or where the recommended special education program would have been implemented and therefore resulted in a denial of FAPE (see F.B., 2015 WL 5564446, at *11-*18; V.S., 25 F. Supp. 3d at 299-301; C.U., 2014 WL 2207997, at *14-*16).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district did not offer the student a FAPE for the 2020-21 school year, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 27, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER