The University of the State of New York

The State Education Department
State Review Officer
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No. 23-178

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 Vladeck, General Counsel, attorneys for petitioner, by Michael Gindi, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son for the 2022-23 school year and awarded compensatory education for the student. The 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

Given the limited issues raised on appeal, a full recitation of the student's educational history is not necessary.

Briefly, the evidence in the hearing record indicates that the Committee on Preschool Special Education (CPSE) convened for an initial meeting to determine the student's eligibility for special education services on March 7, 2023 (Dist. Ex. 2 at p. 1). Finding the student eligible for special education programming as a preschool student with a disability, the CPSE developed an IEP for the student with a projected implementation date of March 2023 (id. at pp. 1, 16). According to the March 2023 IEP, the student was not yet attending school and due to limited availability at that point in the 2022-23 school year, the parent would visit programs and an "IEP Reconvene [would] take place prior to September 2023" (id. at p. 1). The March 2023 CPSE recommended that the student be placed in a special classroom integrated setting (SCIS), bilingual in Spanish for five hours per day, along with two 30-minute sessions per week of individual speech language therapy in Spanish, one 30-minute session per week of group speech language therapy

in Spanish, three 30-minute sessions per week of group occupational therapy (OT), and one 30-minute session per week of both group and individual physical therapy (PT) (id. at p. 16). The CPSE also recommended a 12-month program consisting of direct special education itinerant teacher (SEIT) services in Spanish with the same related services (id. at p. 17). By prior written notice dated March 7, 2023, the district summarized the recommendations of the March 2023 CPSE (Dist. Ex. 3). The prior written notice indicated that the CPSE was scheduled to reconvene before September 2023 to assess the student's progress, review a vision assessment, discuss the results of an application with the office of school health regarding the student's eligibility for a 1:1 paraprofessional, and to determine if alternate IEP recommendations would be needed for the upcoming 2023-24 school year (id. at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated April 22, 2023, the parent repeated some of the student's educational history, indicating that he was evaluated in or around September 2022 but the report was "riddle[d] with misinformation"; the district then agreed to reevaluate the student and the March 2023 evaluation was "pretty accurate"; however, the district was not able to provide the student with a program and from December through the date of the due process complaint notice, the student was not "covered or protected" (Dist. Ex. 1). As relief, the parent requested: a proper school for the student; a bilingual program for the student; the immediate placement of the student in a school that "guarantee[d] [] his right to access [a] proper education"; for the district to provide the same "proper school to fulfill all his requirements" for the 2023-24 school year; the immediate assignment of a paraprofessional to the student; and for the district to ensure the student received a 12-month program (id. at p. 2). The parent specified that a proper school for the student was one that could "protect him against injuries"; did not have classes on separate floors; had bathrooms located a close proximity to the student's classroom; had staff trained to assist the student with toileting and hygiene during the school day; was a school specifically designed for students with disabilities; and was located close to the student's home (id.).

B. Events Post Dating the Due Process Complaint Notice—Impartial Hearing Officer Decision

On May 25, 2023, an IHO with the Office of Administrative Trials and Hearings (OATH) conducted a prehearing conference with the parent and a representative of the district (Tr. pp. 1-18). The IHO issued a prehearing conference summary and order which identified the two issues to be addressed during the impartial hearing as whether the district provided the student with a free appropriate public education (FAPE) during the 2022-23 school year and if the district did not offer a FAPE, what the appropriate remedy should be (id.).

On May 26, 2023, the CPSE reconvened to add the support of a 1:1 paraprofessional for the student's "health, safety, and general access to the school environment" to the student's IEP (compare Dist. Ex. 4 at pp. 1, 6, 16 with Dist. Ex. 2 at pp. 1, 6, 16). The May 2023 IEP noted that the student's summer services were scheduled to begin in July and that the parent had accepted a SCIS placement for the student beginning in September 2023 (Dist. Ex. 4 at p. 1). By prior written notice dated May 26, 2023, the district summarized the recommendations of the May 2023 CPSE (Dist. Ex. 5). The prior written notice also indicated that the parent selected a pre-kindergarten placement for the student for the 2023-24 school year; according to the notice, the CPSE left the student's summer services as SEIT services instead of a classroom placement because the

placement chosen by the parent to provide the student's SCIS classroom did not offer 12-month summer services for its SCIS programs (id. at p. 2). The prior written notice also indicated that the district had difficulty locating a bilingual SEIT provider for the summer 12-month program but that the parent would "accept an English speaking provider" (id. at p. 3). Additionally, the prior written notice indicated that an "IEP [r]econvene" was to be scheduled prior to September 2023 to assess the student's progress, review a completed vision assessment, and determine if modifications to the IEP recommendations were needed for the 2023-24 school year (id.).

The parties reconvened to continue the prehearing conference on June 6, 2023 (June 6, 2023 Tr. pp. 19-35).[1] On June 8, 2023, the parties proceeded to an impartial hearing that took place over four days and concluded on June 13, 2023 (June 8, 2023 Tr. pp. 36-128; June 9, 2023 Tr. pp. 36-78; June 12, 2023 Tr. pp 1-24; June 13, 2023 Tr. pp. 1-57). By decision dated July 18, 2023, the IHO found that the district denied the student a FAPE for the 2022-23 school year and ordered the district to provide the student a seat in a bilingual Spanish SCIS with a 1:1 bilingual paraprofessional or fund an "appropriate private school placement of [the p]arent's choosing for the 2023-2024 school year immediately" (IHO Decision at pp. 11-14) The IHO also awarded the student 225 hours of compensatory SEIT services in Spanish, 24 hours of compensatory individual speech-language therapy in Spanish, 12 hours of compensatory group speech-language therapy in Spanish, 22.5 hours of compensatory OT and 7.5 hours of compensatory PT (id. at pp. 13-14).[2] In addition to awarding the parent her requested relief, the IHO ordered the district to, within five "business days" of the date of her decision, assign an individual from its Impartial Hearing Order Implementation Unit to serve as a contact person for the parent regarding the implementation of the order (id. at p. 14). The IHO further ordered that the contact person was required to provide his/her name, direct phone number, and email address to the parent within five days of the date of the order (id.). The IHO also ordered that the contact person was to respond to any inquiry by the parent (or her attorney) concerning the implementation of the order within two business days (id.). The IHO further ordered that the contract person, upon the parent's request, refer the parent to a parent training and information center to assist the parent in understanding the order (id.).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO exceeded her authority by awarding impermissible relief. The district asserts that the IHO is not empowered to address matters pertaining to implementation and can only adjudicate issues germane to an impartial hearing under the IDEA. The district argues that the IHO's order directing it to assign a supervisor from the Impartial Hearing Order Implementation Unit to serve as a contact person and to refer the parent to a training center in order to assist her with understanding the decision rendered by the IHO impermissibly interferes with how the district implements the decision. The district further alleges that the IHO erred by ordering it to place the student in a bilingual Spanish SCIS with a 1:1 bilingual paraprofessional or fund an appropriate private school placement of the parent's choosing for the 2023-24 school year. The district argues this award was vague because the IHO did not

[1] The transcripts were not paginated consecutively. Therefore, for purposes of this decision, the transcript cites will be preceded by the hearing date.

[2] The IHO indicated that she calculated compensatory education beginning in March 2023 because the March 2023 IEP had an implementation date of March 2023 (IHO Decision at p. 13; see Dist. Ex. 2 at p. 16).

address what an appropriate private program would be for the student and further, that the parent's April 2023 due process complaint notice did not include a claim related to the 2023-24 school year and the ordered relief therefore circumvented the process for developing an educational program for the student. As relief, the district requests that the IHO's orders related to the Impartial Hearing Order Implementation Unit, training of the student's parent, and the placement of the student in bilingual Spanish SCIS with a 1:1 bilingual paraprofessional for the 2023-24 school year be vacated.[3]

In its answer, the parent generally denies the material allegations set forth in the request for review and argues that the IHO decision should be upheld in its entirety.

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

[3] The district does not appeal from the IHO's determinations that the district failed to provide the student with a FAPE for the 2022-23 school year or the IHO's award of specific compensatory education to remedy the district's denial of FAPE for the 2022-23 school year. Accordingly, the IHO's determinations as to those issues have become final and binding upon the parties and will not be discussed further (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]).

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]).[4]

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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. Preliminary Matters

1. Scope of the Impartial Hearing

The IHO gave prospective relief in the form of ordering the district to provide the student placement in a bilingual Spanish SCIS with a 1:1 bilingual paraprofessional or fund an appropriate private school of the parent's choosing for the 2023-24 school year (IHO Decision at p. 13). The district argues that the 2023-24 school year was not at issue in this matter and alleges that the IHO erred by awarding prospective relief for the 2023-24 school year. The parent alleges that she never stated that the district did not provide the student FAPE for the 2023-24 school year and requested in her April 2023 due process complaint notice that the district be ordered to provide the student a bilingual program, "provision of a school [immediately]," "[i]n the next school year (September), I ask the same for him, a proper school to fulfill all his requirements" and a paraprofessional (Dist. Ex. 1 at p. 2). Further, in her answer to the district's request for review, the parent argues that the IHO recognized that the district could not implement the student's IEP as written and thus the award was not a prospective placement but allows her to find a unilateral placement that could implement the student's IEP for the 2023-24 school year.

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., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). The Second Circuit has explained that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New

York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3).[5] Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's suspicions that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 2015 WL 2146092, at *3).

Review of the IHO's award directing the district to place the student in a certain program or fund a private program of the parent's choosing for the 2023-24 school year based on the parent's' claims related to the 2022-23 school year raises an issue with the propriety of a prospective placement as relief, which, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

In this instance, as indicated above, the parent filed a due process complaint notice on April 22, 2023, prior to the CSE reconvening in May 2023 to amend the student's IEP to include the 1:1 paraprofessional (see Dist. Exs. 1 at p. 1; 4 at p. 1). The May 2023 CSE recommended that the student be placed in a SCIS, bilingual in Spanish, five hours per day, five times per week with a 1:1 paraprofessional and related services which were projected to begin in September 2023 (Dist. Ex. 4 at p. 16).

Based on the evidence in the hearing record, there is no indication that the parent attempted or wished to amend her due process complaint notice to include challenges to the recommendations contained in the May 2023 IEP for the 2023-24 school year, and, if anything, the parent knew and believed that this proceeding related to the 2022-23 school year and possibly a time prior to such school year based on child-find. The parent stated at the June 6, 2023 pre-hearing conference

[5] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

continuation in response to the IHO's questions regarding her requested relief, "I don't know if this []process only includes a failure from the [district] to provide appropriate education from this period 2022-2023, or you can back date to – some[] time[] in the past where the child was not detected… and maybe he needed early…intervention more appropriately" (June 6, 2023 Tr. p. 31).

To the extent that the IHO acknowledged that the 2023-24 school year was not before her, yet expressed concern that the district could not "identify an appropriate program and placement" for the 2023-24 school year, this concern does not amount to a sufficient basis for circumventing the statutory process. The IHO's order directing the district to provide the student placement in a bilingual Spanish SCIS with a 1:1 bilingual paraprofessional or to fund an appropriate private school placement of the parent's choosing for the 2023-24 school year is premature, and the district should be permitted the opportunity to develop and implement the student's programming for the 2023-24 school year. The hearing record shows that the district had a program for the student prepared for the beginning of the 2023-24 school year and intended to reconvene the CSE prior to September 2023 (see Dist. Exs. 4-7) and the IHO should not have disregarded any alternative program potentially developed by the CSE which the parent has not yet disputed (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

Moreover, the parent does not take issue with the CSE's program recommended in the May 2023 IEP but is seeking to have the district implement the May 2023 IEP, which had a projected implementation date of September 2023 (see Dist. Exs. 1; 4 at p. 6). At the time of the impartial hearings, the district still had an ample amount of time to locate a SCIS bilingual Spanish class with a 1:1 professional for the student for the 2023-24 school year. As such, the parent's implementation claim relating to the 2023-24 school year at the time she filed her April 2023 due process complaint notice had not yet accrued and requesting the IHO to order the district to implement the May 2023 IEP in anticipation that the district will at some point fail to implement the May 2023 IEP is not permissible. However, if non-speculative implementation of the IEP arises as some point in the future, the parent may file a new due process complaint notice containing allegations relating to the 2023-24 school year.

B. Relief

The district alleges on appeal that the IHO is not empowered to address matters pertaining to implementation and that the IHO's order for the district to assign a supervisor from the Impartial Hearing Order Implementation Unit to serve as a contact person and train the parent on the decision impermissibly interferes with how the district implements the decision. The parent did not put forth a specific counter argument to this issue; however, the parent requested an order directing the district to comply with the decision of the IHO.

An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]); however, an IHO may not use this authority to order relief to remedy an issue that was not raised. 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). Under the IDEA and its implementing regulations, 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]). Moreover, it is essential that an IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).

Review of the parent's March 8, 2023 due process complaint notice reflects that the parent did not set forth any facts or circumstances relating to the district's implementation unit nor did the parent request any relief related to the district's implementation unit (see generally, Dist. Ex. 1). In addition, the due process complaint notice did not allege any lack of training on the part of any district employee, nor did the parent request training of district employees as relief (id.). Review of the hearing record also does not include any facts or circumstances that would indicate any issues related to the district's implementation unit, lack of training of district employees, or that the parent sought relief addressing those issues (see May 25, 2023 Tr. pp. 1-18; June 6, 2023, Tr. pp. 19-35; June 8, 2023 Tr. pp. 36-128; June 9, 2023 Tr. pp. 36-78; June 12, 2023 Tr. pp 1-24; June 13, 2023 Tr. pp. 1-57; Parent Exs. 3-4, 6-7; Dist. Exs. 1-7, 9-11; IHO Exs. I-III).

To the extent the IHO's intent in ordering such relief was to address a perceived systemic problem with training of staff or implementation of IHO orders in the district, generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091). Thus, neither the IHO, nor I for that matter, have plenary authority to render a decision on systemic issues related to the district's implementation policies and processes that affect all students.

The IHO's directives relating to the implementation of the order tend to intrude on the district's discretion to follow an administrative process to comply with the order (cf. Abrams v. Carranza, 2020 WL 6048785, at *2 [S.D.N.Y. Oct. 13, 2020] [discussing the district's "reasonable documentation requirements" prior to funding pendency and declining to order injunctive relief "mandating immediate payment"], aff'd sub nom., Abrams v. Porter, 2021 WL 5829762 [2d Cir. Dec. 9, 2021]). Further, in a class action lawsuit relating to the district's failure to implement final IHO orders, the district and the class members entered into a stipulation to target the district's timely implementation of orders and the court appointed a special master to bring the district into compliance with its obligations under the stipulation (see LV v. New York City Dep't of Educ., 2021 WL 663718, at *3 [S.D.N.Y. Feb. 18, 2021]; see Order with Respect to Motion for Appointment of a Special Master, L.V. v. New York City Dep't of Educ., 03-cv-09917 [S.D.N.Y. filed Dec. 12, 2003]). Insofar as the IHO's order places additional requirements related to the district's implementation of the order, it has the potential to interfere with the processes being implemented pursuant to the stipulation and under the guidance of the special master.

Based on the foregoing, as there is no evidence that the IHO's award addressed issues raised in the present matter and as it was beyond the IHO's jurisdiction to cure any perceived systemic violations of the IDEA, the challenged aspects of the IHO's order shall be vacated.

VII. Conclusion

For all of the reasons outlined above, the IHO exceeded her authority in this matter by ordering the district to (1) assign an individual from its Impartial Hearing Order Implementation Unit to serve as a contact person for the parent regarding the implementation of her decision within five days of the decision, (2) provide the contact person's name, direct phone number, and email address to the parent and the parent's attorney within five days of the date of her decision, and (3) require the contact person to respond to any inquiry by the parent or her attorney concerning the implementation of her decision within two business days. The IHO further exceeded her authority in this matter by ordering the district to provide the student placement in a bilingual Spanish SCIS with a 1:1 bilingual paraprofessional or fund an appropriate private school placement of the parent's choosing for the 2023-24 school year. Accordingly, these portions of the IHO's decision must be reversed.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 18, 2023 is modified by vacating those portions delineated as paragraphs one, seven, and eight, which ordered the district to provide prospective placement for the student for the 2023-24 school year or fund an appropriate private placement of the parent's choosing, and further required the district to provide a contact person from the district's implementation unit to assist the parent.

Dated: **Albany, New York**
September 27, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER