



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-019

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:

Liz Vladek, General Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

Law Offices of Regina Skyer and Assoc., LLP, attorneys for respondents, by Gregory Cangiano, Esq. and Linda A. Goldman, 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 the district was incapable of implementing the educational program recommended for 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 parents cross-appeal from the IHO's determination that the district offered an appropriate educational program to the parents' son for the 2020-21 school year. The appeal must be sustained in part. The cross-appeal must be sustained.

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 general education classes for kindergarten through second grades (Dist. Ex. 7 at p. 2). He attended public schools in the district since second grade (id.). During second grade he was identified as having "some vision difficulties" and as a result received vision therapy services (id.). The parents reported that the student also struggled to complete his homework at that time (id.). The student completed grades three through seven with no academic

difficulties noted (id.). In eighth grade, the student was referred by the parents for an initial eligibility determination based on his difficulties with language comprehension and attending as well as his difficulties with completing an increased workload (id.). In response, the district conducted a social history, a classroom observation, a psychoeducational evaluation, a Level 1 vocational interview, and a speech-language screening (Parent Ex. C; Dist. Exs. 4; 5; 6; 7; 8).

A CSE convened on February 10, 2020 to review the results of the student's initial evaluation and determine the student's eligibility for special education (Dist. Ex. 1 at pp. 1-5, 14-15). Finding the student eligible as a student with a learning disability, the February 2020 CSE recommended that the student receive special education teacher support services (SETSS) two periods per week in English language arts (ELA) and two periods per week in math, with a projected implementation date of February 24, 2020 (Dist. Exs. 1 at pp. 1, 9; 2 at pp. 1-2).¹ According to the parents, the student continued attending public school and received services under the IEP in the 2019-20 school year (Parent Ex B at p. 2), but I note that in March 2020 the COVID-19 pandemic resulted in the shutdown of all school buildings statewide.²

On August 4, 2020, Churchill issued an enrollment contract for the 2020-21 school year (Parent Ex. E at pp. 1-4). On August 6, 2020, the student's mother signed the contract and on August 7, 2020, the student's father signed the contract (id. at pp. 4-5). On August 13, 2020, the enrollment contract was countersigned by a representative of Churchill (id. at p. 5).

By letter dated August 28, 2020, the parents provided ten-day written notice to the district of their intention to unilaterally enroll the student at Churchill and seek public funding for the cost of the student's attendance, and further requested that the district provide transportation services (Parent Ex. B at pp. 1, 2). The parents indicated their disagreement with the district's failure to timely evaluate the student and further alleged that the district's recommendation of SETSS was "woefully insufficient" to address the student's needs and also did not provide "a suitable and functional peer grouping" (id.). The parents also asserted that the CSE "failed to put forth" appropriate annual goals, proper management needs, adequate language support, adequate social/emotional support, and recommended an inappropriate program that could not properly address the student's identified special education needs (id. at p. 2). The parents also claimed that the CSE failed to properly prepare an individualized program for remote learning (id.). In closing, the parents stated that "[u]ntil such time as an appropriate placement [wa]s recommended, and until such time as the [district] cure[d] the procedural and substantive defects within the IEP, the [p]arents intend[ed] to enroll [the student] at Churchill" and seek funding from the district as well as transportation services (id.).

The student was privately evaluated on August 27, 2020, August 31, 2020, and September 3, 2020 by a clinical psychologist and a clinical neuropsychologist, the results of which were set

¹ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

² The parents asserted claims that the district did not prepare an "individualized program for remote learning" for the student, but the COVID-19 pandemic did not result in school building shutdowns until after the February 2020 IEP in this case was developed. In light of my conclusions below, it is not necessary to further address that issue other to note that it was raised in this proceeding, but I express no opinion on the merits of that issue.

forth in a report dated October 1, 2020 (Parent Ex. D at pp. 1, 11). In the October 2020 neuropsychological evaluation report, the evaluators found that the student met the criteria for a specific learning disorder with impairment in reading, a specific learning disorder with impairment in written expression, and an attention-deficit/hyperactivity disorder (ADHD) predominantly inattentive presentation (id. at pp. 1, 8). The evaluators described the student as "a sweet, likeable young man with solid cognitive potential, presenting with learning disorders in reading and writing, alongside attentional and executive functioning challenges and vulnerable self-esteem" (id. at p. 8). The evaluators recommended that the student attend a small, structured and supportive full-time special education class and school for students with language-based learning needs to address the student's academic weaknesses and emotional concerns (id.).

The student attended Churchill for the 2020-21 school year (see Parent Exs. F; G; I).

A. Due Process Complaint Notice

In a due process complaint notice dated August 24, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) "on procedural as well as substantive grounds" and asserted that the district had made an "arbitrary determination related to [the student]'s educational program (Parent Ex. A at p. 1). The parents contended that the February 2020 CSE's recommendation for the student to receive four periods per week of SETSS in a group of an unspecified size was "woefully insufficient to address [the student]'s complex learning challenges" (id. at p. 2). The parents also alleged that that the recommended program could not "provide the necessary support and constellation of services" that the student required to make progress and prevent regression, and that the recommended program did not provide a "suitable and functional peer grouping" (id.).

Next, the parents asserted that the district failed to consider the student's needs and did not evaluate the student in all areas of suspected disability, and that the February 2020 IEP failed to provide an accurate representation of the student's present levels of performance (Parent Ex. A at p. 2). The parents further alleged that the February 2020 CSE did not properly consider peer-reviewed research-based methods that the district knew the student required to receive a FAPE (id.). The parents contended that the February 2020 IEP did not adequately describe the basis of the CSE's recommendations, was "laden with procedural violations," and failed to "put forth appropriate annual goals that encompass[ed] the full breadth of [the student]'s needs" (id.). The parents also asserted that the February 2020 CSE failed to involve the parents in the development of the annual goals and there was no discussion of the student's "proper" management needs (id.). The parents further alleged that the IEP did not include proper management needs, the CSE failed to recommend adequate language support or adequate social/emotional support, failed to properly prepare an individualized program for remote learning, and did not recommend a placement that was appropriate or that could properly implement the IEP (id.).

With regard to the February 2020 CSE's recommendation of SETSS, the parents alleged that they were inappropriate and that the student required a "smaller and more supportive, specialized educational environment to address his documented educational," speech-language, and social/emotional challenges (Parent Ex. A at p. 2). The parents further asserted that the February 2020 CSE's recommendation was based on the programs available rather than on the student's needs, which in their view included a self-contained classroom within a small, specialized

school (id.). The parents also alleged that the February 2020 IEP failed to address the student's attentional issues, challenges related to executive functioning, and failed to provide proper support in these areas (id. at p. 3). The parents alleged that the district failed to offer the student a FAPE for the 2020-21 school year, that their unilateral placement of the student at Churchill was appropriate, and that equitable considerations did not bar reimbursement (id.). As relief, the parents requested direct funding or tuition reimbursement of the cost of the student's attendance at Churchill for the 2020-21 school year (id.). The parents also requested that the district provide door-to-door transportation (id.).

B. Impartial Hearing Officer Decision

A prehearing conference was held on October 19, 2021, which was attended remotely by the parents' attorney, the IHO, and the court reporter (Tr. pp. 1-7). The district failed to appear (Tr. pp. 1, 2). An impartial hearing convened on December 2, 2021 for one day of proceedings (Tr. pp. 8-68). By decision dated, January 24, 2022, the IHO found that the district offered "a cogent and responsive explanation for the recommendations in the IEP," "consider[ed] sufficient evaluative material," and that the district's witness's testimony was "credible, persuasive and impressive" (IHO Decision at pp. 5-6). The IHO further determined that the February 2020 IEP was appropriate and offered the student a FAPE for the 2020-21 school year (id. at p. 7). The IHO then found that the district "presented no evidence, either documentarily or testimonial, that it made any school location recommendation whatsoever for the 2020-2021 school year, much less a school recommendation that could implement its IEP" (id.). On this ground alone, the IHO determined that the district failed to offer the student a FAPE (id. at pp. 8-9).

Turning to the appropriateness of the parents' unilateral placement, the IHO found that the district presented no evidence or argument to challenge the parents' contentions and further that the parents "presented detailed and comprehensive affidavit testimony and submitted substantial documentary evidence in support of their position that . . . Churchill . . . provided a unique and specialized program that was individualized to the meet the [s]tudent's needs, and that the [s]tudent made educational progress" (IHO Decision at p. 10). With regard to equitable considerations, the IHO found that the district "did not raise any issues that would limit or preclude tuition reimbursement" (id. at p. 11). In conclusion, the IHO found that the district failed to offer the student a FAPE for the 2020-21 school year, that the parents demonstrated the appropriateness of their unilateral placement of the student at Churchill and that equitable considerations favored full reimbursement (id. at pp. 11-12). The IHO ordered the district to reimburse the parents directly for the full amount of their payments to Churchill for the 2020-21 school year within 30 days of submission of proof of payment (id. at p. 12).

IV. Appeal for State-Level Review

The district appeals the IHO's finding that it failed to offer the student a FAPE for the 2020-21 school year and requests that all relief awarded to the student be annulled. The district argues that the IHO erred in finding that the district failed to offer the student a FAPE on a ground that was not alleged in the parents' due process complaint notice. The district asserts that the IHO improperly found that the district did not provide any evidence that it had made a school location recommendation for the 2020-21 school year. The district contends that the parents did not allege any nonspeculative assigned school claims, did not allege that the assigned school was factually

incapable of implementing the February 2020 IEP, and did not allege that the district did not make a school location recommendation for the 2020-21 school year in their due process complaint notice. Therefore, the district argues, its obligation to present evidence about the capacity of the proposed assigned school to implement every aspect of the February 2020 IEP was never triggered. In addition, the district asserts that it did not open the door to this issue, and that the parents' attorney raised the issue for the first time in a closing brief without the IHO's approval. As such, the district requests that the IHO's determination that it failed to offer the student a FAPE be annulled due to the IHO exceeding his authority and ruling on an issue that was not raised in the due process complaint notice. In the alternative, the district alleges that the parents' claim that the district failed to recommend a placement that could properly implement the IEP was based on mere speculation that the assigned school would not adequately adhere to the IEP. For those reasons, the district requests that the IHO's determination that it failed to offer the student a FAPE for the 2020-21 school year be reversed and the IHO's awarded relief be annulled.

In an answer with cross-appeal the parents request that the IHO's determination that the district failed to offer the student a FAPE for the 2020-21 school year be affirmed and cross-appeal the IHO's determination that February 2020 IEP was procedurally and substantively appropriate. The parents argue that the IHO erred in finding that the district provided an adequate justification for its IEP and program recommendation, that the IEP goals were adequate, that the CSE considered sufficient evaluative material, that the testimony of the district's witness demonstrated that the CSE's recommendations addressed the student's significant needs, social/emotional challenges, management needs, and that the recommendation of SETSS in a general education setting was appropriate and constituted the least restrictive environment (LRE). The parents further allege that the IHO improperly shifted the burden of proof to the parents to establish that the student required a highly individualized, specialized educational program in a small-supportive school to meet the student's significant special education needs. Finally, the parents allege that the IHO should have addressed the parents' allegation that the district failed to provide the student with an IEP for remote learning. As relief, the parents request that the IHO's finding that the February 2020 IEP was substantively appropriately be reversed, and that the SRO find that the February 2020 IEP failed to offer the student a FAPE, and that the IHO's decision be affirmed in all other respects.

In an answer to the parents' cross-appeal, the district first argues that the parents' allegation of impermissible burden-shifting is without merit. The district further asserts that the IHO properly determined that the February 2020 IEP was appropriate and would have offered the student a FAPE for the 2020-21 school year. As relief, the district requests that the parents' cross-appeal be dismissed.

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 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).

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. February 2020 IEP

I will turn first to the parents' cross-appeal, in which they assert numerous arguments why the IHO should have concluded that the February 2020 IEP was procedurally and substantively inappropriate.

1. Sufficiency of Evaluative Information

With respect to the sufficiency of evaluations conducted, the parents allege in their cross-appeal that the district psychoeducational evaluation did not include a "full battery of tests . . . to

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).

assess the full extent of [the student's] academic struggles in reading and writing (Answer & Cr.-Appeal at p. 9).

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In addition to drawing on a variety of sources including "aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]), federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student suspected of having a learning disability (see 34 CFR 300.307-300.311; 8 NYCRR 200.4[j]; see also 8 NYCRR 200.4[c][6]). As the student's achievement when provided with appropriate instruction is central to determining whether a student has a learning disability (see 34 CFR 300.309[a][1]; 8 NYCRR 200.4[j][3]), State and federal regulations require that the evaluation of a student suspected of having a learning disability "include information from an observation of the student in routine classroom instruction and monitoring of the student's performance," and further require that the CSE include the student's regular education teacher (8 NYCRR 200.4[j][1][i]; [2]; see 34 CFR 300.308[a]; 300.310).⁴ Finally, when determining eligibility for a student suspected of having a learning disability, the CSE shall prepare a written report containing specific documentation and certification(s) in writing as to whether the report reflects each member's conclusion or, if not, a separate statement presenting the member's conclusion (8 NYCRR 200.4[j][5]; see 34 CFR 300.311).

A CSE convened on February 10, 2020 for a determination of the student's initial eligibility for special education and related services (Dist. Ex. 1 at pp. 1, 14). The February 2020 CSE had before it a November 6, 2019 classroom teacher progress report, a November 25, 2019 social history report, a December 16, 2019 classroom observation, a January 16, 2022 speech-language

⁴ More specifically, the CSE must consider data that demonstrates that the student was provided appropriate instruction by qualified personnel in a "regular education setting," and data-based documentation of "repeated assessments of achievement at reasonable intervals, reflecting formal assessments of student progress during instruction" (8 NYCRR 200.4[j][1][ii][a]-[b]).

screening form, a January 22, 2022 level I vocational assessment, and a February 3, 2020 district psychoeducational evaluation (Tr. pp. 18-19; Dist. Exs. 1 at pp. 1-2; 2 at p. 1; see Dist. Exs. 3-8). The February 2020 CSE determined that the student was eligible for special education services as a student with a learning disability (Dist. Exs. 1 at p. 1; 2 at p. 1).

The November 6, 2019 classroom teacher progress report described the student as "very expressive verbally," but noted that his written work did not match his verbal expression (Dist. Ex. 3 at p. 1). The teacher report indicated that the student was sometimes distracted in class, but that his overall comprehension was good (id.). According to the teacher report, the student's overall reading skills were at the eighth-grade level, but he sometimes missed details when reading advanced texts (id. at pp. 1-2). The student's math skills were at grade level, he was proficient at using algorithms, but his classwork and homework were messy (id. at p. 1). The student had some difficulty with word problems and his recent quiz scores were low (id.). The teacher report indicated that the student's skills in grammar and spelling were good, but his written work did not reflect the complexity of ideas he expressed verbally (id. at p. 2). The student struggled to use more expressive styles and details, and he needed a lot of time to write short responses (id.). With respect to social/emotional development, the teacher report stated that the student was very active socially and friendly with everyone (id.). He could become distracted by his friends during class but was easily redirected (id.). The teacher indicated that the student learned best during class discussions and with hands on activities, preferred to receive information aurally, visually, or through kinesthetic activities, but was also able to understand written information (id. at p. 3).

A December 16, 2019 classroom observation was conducted during the student's eighth grade social studies/geography class, which consisted of 26 students ranging from fifth grade to eighth grade and included three teachers (Dist. Ex. 8 at p. 1). The student reportedly followed directions and attended well during the activity (id.).

A January 16, 2020 speech-language screening report indicated that the student was screened using the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-5) Screener to assess his expressive and receptive language skills (Dist. Ex. 6 at p. 1). The student showed strength in following directions, sentence assembly, and semantic relationships, and weakness in word classes (id.). The student met the criterion score for his age and the screening determined that the student did not require a full speech-language evaluation (id.).

The student was evaluated by a district school psychologist on January 22, 2020 and a psychoeducational evaluation report dated February 3, 2020 reflected that the student was assessed using a student interview, the Wechsler Individual Achievement Test, Third Edition (WIAT-III), the Behavior Assessment System for Children-Third Edition (BASC-3), the Delis-Kaplan Executive Function System (D-KEFS): Tower test, and the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) (Dist. Ex. 4 at p. 1).

According to the student interview and the school psychologist's behavior observations, the student expressed interest in the evaluation process and appeared motivated to participate (Dist. Ex. 4 at p. 1). During the course of the evaluation, the student informed the school psychologist that he believed he was easily distracted and that this impacted his functioning in different academic areas (id.). The student reported that when reading, he often had to reread and that had impacted his enjoyment of reading (id.). In math, the student reported that he lost track of his

place within math problems but still enjoyed math (id.). The school psychologist noted that during the math problem solving subtest of the WIAT-III, the student persisted at challenging problems and often checked over his work to evaluate the reasonability of his answers (id.). The student also informed the school psychologist that the act of writing notes helped him to internalize information and he also stated that science was his favorite class (id.).

The student's cognitive ability was assessed using the WISC-V (Dist. Ex. 4 at p. 1). The school psychologist noted that the student's scores across the verbal comprehension index, visual spatial reasoning index, fluid reasoning index, working memory index and processing speed index were relatively even across all of the assessed areas and that the student's overall score of 99 placed him within the average range of functioning (id. at pp. 1-2, 4). The student completed two tasks on the fluid reasoning index: matrix reasoning and figure weights (id. at p. 2). The student displayed strong quantitative reasonability on the figure weights subtest, receiving a scaled score of 13, which placed him in the high average range of functioning (id.).⁵ On the matrix reasoning subtest, the student received a "Standard or Scaled Score" of 8, which placed him in the low average range (id. at pp. 2, 4). The school psychologist opined that the discrepancy in the student's performance on the two subtests "could relate to the amount of careful visual attention required to perform each of the tasks, with his performance deteriorating as visual analysis demands increase[d]" (id. at p. 2).

The psychoeducational evaluation report indicated that the student's ability to access and apply acquired word knowledge was measured using the verbal comprehension index of the WISC-V (Dist. Ex. 4 at p. 2). The two subtests, similarities and vocabulary, required verbal concept formation, reasoning, and verbal expression (id.). The student's overall score on the verbal comprehension index was 100, which placed him within the average range of functioning (id.).

The student's ability to evaluate visual details and understand visual spatial relationships was assessed using the visual spatial index of the WISC-V (Dist. Ex. 4 at p. 2). The school psychologist reported that the student performed within the high average range on the visual puzzles subtest and within the low average range on the block design subtest (id.).⁶ The school psychologist stated that the student's high average performance provided evidence of intact ability for mental rotation and high average fluid intelligence (id.). The student's low average performance on the block design subtest was suggestive of relatively weak abilities for visual-perceptual organization and the school psychologist opined that "it may be hard for [the student] to impose order upon what he [wa]s examining (id.).

On the working memory index of the WISC-V, the student reportedly scored evenly across two subtests and received an overall score of 107, which placed him within the average range of

⁵ The evaluator included the student's test scores from the WISC-V on a table annexed to the psychoeducational evaluation (Dist. Ex. 4 at p. 4). The table indicates that the student received a "Standard or Scaled Score" of 15 on the figure weights subtest (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 4 at p. 4).

⁶ The table of the student's WISC-V scores annexed to the psychoeducational evaluation reflects that the student received a "Standard or Scaled Score" of eight on the block design subtest and of 13 on the visual puzzles subtest (Dist. Ex. 4 at p. 4). The student received a "Standard or Scaled Score" of 102 on the visual spatial index, which placed him in the 55th percentile (id.).

functioning and in the 68th percentile (Dist. Ex. 4 at p. 2). The student's ability to efficiently access and retrieve information from long term memory was measured using two WISC-V subtests: naming speed literacy and naming speed quantity (*id.*). According to the school psychologist, the student "scored solidly within the [a]verage range" on naming speed quantity "but significantly lower and near the lower limit of the [a]verage range" on naming speed literacy (*id.*). The school psychologist stated that "[t]he chances that this variability [wa]s due to actual skill differences, and not chance, [we]re 90 out [of] 100" (*id.*).

The school psychologist indicated that the student's executive functioning abilities were assessed using the D-KEFS Tower test, select subtests from the WISC-V, a parent report and a student self-report from the BASC-3 and by examining the student's behaviors during the evaluation (Dist. Ex. 4 at p. 3). The student reportedly did not display any observable signs of impulsivity during testing (*id.*). On the BASC-3 self-report, the student indicated that he maintained an age-appropriate level of attention and self-control (*id.*). The parent also reported age-appropriate attentional control (*id.*). The student's performance on the WISC-V cancellation subtest did not indicate problems with response inhibition or motor perseveration (*id.*). Notably, the student obtained his lowest intelligence test scores on tasks that required attention to visual detail and the ability to impose order and organization upon his visual field (*id.*). The student's results on the D-KEFS Tower test indicated that the student had trouble with higher-level planning and relied on a trial-and-error strategy (*id.*). Similar to the student's Tower test performance, the parent's BASC-3 report placed the student in the extremely elevated range in problem solving and indicated that the student approached tasks in a haphazard fashion, had difficulty with planning, and was typically disorganized (*id.*). In the area of social/emotional development, the student was active in his school community, had a strong friend group, and was friendly with everyone (*id.*). There were no elevated problems reported with regard to the student's attitude towards school or teachers, and no conduct related problems (*id.*). On the BASC-3 self-report the student reported that he frequently felt nervous, sad, and misunderstood (*id.*).

The student's reading achievement was assessed using two subtests from the WIAT-III: oral reading fluency and reading comprehension (Dist. Ex. 4 at p. 3). The school psychologist noted that the student often stopped to read sections of text, which slowed his overall reading rate, and his word identification errors were characterized by inserting words that fit the sentence structure and meaning (*id.*). The student read with expression and appropriate phrasing, and he attended carefully to meaning demonstrated by his phrasing, verbal reactions to content and correct answers to comprehension questions (*id.*). The student's score on the oral reading rate placed him in the 9th percentile and his score on the oral reading accuracy scale placed him in the 45th percentile (*id.*). On the reading comprehension subtest, the student's score placed him in the 47th percentile, which was within the average range (*id.*). The student's math achievement was assessed using the math problem solving subtest of the WIAT-III; the student's score placed him in the 84th percentile, which was within the high average range (*id.*). On the oral discourse comprehension subtest, the student's score placed him in the 58th percentile, which was within the average range (*id.*).

The district school psychologist who conducted the February 2020 psychoeducational evaluation also served in the role of district representative during the February 2020 CSE meeting

(district representative)⁷ testified that the February 2020 CSE considered information from the parents, the social history, a teacher progress report, a classroom observation and the psychoeducational evaluation he conducted (Tr. pp. 16, 17-19). The February 2020 CSE also considered the speech-language screening (Tr. p. 19). The district representative testified that the evaluative information considered by the February 2020 CSE indicated that the student needed help and that he had difficulty with time management, comprehension, and in written expression with getting his ideas out efficiently and in an organized manner (Tr. p. 20).

The district representative also testified that during the psychoeducational evaluation the student exhibited mild delays in processing speed, retrieval of verbal information from memory, and block design, which required him to impose organization in an unstructured, unfamiliar task (Tr. pp. 21-22). The teacher report considered by the February 2020 CSE indicated that the student generally understood what was going on and would be able to participate in discussions and display comprehension, however "he had trouble getting things done on time, and maybe at times, he needed refocusing" (Tr. pp. 22-23). The teacher report further indicated that the student was not far behind, his skill competencies were on grade level in reading, decoding, reading comprehension and math was "rated a little bit lower" (Tr. p. 23).

With respect to the aspects of the psychoeducational evaluation specifically challenged by the parents, the district representative testified that he did not administer all subtests of the WIAT-III, including tests to assess the student's writing and spelling (Tr. pp. 41-42). The district representative justified choosing certain subtests, rather than administering a full battery of subtests during the January 2020 psychoeducational evaluation, as more efficient and because he wanted to "get to the heart" of the student's issues, based on his "areas of cognitive vulnerability and weakness" (Tr. pp. 53-54). However, it is unclear why the district representative chose not to conduct subtests to assess the student's written expression, given his concession in testimony that among the reasons for the referral of the student for an evaluation was "his writing . . . not matching up with his oral abilities," along with his time management, ability to complete assignments, and reading comprehension (Tr. pp. 54-55). The district representative could not recall if the CSE had a copy of the student's report card at the meeting (Tr. p. 43). Also of note is the lack of information in the hearing record indicating that the CSE considered data demonstrating that, prior to or as part of the referral process, the student was provided appropriate instruction or data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of the student's progress during instruction (8 NYCRR 200.4[j][1][ii][a]-[b]).

In light of the foregoing, the evidence in the hearing record does not support the IHO's conclusion that the CSE considered sufficient evaluative information. However, the deficiencies in the evaluative information are a procedural violation, and the degree to which the violation impeded the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits will be discussed further below (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

⁷ Such a dual role is permissible, and I have used the term school psychologist and district representative interchangeably in this decision.

2. Present Levels of Performance

Next, the parents allege that the district members of the February 2020 CSE "viewed [the student's] academic and emotional needs through a very narrow lens" and that the district representative testified that the student "had only three areas of deficit that required remediation, namely, time management, planning, and reading comprehension," whereas the evaluative information and the IEP itself reflected that the student struggled with reading fluency and rate, storage and retrieval of verbal information, reading accuracy, matrix reasoning, writing, slow processing speed, visual-perceptual weaknesses, concentration, and executive functioning skills, and exhibited social/emotional needs (Answer & Cr.-Appeal at pp. 7-8).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The February 2020 IEP included the current assessment findings which provided evidence of the student's age-appropriate ability to organize events and knowledge in an accurate and precise way (Dist. Exs. 1 at p. 1; 4 at p. 5). Consistent with the February 2020 psychoeducational evaluation, the IEP reported that the student was able to register, maintain, and manipulate an average quantity of information in conscious awareness, but reported having trouble with concentration (Dist. Exs. 1 at p. 1; 4 at p. 5). The IEP reflected that the student exhibited deficits in executive functioning and his reasoning ability diminished as tasks required increased levels of visual analysis (Dist. Exs. 1 at p. 2; 4 at p. 2). The IEP also included information from the psychoeducational report that the student's decoding and reading comprehension skills were average but that his reading pace was deficient due to memory and processing difficulties (Dist. Exs. 1 at p. 2; 4 at p. 3). The IEP reported that the student scored above average on a math problem-solving task (Dist. Exs. 1 at p. 2; 4 at p. 3). According to the IEP, the student reported being easily distracted, which impacted his academic functioning (Dist. Exs. 1 at p. 2; 4 at p. 1).

The IEP reported that the parents were concerned about the student's difficulties with comprehension, attention, and completing his increased workload (Dist. Exs. 1 at p. 2; 4 at p. 1). In addition, according to the IEP, there were concerned about the student's lack of efficiency, as well as his difficulty planning and starting tasks (Dist. Ex. 1 at p. 2). The IEP reported that the student's difficulty with storage and retrieval of verbal information interfered with his ability to follow along with discussions and caused him to appear distracted (*id.*). Finally, the IEP included information from the teacher report that the student's abilities in written expression did not correspond with his verbal expression (Dist. Exs. 1 at p. 2; 3 at p. 1).

In the area of social development, the IEP included information from the psychoeducational evaluation that the student was regarded by teachers and family as having many personality strengths, although he seemed to be experiencing a significant level of emotional

distress possibly due to his dissatisfaction with his ability to perform a variety of tasks, even when putting forth substantial effort (Dist. Exs. 1 at p. 2; 4 at p. 3). The IEP indicated that the student's emotional distress often manifested in physical symptoms such as headaches and stomachaches (Dist. Exs. 1 at p. 2; 4 at p. 3).

Overall, even if the district representative's testimony at the impartial hearing reflected a narrow view of the student's needs, as argued by the parents (see Tr. pp. 24, 33), the present levels of performance accurately reported the results of the evaluative information that was before the CSE included the main areas of concern raised by the parents, the teacher, and as reported in the psychoeducational evaluation report.⁸ The degree to which the CSE recommended supports to address these identified needs, however, will be discussed further below.

3. Annual Goals

In their cross-appeal, the parents allege that the IEP lacked reading, math, and social/emotional annual goals. In addition, the parents take issue with the minimal goals included in the IEP in area of time management, and further assert required the student was inappropriately expected to "self-implement his goals" (Answer & Cr.-Appeal at p. 8).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The student's February 2020 IEP featured three annual goals to address the student's needs in executive functioning and writing (Dist. Ex. 1 at pp. 5-7). To address the student's needs in the area of executive functioning, the student was working on establishing a time frame for the completion of weekly assignments and projects (id. at p. 5). In addition, the student was working on formulating and writing down a question or prediction relevant to an upcoming lesson and privately reflecting upon the accuracy of that question or prediction at the conclusion of the lesson (id. at p. 6). Finally, to address the student's writing difficulties the student was expected to reduce the time it took him to draft an essay by ten percent (id. at p. 7).

According to the district representative, evaluating the student's progress was built into the goals on the student's February 2020 IEP, and the goals were "reasonable as a tool for measuring" whether the student was benefitting from intervention (Tr. p. 31). He explained that the first goal directly addressed the student's abilities in self-regulating, planning, and time management (Tr. p. 31). In addition, he noted that the expectation was for the student to engage in the "process of

⁸ To be sure, given that the psychoeducational evaluation report did not assess the student's written expression needs, the IEP included only the teacher's characterization of the student's weakness in this area (see Dist. Ex. 1 at p. 2).

forethought" and seek out information rather than being a "passive recipient of information" (Tr. p. 32). The student was further expected to build into his routine the daily recording of his predictions, which would show whether he was benefitting from the SETSS (*id.*). Finally, the district representative opined that the student's goal addressing his ability to write essays more efficiently, in a more organized manner, and in ten percent less time, would be a reasonable way to assess progress (Tr. pp. 32-33).

While the parents argue that the IEP should have included reading, math, and social/emotional goals, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (*J.L. v. New York City Dep't of Educ.*, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see *C.M. v. New York City Dep't of Educ.*, 2017 WL 607579, at *20-*21 [S.D.N.Y. Feb. 14, 2017]). There is merit, however, to the parents' argument that the annual goals were lacking, particularly given the lack of focus on the student's difficulty with storage and retrieval of information, despite the articulation of the student's needs in the present levels of performance (see Dist. Ex. 1 at pp. 1-3, 5-7).⁹ Moreover, the annual goal targeting the speed at which the student could write an essay did not seem to take into account whether an essay developed more quickly would be written with improved retrieval skills (*id.* at p. 7). It may be that evaluation of the student's written expression would have yielded more insight to develop a better goal to address the student's writing needs.

Based on the foregoing, the annual goals had some defects; however, such deficiencies, without more, would not support a finding that the district denied the student a FAPE (see *P.K. v. New York City Dep't of Educ.*, 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], *aff'd*, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Rather, it is the other defects in the CSE process and resultant IEP discussed herein that lead to the ultimate finding in this matter that the district failed to meet its burden to demonstrate that it offered the student a FAPE for the 2020-21 school year.

4. Special Education Teacher Support Services and Supports for Management Needs

In their cross-appeal, the parents argue that the February 2020 CSE's recommendation that the student attend "a large general education classroom" was inappropriate and that the view that SETSS would address the student's significant needs was "nothing more than an aspiration" (Answer & Cr.-Appeal at p. 9). In addition, the parents allege that the IEP failed to include recommendations for small-group instruction in the classroom or sufficient supports for the student's challenges with attention.

As the parents point out, SETSS are not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of

⁹ On the other hand, the IEP includes supports for the student's management needs that address the student's verbal storage and retrieval weaknesses (Dist Ex. 1 at p. 3).

"SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

The district representative testified that the CSE recommended SETSS for the student because SETSS was "good for students who need[ed] coaching with time management, help with organizing thoughts and ideas and pacing for the completion of writing assignments" (Tr. pp. 23-24). He stated that SETSS allowed students to work in small groups and offered coaching and assistance in the student's areas of identified needs (Tr. p. 24). The group size for SETSS was not specified on the student's February 2020 IEP, and instead the district representative testified during the impartial hearing that the group size would not be more than eight (Tr. pp. 37-38). Based on this testimonial, after the fact description, it would seem that the district representative believed that the SETSS was very similar or identical to resource room services (8 NYCRR 200.6[f]).

State regulation defines resource room as a "special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]). Resource room programs "shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]). State regulations also specify that "[A]n instructional group which includes students with disabilities in a resource room program shall not exceed five students per teacher except that, in the city school district of the City of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of five students per teacher" (8 NYCRR 200.6[f][3]). However, the problem remains that the term "SETSS" was insufficiently described in the February 2020 IEP as the group ratio was not described at all. The district relied on retrospective testimonial evidence to rehabilitate the February 2020 IEP, but the Second Circuit's holding in R.E. prevents a district from attempting to rehabilitate a deficient IEP by relying on information not available to the CSE (694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). Moreover, even if the district could rely on the testimonial definition of SETSS as a maximum of 8 students in a group, there is no evidence in the hearing record that the district followed the procedures to obtain a variance from the Commissioner in accordance with State regulations that would permit 8 students rather than the 5-student maximum specified in State regulations.

The district representative testified that the CSE did not recommend any additional services because the recommended services "aligned with [the student's] needs" (Tr. p. 24). He explained that, if the student needed help understanding what was happening in a discussion, the district had ICT services, but the student's teachers were saying that the student understood discussions and participated and showed comprehension (Tr. p. 24). The district representative testified that SETSS would offer the student the opportunity to work on his "three areas of need" including time

management, planning, and reading comprehension, as well as his ability to communicate more effectively in writing (*id.*). According to the district representative, these skills were best addressed through intervention provided outside the classroom (Tr. p. 25). The district representative reported that the student's teacher agreed that SETSS was the program that made sense for the student (Tr. pp. 25-26). With regard to the results of the psychoeducational evaluation, the district representative reported that, although the student was a "bit of a slow reader" and the reading comprehension test was "a bit laborious for him," he performed at grade level on reading comprehension given extra time and performed particularly well on math problem solving test (Tr. p. 27). The district representative stated that student's mild needs and very specific weaknesses would be best addressed by the recommended SETSS program (Tr. pp. 30-31).

The district representative stated that the student's goals addressed his difficulty with time management, comprehension, and written expression and could be met in a general education classroom because his delays were mild, and his difficulties were performance related (e.g., completing his work independently) (Tr. pp. 33-34). The student was reportedly exhibiting signs of distress because he was unable to meet standards, keep up, and finish his work on time (Tr. p. 35). The district representative noted that, because the student could access and understand the work in the general education classroom given the supports recommended on his February 2020 IEP, this constituted the LRE for him (Tr. p. 36).

In addition to recommending SETSS, review of the February 2020 IEP shows that the CSE identified the resources and strategies necessary to address the student's management needs including maintaining a routine; pre-teaching using previews, outlines, graphic organizers, and highlighting vocabulary and concepts; cuing responses and providing sentence starters; overlearning of material and increased repetition; extra time; use of an index card to keep place when reading, limited material on a page and support in planning and completion of assignments (Dist. Ex. 1 at p. 3). The IEP indicated that the student's difficulty with storage and retrieval of verbal information interfered with his abilities in planning and sequencing tasks, oral reading fluency, and following discussions, which contributed to him appearing and feeling distracted (*id.*). The district representative testified that supports for the student's management needs were developed in accordance with evidence-based strategies to help students with organization, memory retrieval, and comprehension (Tr. pp. 28-29). He testified that the management needs were designed to maximize the student's performance and help him become more self-sufficient and self-regulating (Tr. p. 30).

The parent testified by affidavit that the student's deficits in reading, writing, and mathematics, as well as his attentional challenges and executive functioning deficits have had a profound impact on his education (Parent Ex. K at p. 1). The parent asserted that at the February 2020 CSE meeting, the school staff members informed her that they were recommending SETSS for the student and did not consider any other type of support or program (*id.*). The parent reported that she expressed concerns at the CSE meeting regarding the student's difficulties with reading comprehension, executive functioning, writing, storing verbal information, and retrieving verbal information (*id.*). In addition, the student attended and reported at the CSE meeting how his attentional challenges impacted him on a daily basis (*id.*).

Overall, while it may have been theoretically possible that the recommendation for four periods of SETSS would have been an appropriate support to address the student's areas of deficit,

the gaps in the evaluative information before the CSE cast too much doubt make such a determination reliable. In particular, to the extent that the student would continue to attend the general education class setting for all but four periods of SETSS per week, the appropriateness of such a recommendation is difficult to ascertain without data regarding the instruction the student was receiving prior to referral or assessment of the student's progress during instruction in the general education classroom (see 8 NYCRR 200.4[j][1][ii][a]-[b]). Moreover, while the IEP ultimately acknowledged the student's need in the area of written expression as reported by his teacher, the degree of this area of deficit remained unexplored (see Dist. Exs. 1 at p. 2; 3 at p. 1). More troubling, the parents' claim that the special education services on the February 2020 IEP services in the form of group SETSS was inadequately defined and the district impermissibly attempted to rely on retrospective evidence to justify terms that should have been in the IEP, and the district representative's testimony seemed at best to establish that service was offered in excess of State-mandated ratios. Accordingly, and in combination with the discussion below of the student's social/emotional needs as well as the above-noted deficiencies in the evaluative information, the district failed to meet its burden to demonstrate that the February 2020 IEP offered the student a FAPE.

5. Social/Emotional Needs

Finally, the parents argue that the February 2020 IEP was deficient because it included no recommendation for counseling services to address what the IEP characterized as "a significant level of emotional distress" (Answer & Cr.-Appeal at p. 8, quoting Dist. Ex. 1 at p. 2).

The district representative confirmed that his psychoeducational evaluation raised concerns regarding the student's emotional state (Tr. p. 46). Specifically, as part of his responses to the BASC-3, the student had reported he frequently felt withdrawn, nervous and worried, sad and misunderstood, and as if life was getting worse (Tr. pp. 46-47; Dist. Ex. 4 at p. 3). The psychoeducational evaluation did not include scores from administration of the BASC-3 and, instead, just set forth the district representative's interpretation, which he set forth "narratively," describing "the trends and the findings" and what he "thought was important" (Tr. pp. 47-48; see Dist. Ex. 4 at p. 3). The February 2020 IEP indicated that the student's emotional distress "may relate to his" frustration with his inability to perform some tasks even with substantial effort (Dist. Ex. 1 at p. 2; see Dist. Ex. 4 at p. 3). The IEP also acknowledged that the student's emotional distress "often" manifested in physical symptoms (Dist. Ex. 1 at p. 2).

The CSE "rejected counseling" because it believed that the student's needs could be addressed by providing appropriate instructional support (Dist. Ex. 1 at p. 15). With regard to the lack of program or services recommendations on the IEP to address the student's social/emotional difficulties, the district representative testified that often you could address a student's social/emotional needs by helping them in the area in which they were struggling (Tr. p. 35). He opined that providing the student with contextualized academic support in the areas he was struggling with would be an appropriate way to help the student feel better about himself and feel motivated (Tr. p. 21).

Here, the district failed to meet its burden to show that the supports included in the IEP were sufficient to address the student's social/emotional needs, which the IEP itself described as "significant." While academic support to address the student's social/emotional needs may well

have helped the student in this area, there is insufficient evidence in the hearing record to indicate that the student's perception of his abilities was the only factor underlying the student's emotional distress and that additional supports were not warranted. Accordingly, the district did not meet its burden to prove that the CSE sufficiently addressed the student's social/emotional needs, and in combination with the above-discussed shortcomings, supports a finding that the district did not show that it offered the student a FAPE.

B. Assigned Public School Site

Turning to the district's appeal, the district argues that the IHO erred in reaching the question related to the assigned public school site since it was not alleged in the parents' due process complaint notice. 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]).

Here, the parents' due process complaint notice broadly claimed that "the CSE did not recommend a placement that [wa]s appropriate or that could properly implement the IEP" (Parent Ex. A at p. 2). While the due process complaint notice did not articulate a claim relating to an assigned school's capacity to implement the IEP with great specificity, the language was sufficient to put the district on notice of the parents' allegation. Ultimately, however, given the factual context of the allegation, the parents' claim fails as it is speculative. Thus, while the parent raised a broad claim relating to the assigned school, factually, the IHO erred in finding that the IEP could not be implemented due to a lack of a school location letter (IHO Decision at pp. 7-9).

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., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). 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., 793 F.3d at 244; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20). 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. Dec. 30, 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 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]).

At the outset, the IHO failed to appreciate that the February 2020 IEP had already been implemented beginning on February 24, 2020, during the 2019-20 school year while the student attended eighth grade (Dist. Ex. 1 at p. 1). The enrollment contract with Churchill was fully executed on August 13, 2020, and the parents provided a ten-day written notice of their intention to unilaterally enroll the student at Churchill on August 28, 2020, prior to the first day of the 2020-21 school year. Here, the notion that the district would simply cease implementing the student's then-current IEP for the sole reason that the student would be moving to a new school building for ninth grade represents the type of "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so; that is proscribed by the holding in M.O. (793 F.3d at 244). Further, there is no evidence in the hearing record to indicate that the parents had previously

expressed concern over or even questioned where the student would attend ninth grade (Parent Exs. B at pp. 1-2; K at p. 1; Dist. Ex. 1 at pp. 1, 2).^{10, 11}

Reviewing the parents' due process complaint notice in light of the foregoing, the parents did not allege any prospective, non-speculative challenges to the district's capacity to implement the SETSS recommended in the February 2020 IEP, notwithstanding the district's failure to produce a school location letter (see Parent Ex. A). As a result, the district's burden to present evidence about the capacity of a proposed assigned school site to implement every aspect of the February 2020 IEP when the student changed schools for the 2020-21 school year was never triggered (see J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [finding that a district did not have a burden to produce evidence demonstrating the adequacy of the assigned public school site absent non-speculative allegations about the school's ability to implement the IEP]; N.K., 2016 WL 590234, at *6 [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]; see also M.B. v New York City Dep't of Educ., 2017 WL 384352, at *6 [S.D.N.Y. Jan. 25, 2017] [noting that the parent in that matter did "not allege that the placement school did not have the ability to satisfy the IEP" but instead sought "to require the District to prove in advance that it w[ould] properly implement the IEP," which "M.O. does not require"]).

The IHO's error is not fatal to the parents' case and does little to help the district's case because based on the foregoing, the hearing record supports the IHO's ultimate conclusion that the district failed to offer the student a FAPE for the 2020-21 school year, albeit on different grounds. That is, contrary to the IHO's determination, review of the evidence in the hearing record shows that the district failed to meet its burden to prove that the February 2020 IEP offered the student a FAPE for the 2020-21 school year. Further, I do not agree with the IHO that the district's purported failure to provide the parent with notice of a particular public school for the student to attend for the 2020-21 school year contributed to a denial of a FAPE. As the parties have not appealed the IHO's determinations that Churchill was an appropriate unilateral placement for the student for the 2020-21 school year or that equitable considerations weighed in favor of an award of tuition reimbursement, those findings have become final and binding on the parties and will not be reviewed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of

¹⁰ To the extent the parents argue that their 10-day notice letter informed the district that they were awaiting notice of a school location (see Answer & Cr.-Appeal ¶ 2), review of the letter does not support this characterization. The August 28, 2020 letter stated that the parents would unilaterally place the student at Churchill "until such time as an appropriate placement is recommended" (Parent Ex. B at p. 2). "Placement" has been found to mean "the general type of educational program in which the child is placed" (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]), not the bricks and mortar school location, and viewing the parents' letter as a whole, the use of the word "placement" appears to refer to the IEP recommendations, as there is no other reference indicating the parents' concern about the particular school the student would be expected to attend.

¹¹ In addition, SROs and courts have long held that the "inability [of a parent] to visit the classroom to form an opinion as to its appropriateness is not itself a procedural defect" (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *13 [S.D.N.Y. Nov. 9, 2011]) and the same may be said of a consultant hired by a parent to conduct a similar site visit (see C.M. v. Mount Vernon City Sch. Dist., 2020 WL 3833426 [S.D.N.Y. July 8, 2020]).

Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). For these reasons, the IHO's determination and award of tuition reimbursement at Churchill will not be disturbed.

VII. Conclusion

Having found 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 parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

Dated: **Albany, New York**
 May 2, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER