The University of the State of New York

The State Education Department
State Review Officer
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No. 23-006

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

Appearances:
Law Office of Regina Skyer & Associates, attorneys for petitioners, by Abbie Smith, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Vermont Academy for the 2021-22 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 student's educational history shows that he attended a nonpublic school prior to and during the 2017-18 school year (sixth grade) where he received extra support services and outside tutoring (Tr. p. 72; Parent Ex. C at p. 1). In June 2018, a neuropsychological evaluation of the student was conducted due to "behavioral issues in the home, including difficulty regulating anger," academic concerns, and because his parents were interested in determining "the types of support" the student "need[ed] to perform to his academic and emotional potential" (Parent Ex. C at p. 1).[1] Based on parental report, neuropsychological testing, review of records, behavioral

[1] The hearing record contains multiple duplicative exhibits (see e.g. Parent Exs. B; C; Dist. Exs. 1; 9). For

observations, and educational assessments, the evaluator found that the student continued to meet the criteria for previously received diagnoses of attention deficit hyperactivity disorder (ADHD) primarily inattentive subtype and generalized anxiety disorder, and at the time of the evaluation, also met the criteria for a diagnosis of specific learning disorder with impairment in reading (id. at pp. 1, 16). The evaluator opined that the student's academic needs warranted a small, specialized education program and listed several management needs including testing accommodations specific to the student's neurocognitive and behavioral needs (id. at pp. 16-18). The student attended the same nonpublic school for most of seventh grade until spring 2019, at which time he "transferred to Fusion Academy for the last few weeks" of the 2018-19 school year "due to academic and emotional stress" (Dist. Ex. 6 at p. 2).

In July and August 2019, the district conducted an initial evaluation of the student upon request of the parents due to concerns that the student's diagnoses of ADHD and anxiety disorder were "negatively impacting his ability to progress in a general education setting" (Dist. Ex. 7 at p. 1; see Dist. Exs. 6-8). A July 2019 psychoeducational evaluation of the student yielded a full-scale IQ of 93, within the average range (Dist. Ex. 7 at p. 5). The evaluation included the results of a social history interview with the parents, a vocational interview with the student, the 2018 neuropsychological evaluation, and academic test results from administration of the Weschler Individual Achievement Test-Third Edition (WIAT-III), which yielded a basic reading composite score in the above average range and a mathematics composite score in the average range, with the student scoring in the average or above average range in all areas tested except the numerical operations subtest which yielded a score in the below average range (id. at pp. 3-5). In the report, the evaluator reiterated the student's academic strengths as demonstrated during testing, stated that the student "may perform best when instruction is presented in a multisensory format," and among other things, recommended the use of "manipulatives, pictures, models, diagrams, and graphs" whenever possible (id. at pp 5-6).

The student attended the Winston Preparatory School (Winston Prep) during the 2019-20 school year (eighth grade) and was enrolled at Winston Prep remotely for the 2020-21 school year (ninth grade) (Tr. pp. 72, 75; Dist. Exs. 10; 11).

While the student was attending Winston Prep, a CSE convened on October 5, 2020 to conduct the student's annual review and to develop an IEP with a projected implementation date of October 20, 2020 (Dist. Ex. 3 at p.1). Finding that the student remained eligible for special education as a student with an other-health impairment, the CSE recommended that the student receive five periods per week of integrated co-teaching (ICT) services in each of his core academic subjects (math, English language arts (ELA), science, and social studies) in a district school with related services of one 40-minute individual counseling session and one 40-minute group counseling session per week (id. at pp. 1, 2, 16, 20-22). The CSE also recommended testing accommodations and identified resources to address the student's management needs to support the student's academic participation (id. at pp. 6, 18).

purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

On April 9, 2021 the parents executed a contract with Vermont Academy for the student's attendance for the 2021-22 school year (Parent Ex. E).

In a June 29, 2021 prior written notice and school location letter sent to the parents, the district described the CSE's recommendations in the October 2020 IEP and notified the parents of the public school building the student was assigned to attend for the 2021-22 school year (Dist. Exs. 4; 5).

In a letter dated August 24, 2021, the parents provided the district with notice of their intent to unilaterally place the student at Vermont Academy, a nonpublic boarding school, for the 2021-22 school year (Parent Ex. A). In the notice, the parents asserted that the October 2020 CSE had failed to "rely upon the findings of objective evaluative material," recommended "an inadequate, inappropriate program," failed "to adequately address and consider the full extent of [the student's] needs," and convened "an untimely IEP meeting held nearly a year before the start of the school year" (id. at p. 2). The parents advised the district that "unless an IEP is developed recommending an appropriate full time special education program and placement" for the student, the parents would unilaterally place the student at Vermont Academy and would seek tuition reimbursement from the district (id.). The student attended Vermont Academy during the 10-month 2021-22 school year as a boarding student where he repeated ninth grade (see Parent Exs. E-K; L ¶¶ 15, 24).

A. Due Process Complaint Notice

In a due process complaint notice dated October 21, 2021, the parents alleged that the district failed to offer the student a FAPE for the 2021-22 school year (see Parent Ex. B). In particular, the parents argued that the district's recommendation for ICT services was not adequate to meet the student's needs for the 2021-22 school year (id. at p. 2). The parents asserted that the student continued to "require placement in a small, supportive, and highly structured, full time special education program within a small school setting, with students of similar cognitive strengths as well as needs" (id.). The parents further alleged that ICT services was not calculated to confer a benefit to the student and that the CSE team ignored recommendations from the student's teachers and parents (id.).

Further, the parents alleged that the October 2020 CSE meeting was not held in a timely manner (Parent Ex. B at p. 2). More specifically, the parents argued that the October 2020 CSE meeting occurred months before it would have made "sound educational sense" to assess the student's educational progress and make program and service recommendations for the 2021-22 school year (id.). The parents also alleged that their opportunity for meaningful participation was thwarted when the district's assigned school failed to respond to the parents' communications to schedule a school visit (id. at p. 3).

With respect to the unilateral placement, the parents asserted that Vermont Academy was appropriate and reasonably calculated to confer an educational benefit to the student (Parent Ex. B at p. 3). The parents also asserted that equitable considerations weighed in their favor because they had "always behaved fairly, honestly and in an open manner with the district" (id.).

As a proposed resolution, the parents requested that the district directly fund tuition for the student's unilateral placement at Vermont Academy for the 2021-22 school year (Parent Ex. B at p. 3).

B. Impartial Hearing Officer Decision

The IHO convened a prehearing conference with the parties on March 18, 2022, and two status conferences on April 7, 2022 and June 29, 2022 (Tr. pp. 1-18). The evidentiary phase of the impartial hearing began on July 29, 2022 and concluded on October 24, 2022 after three days of hearings (Tr. pp. 19-180). In a decision dated December 5, 2022, the IHO determined that the district offered the student a FAPE for the 2021-22 school year (IHO Decision at pp. 5-8). The IHO held that the district met its burden to show that the ICT services and related services recommended in the October 2020 IEP were designed to meet the student's unique needs and were reasonably calculated to enable the student to receive an educational benefit (id.). The IHO also found no evidence in the hearing record that the parents contacted the assigned school location in summer 2021 to schedule a site visit (id. at p. 7).

Next, the IHO held, in the alternative, that the parents' unilateral placement of the student at Vermont Academy was inappropriate and further found that Vermont Academy did not "have the requisite special educational programs that would necessary[ily] permit the [student] to benefit from its instructions" (IHO Decision at pp. 8-9). The IHO found that the change in the student's school was based on a "family decision including the student who [wa]s an avid skier," and that there was no evidence in the hearing record that there was a "recommendation from a special education professional, doctor or therapist that a residential boarding school was in the best interest of the [student]" (id. at p. 8). The IHO further held that the placement was inappropriate because the student repeated ninth grade at Vermont Academy during the 2021-22 school year and there was "no clear evidence in the hearing record as to the reason the student repeated the [ninth] grade" (id.). Moreover, the IHO referenced the district school psychologist's testimony that having the student repeat the ninth grade would be detrimental for him because "he [wa]s cognitively capable of doing the work" (id.). In addition, the IHO determined the student was "absent from classes in part because he stayed up late ordering pizza" and that at Vermont Academy "[t]here seem[ed] to be a lack of supervision and any structure to ensure that the student's special educational needs were met" (id. at pp. 8-9).

Accordingly, the IHO denied the parents' request for tuition reimbursement for Vermont Academy for the 2021-22 school year (IHO Decision at p. 9).

IV. Appeal for State-Level Review

The parents appeal. The parents contend that the IHO erred in finding that the district offered the student a FAPE for the 2021-22 school year and in denying the parents tuition reimbursement/funding for Vermont Academy.

First, the parents allege that the IHO neglected to address the parents' claim that the CSE failed to timely convene to create an IEP for the 2021-22 school year. The parents allege that the CSE failed to convene a within a reasonable time prior to the start of the school year, and as such, the October 2020 IEP did not offer a FAPE to the student for the 2021-2022 school year.

According to the parents, the evaluative information contained in the October 2020 IEP was stale as of the time the parents made their decision to place the student at Vermont Academy because the CSE could not have taken into account the student's progress during the 2021-22 school year. The parents argue that the "eleven-month-old" October 2020 IEP would have been in effect for less than one month of the 2021-22 school year and was based on "substantially older data from the 2018-2019 and 2019-2020 school years." The parents also assert that consideration of more recent assessments and evaluative material was "warranted" in this matter because an appropriate placement for the 2021-22 school year was contingent upon how the student coped, progressed, performed, and fared in 2020-21 school year. Further, the parents argue that the district did not present any evidence as to what post-October 2021 IEP goals would look like for the student or what program, services, and supports the student could expect to receive after the first month of the 2021-22 school year. The parents argue that the use of "stale and outdated [data] in connection with" the district's program recommendation for the 2021-22 school year "undermine[s] a conclusion that there was an effort by the CSE to ensure that the goals to be implemented in the 2021-2022 school year were current or that the proposed program was appropriate." Furthermore, the parents allege that the CSE's failure to take into account nearly an entire school years' worth of "progress and challenges" between October 5, 2020 (the date of the CSE meeting) and September 2021 (the start of the 2021-2022 school year) warrants a finding that the October 2020 IEP was deficient and not an appropriate assessment of the student's needs and present levels of performance and that the district failed to sustain its burden that the goals from the prior school year were still appropriate for the student in the coming 2021-22 school year.

In their request for review, the parents attempt to anticipate a possible defense that the district could raise, namely, that the district was not obligated to develop an IEP for the student more than once annually and that the October 2020 IEP had not yet expired as of the start of the 2021-22 school year. The parents assert that such a defense "does not reflect a fair meaning of the regulations at issue." According to the parents, a school district is not precluded from conducting additional evaluations or assessments of a student within one year if the new evaluative information is necessary to develop an appropriate IEP for the student for any given school year. The parents contend that consideration of more recent evaluative information was necessary as any recommendation for an appropriate placement for the student for the 2021-22 school year was contingent on how the student "coped, progressed, performed, and fared in [the] 2020-2021 school year." Based on this, the parents allege that the CSE was required to convene within a reasonable time of the start of the 2020-21 school year to develop an IEP for the student.

Lastly, the parents assert that the IHO erred in finding that placement at Vermont Academy was not appropriate for the student. The parents argue that Vermont Academy met all of the student's needs; that the student benefited from Vermont Academy's residential setting because they were "able to monitor his work outside of the classroom and get him the help he needed or get him back on task"; and overall, the student "learned how to become independent, how to reach out to people he needed and how to connect with other kids his age" while residing at Vermont Academy.

In an answer, the district asserts that the IHO's findings that the district offered the student a FAPE for the 2021-22 school year and that Vermont Academy was not an appropriate placement for the student should be affirmed and the parents' appeal should be dismissed with prejudice.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[2]

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).

[2] 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., 580 U.S. at 402).

VI. Discussion

A. Scope of Review

Before turning to the merits of the parents' appeal, 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 identifying the precise rulings, failures to rule, or refusals to rule presented for review " 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] [emphasis added]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]).

In this matter, the IHO found that the district met its burden to show that it had offered a FAPE to the student for the 2021-22 school year (IHO Decision at p. 8). The IHO found that the programming of ICT services with counseling in the most recent, October 2020 IEP was designed to meet the student's unique needs and was reasonably calculated to enable the student to receive an educational benefit (id.). On appeal, the parents do not advance any error in that conclusion or argument that the October 2020 CSE's recommendation that the student receive ICT services and counseling was not an appropriate program for the student for the 2021-22 school year and denied the student a FAPE (see generally, Req. for Rev.). Within the request for review, prior to identifying the issues presented for review, the parents set forth a number of allegations identified as a statement of facts, within which they quote one of the recommendations from the 2018 neuropsychological evaluation report indicating, among other things, that the student needed a "small, structured, specialized education program" and later on in the statement of facts the parents indicate the recommended "ICT program would have between 20 and 30 students in it" (Req. for Rev. ¶¶ 3, 10). Taken together, these two statements could imply that the parents wanted to raise an argument related to the recommended ICT services; however, as required by State regulation, the request for review includes specific numbered issues and under those properly identified issues, the parents do not argue that the classroom in which the October 2020 recommended ICT services would be implemented was too large or that ICT services with counseling was not an appropriate program for the student given his unique needs. Accordingly, the inclusion of a quotation in a statement of facts from the 2018 neuropsychological evaluation report indicating that the student needed a small, structured, specialized education program and the passing mention of the ICT services being provided in a class of 20 to 30 students is not sufficient to raise the issue for review. The IHO's finding that the district met its burden to show that it offered the student a FAPE for the 2021-22 school year has, therefore, become final and binding 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]).

In any event, I have conducted an independent review of the evidence in the hearing record and find no reason to disturb the IHO's determination that the district met its burden to show that it offered the student a FAPE for the 2021-22 school year. When making his determination, the IHO considered the testimony of the district school psychologist and the assistant principal of the assigned school (IHO Decision at pp. 6-8). The school psychologist, who also served as the district representative at the student's October 2020 IEP meeting, testified that the CSE recommended ICT services for the student based on his needs, the least restrictive environment, how he could best reach his potential, and the fact that there would be two teachers in his classroom, one being a special education teacher to support the student in the areas he had challenges (Tr. pp. 131, 133-34, 149-52; Dist. Ex. 3 at pp. 16, 25). In reviewing the IEP, the student's struggles with attention, anxiety, processing speed, and reading comprehension could have been addressed with the support of ICT services and counseling (Dist. Ex. 3 at p. 23).

At the October 2020 CSE meeting the parents expressed concerns that a classroom with ICT services was too large (Dist. Ex. 3 at p. 22). As identified in the October 2020 IEP and the June 2021 prior written notice, the CSE considered other program options for the student, including a 15:1 special class, which both the CSE and the parents agreed would not have been appropriate for the student, and an approved nonpublic day school, which was rejected as the CSE determined the student did "not need such intensive specialized instruction to address his educational needs" (id. at p. 23). Regarding the parents' request for a smaller class setting and whether the student required a boarding/residential setting such as Vermont Academy, the school psychologist opined that the information available at the time of the October 2020 CSE meeting did not indicate that the student required such a placement, and that it would be overly restrictive based on his needs, specifically related to his social interaction with others and his life goals (see Tr. pp. 157-59; see Dist. Ex. 3 at p. 22). Additionally, review of the recommendations included in the June 2018 neuropsychological evaluation report shows that many of the recommendations were incorporated into the student's October 2020 IEP management needs in order to provide the student with additional support in the class where ICT services would be delivered (Tr. pp. 144-46; compare Parent Ex. C at p. 17, with Dist. Ex. 3 at p. 6). Further, to address the student's attention and anxiety, the CSE recommended that the student receive two sessions per week of counseling and developed annual goals to improve the student's ability to take another's perspective, reduce "black and white thinking," improve attention and focus, decrease anxiety, and improve self-regulation (Tr. p. 152; Dist. Ex. 3 at pp. 5, 6, 9-10, 16).

Thus, the parents have not alleged on appeal that the IHO should have concluded that the substantive recommendations of the October 2020 CSE, including ICT services and counseling, were inappropriate at the time the IEP was created. Additionally, even if it were permissible to reach those unappealed issues, as discussed above, a brief review of the hearing record related to the October 2020 CSE's recommendations shows that they appear to have been reasonably calculated to address the student's special education needs identified as of the date of the CSE meeting. However, as set for by the parents in their request for review, the IHO did not address the parents' arguments that the October 2020 CSE was held too far in advance of the 2021-22 school year and the CSE failed to reconvene prior to the start of the 2021-22 school year resulting in the student's identified needs and annual goals being stale as of the start of the school year.

B. Unaddressed Issue – 2021-22 School Year

The parents' central argument is that the IHO failed to address their claim that the district failed to convene a timely CSE prior to the start of the 2021-22 school year. The parents assert that because the October 2020 IEP was created "more than eleven months prior to the start of the 2021-2022 school year," the district cannot reasonably claim that the student would have been provided a FAPE for the entire 2021-22 school year.

As a general matter, the district has an obligation to review the IEP of a student with a disability periodically but at least annually, and the CSE, upon review, must revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's anticipated needs; or other matters (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). State regulations additionally provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). In guidance letters, the United States Department of Education indicated that it is the district's responsibility to determine when it is necessary to conduct a CSE meeting but that parents may request a CSE meeting at any time and, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Frumkin, 79 IDELR 233 [OSERS 2021]; Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). The United States Department of Education's Office of Special Education Programs has indicated that "[g]enerally, an IEP meeting must take place before a proposal to change the student's placement can be implemented" (Letter to Green, 22 IDELR 639 [OSEP 1995]). However, there is no requirement that a CSE reconvene "whenever additional information comes to its attention" (MN v. Katonah Lewisboro Sch. Dist., 2020 WL 7496435, at *12 [S.D.N.Y. Dec. 21, 2020]).

The parents contend that for the district to rely on an eleven-month-old IEP, which was based on data from the 2018-19 and 2019-20 school years without assessing the student's progress during the 2020-21 school year, present levels of performance as of the start of the 2021-22 school year, and whether the student achieved his goals, is "patently inconsistent with what regulations pertaining to annual review contemplate" (Req. for Rev. ¶ 13).

Initially, as correctly stated by the parents in their request for review, pursuant to the IDEA and federal and State regulations, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). It is unclear from the parents' request for review if they are alleging, for the first time on appeal, that the student's educational or related services needs warranted a reevaluation and that the district's failure to conduct a reevaluation resulted in a denial of FAPE (compare Parent Ex. B, with Req. for Rev.). However, even if such claims were ripe for review in this appeal, there is no evidence in the hearing record that the October 2020 CSE lacked sufficient evaluative information to create an IEP for the student, nor do the parents raise such a

claim in their due process complaint notice (see generally Parent Ex. B). The parents claim the evaluative information used to develop the October 2020 IEP was "stale" for the 2021-22 school year (Req. for Rev. ¶¶ 13-14). However, the evidence in the hearing record shows that the student was evaluated in 2018 and 2019 by both the district and a private provider selected by the parents which yielded the following: a neuropsychological evaluation report dated June 16, 2018, a social history dated August 8, 2019, a psychoeducational assessment report dated June 16, 2019,[3] an educational evaluation report dated July 30, 2019, and a vocational assessment report dated July 30, 2019 (Tr. pp. 73, 81-82; see Parent Ex. C; see Dist. Exs. 4 at p. 2; 6; 7; 8).[4] At the time of the October 2020 CSE meeting, the 2018/2019 evaluations and assessments of the student were less than three years old (see Parent Ex. C; see Dist. Exs. 4 at p. 2; 6; 7; 8). Moreover, there is no evidence in the hearing record that the parents or the student's teachers requested that the student be re-evaluated (see Tr. pp. 1-180; Parent Exs. A-L; Dist. Exs. 1-11).

The parents primarily cite to two district court cases in arguing that the October 2020 IEP was inappropriate at the start of the 2021-22 school year because it was based on stale and deficient information (Req. for Rev. ¶¶ 12-19; see Avaras v. Clarkstown Central School District, 2017 WL 3037402 [S.D.N.Y. July 17, 2017]; E.H. v. New York City Dep't of Educ., 164 F. Supp. 3d 539 [S.D.N.Y. 2016]). However, neither of the cases cited are pertinent to the argument the parents are making—the argument that the district could not rely on the October 2020 IEP at the start of the 2021-22 school year and was required to reconvene a CSE prior to the start of the 2021-22 school year. In Avaras, the court found that the CSE's recommendations for the student in a June 2013 IEP for the 2013-14 school year were "largely the same as the prior year's IEP and were not based on reports of [the student's] progress at [the student's current school]" and further found that the CSE had insufficient evaluations and information about the student at the time it met in June 2013 to recommend a program for the student (Avaras, 2017 WL 3037402, at *21.). In E.H., the court determined that a June 2012 CSE reviewed an outdated report of progress that did not take into the student's progress for the six months prior to the CSE meeting (E.H., 164 F. Supp. 3d at 555). Both of these decisions looked at the evaluative information available to the CSE as of the time the IEP was created, this kind of analysis is consistent with the Second Circuit's holding that the question of whether an IEP was reasonably calculated to enable a student to receive educational benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]).

In contrast, the parents in this matter are not challenging the evaluative information available to the October 2020 CSE. Rather, the parents assert that the October 2020 CSE did not account for the student's progress during the 2020-21 school year subsequent to the CSE meeting and, therefore, the parents had to base their placement decision on an IEP that was not based on

[3] The June 16, 2019 assessment was listed in a prior written notice, but not included in the hearing record.

[4] The parent testified that she obtained a private neuropsychological assessment in 2014 when the student was in third grade (Tr. p. 73; Parent Ex. C at p. 2).

the student's present levels of performance or current evaluative information (Req. for Rev. ¶ 16). Accordingly, the cases cited by the parents do not support their position.

Additionally, the October 2020 IEP indicated that it had a projected implementation date of October 20, 2020 and a projected annual review date of October 5, 2021 (Dist. Ex. 3 at pp. 1, 23). The district sent the parents a prior written notice and a school location letter, both dated June 29, 2021, which notified them of the student's programming listed in the most recent IEP and the assigned school site for the 2021-22 school year (Dist. Exs. 4; 5). The assistant principal of the assigned school testified that the student's IEP would be "renewed" or evaluated to determine if it was still appropriate and what "updates" would be needed before the projected annual review date (Tr. p. 59). The district's plan to review the student's educational program in the beginning of the 2021-22 school year was consistent with the provisions of the IDEA and State regulations (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]).

The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 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"]).[5] In line with the prospective analysis required by the Second Circuit, the October 2020 IEP was the operative IEP at the time of the parents' placement decision and the district was not required to defend any programs developed after the student began attending the unilateral placement (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88).

If the parents wanted the CSE to reconvene prior to the projected annual review date so that they could have a CSE review the student's progress during the course of the 2020-21 school year prior to making the decision to place the student at Vermont Academy, the parents could have notified the district that they believed the student's program as recommended in the October 2020 was no longer appropriate for the student and they could have requested that the CSE reconvene (8 NYCRR 200.4[e][4]).[6] However, there is no evidence in the hearing record to suggest that the

[5] There is some authority that indicates that a later-developed IEP is operative that has arisen from circumstances where a school district attempts to defend an IEP developed later (usually after the beginning of the school year) that includes additional recommendations in line with a course of action discussed with the parents at an earlier date (McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP" where it "incorporate[d] recommended classes, accommodations, and goals that were presented to Parent prior to her unilateral decision to enroll" the student in a private school]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]; Application of the Dep't of Educ., Appeal No. 12-215).

[6] It is unclear what the basis for requesting another CSE meeting prior to the beginning of the 2021-22 school year would have been as the student was parentally placed at Winston Prep for the 2020-21 school year and it does not appear that the October 2020 IEP was ever implemented (see Tr. pp. 72, 74-75). The parent testified that they chose Winston Prep because the school was a full time special education program with "very small classroom sizes" (Tr. pp. 71, 72, 74). She testified further that the reason why the student left Winston Prep was because he found that he did not socially connect in a "deep" way with the other students and "[h]e needed a chance to develop social interactions and deal with his social-emotional health, which was really suffering at the time" (Tr. pp. 75-76).

parents requested that the CSE reconvene prior to the projected annual review date because their son's placement was no longer appropriate (see generally Tr. pp. 1-180; Parent Exs. A-L; Dist. Exs. 1-11). The evidence in the hearing record does not indicate that the CSE was required to reconvene and establish a new IEP prior to the projected annual review date.

VII. Conclusion

The foregoing evidence shows that the parents did not appeal from the IHO's finding that the district met its burden to show that the October 2020 IEP offered the student a FAPE at the time it was drafted. The time for conducting an annual review of the October 2020 IEP had not yet elapsed and it was the operative IEP as of the time the parents made their decision to unilaterally place the student at Vermont Academy. Although the IHO should have addressed the parents' claim, there was insufficient evidence to support the parents' argument that the CSE was required to reconvene prior to the start of the 2021-22 school year. Because I find no reason to depart from the IHO's conclusion that the district did not deny the student a FAPE, there is no need to reach the issue of whether Vermont Academy was an appropriate unilateral placement for the student for the 2021-22 school year or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 8, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER