



The University of the State of New York

The State Education Department
State Review Officer
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No. 24-173

Application of a STUDENT WITH A DISABILITY, by his parent, 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:

The Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which found that respondent (the district) offered her son a free appropriate public education (FAPE) and denied the parent's request for tuition reimbursement for Big N Little: Stars of Israel (Stars of Israel) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. According to the parent, the student attended Stars of Israel for the 2020-21, 2021-22, and 2022-23 school years in a special class of up to 12 students, and several other due process proceedings occurred or are pending between the parties (see Parent Ex. A at pp. 1-2). A CSE convened on October 6, 2022, and formulated an IEP for the student with a projected implementation date of October 6, 2022 (see generally Parent Ex. B).¹ The CSE found the student eligible for special education as a

¹ Duplicative copies of the October 6, 2022 IEP appears in the hearing record as Parent Exhibit B at pp. 1-28 and as District Exhibit 1 at pp. 1-27. The discrepancy in pagination appears to occur between pages 4 and 5. The district's copy included a portion of the physical development section of the IEP on p. 4 of the document, whereas

student with a speech or language impairment and recommended that he attend a 12:1+1 special class and receive related services of two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 21). At the time of the CSE meeting, the student was attending Stars of Israel in a class with a student to adult ratio of 8:1+1 (Parent Ex. B at p. 1; Dist. Ex. 4).

In a letter dated June 19, 20223, the parent informed the district that she had not "receive[d] a proper or adequate educational and school placement" for the 2023-24 school year and, as a result, intended to unilaterally place the student at Stars of Israel for the 2023-24 school year and seek funding from the district (see Parent Ex. I). The district sent the parent a prior written notice of recommendation on June 21, 2023 citing the October 2022 IEP and advising the parent of the recommended placement and services for the student for the 2023-24 school year and identifying the public school location where the student's program would be provided (Dist. Ex. 7 at pp. 1-2; 8 at p. 1).² The parent executed a contract with Stars of Israel on June 22, 2023 for the student's attendance for the 2023-24 school year (Parent Ex. C).

A. Due Process Complaint Notice

In a due process complaint notice dated July 18, 2023, the parent alleged that the district denied the student a FAPE for the 2023-24 school year because the district failed to provide the student with an "appropriate program and . . . placement" (Parent Ex. A at p. 3).³ Specifically, the parent alleged that the student required an extended school year with individualized support and a behavioral plan (id. at p. 2). For relief, the parent requested direct funding or reimbursement for the student to remain in the Stars of Israel program for the 12-month extended 2023-24 school year (id. at p. 3).

B. Impartial Hearing Officer Decision

On August 14, 2023, the district agreed that, for the duration of the proceedings, the student's pendency placement was the twelve-month programming at Stars of Israel based upon a prior IHO decision dated March 10, 2023 (see Pendency Imp. Form). The parent had unilaterally placed the student at Stars of Israel since the 2020-21 school year (Parent Ex. A).⁴ The parties

the parent's copy started the physical development section on page 5 (compare Dist. Ex. 1 at pp. 4-5, with Parent Ex. B at pp. 4-5). For purposes of this decision, Parent Exhibit B will be used when referring to the October 6, 2022 IEP.

² The October 2022 IEP had an implementation date of October 16, 2022, and a projected annual review date of October 6, 2023 (Parent Ex. B at p. 1). Thus, the IEP remained in effect at the beginning of the 2023-24 school year (id.).

³ The parent's due process complaint notice alleged that the student's last program was set forth in an individualized education services plan (IESP) developed on May 31, 2022 (see Parent Ex. A at p. 1); however, the hearing record does not include a May 2022 IESP and it is undisputed that the educational plan at issue during the impartial hearing was the October 2022 IEP.

⁴ At the impartial hearing, parent's counsel attempted to have prior IHO decisions admitted into the record (Tr. pp. 17-18). The IHO excluded the prior decisions from record on the basis that they were irrelevant (see Tr. p. 18). While it has not erupted into a dispute in this proceeding, it is poor hearing practice to exclude the documentation of prior, recent litigation between the parties as it often contains useful history regarding the

appeared before an IHO on September 27, 2023 and November 16, 2023 (9/27/23 Tr. pp. 1-6; 11/16/23 Tr. pp.7-10).⁵ After recusal of the first IHO, the matter was reassigned to the Office of Administrative Trials and Hearings (OATH), and another IHO (the IHO) conducted a prehearing conference on February 6, 2024 (Tr. pp. 1-8). The IHO reconvened the matter for an impartial hearing on February 29, 2024 which concluded on the same day (Tr. pp. 9-69). In a decision dated March 29, 2024, the IHO determined that the CSE considered the assessments and progress reports in the district's documentary evidence that adequately explained why the district's programming was sufficient to offer the student a FAPE for the 2023-24 school year, notwithstanding the fact that the district did not offer witness testimony during the impartial hearing (IHO Decision at p. 7). As the IHO determined the district provided the student a FAPE he did not proceed with a further analysis of the appropriateness of the parent's unilateral placement or any equitable considerations (*id.*). Accordingly, the IHO dismissed the parent's due process complaint with prejudice (*id.*).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding the district offered the student a FAPE and dismissing her due process complaint with prejudice.⁶ Specifically, the parent argues that the IHO erred because the district did not present any witnesses at the impartial hearing. The parent argues witness testimony was necessary to justify the appropriateness of the CSE's recommendations in the October 2022 IEP. The parent also contends that the district did not show that it sent its school location letter to the parent and failed to show that the district was capable of implementing the October 2022 IEP. The parent argues that the IHO should have found that the unilateral placement was appropriate as the student made demonstrated progress. Moreover, the parent argues that she met the burden of persuasion, and that equitable considerations favored her such that there was no bar to the requested relief.

In an answer, the district requests that the IHO decision be affirmed on the basis that the IHO correctly held that the district offered the student a FAPE for the 2023-24 school year. The district argues the parent failed to raise the issue that the assigned school could not implement the October 2022 IEP in her due process complaint notice. Further, the district argues that its lack of

student or the reoccurrence of particular disputes between the parties. The IHO is not bound by the prior IHO's fact finding or decision (unless the same dispute is being brought before a second IHO), but it is relevant and should not have been excluded.

⁵ The pagination for the transcript of proceedings was restarted at page one when the proceeding was reassigned to OATH and therefore contains duplicative pagination. To distinguish the four volumes for purposes of this decision, the transcript citations to volumes three and four of the transcript are shown with page numbers only without dates and, citation to volumes one and volume two are preceded by the 9/27/23 and 11/16/23 dates respectively.

⁶ Since the parent seeks tuition reimbursement or funding from the district for the costs of the student's unilateral placement at Stars of Israel for the 2023-24 school year and there is no evidence that the parent sought an IESP instead of an IEP from the district, the parent's citation to Education Law § 3602-c is misplaced (*see* Req. for Rev. ¶ 7). Education Law § 3602-c applies when a student is placed at the parent's expense at a nonpublic school but the parent requests that the student receive public special education services from the district in which the nonpublic school is located (Educ. Law § 3602-c[2]).

testimonial evidence at the impartial hearing is not dispositive and that the documents in the hearing record were sufficient for the IHO to make an assessment of the parent's claims.

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 Andrew 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]).⁷

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).

⁷ 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" (Andrew F., 580 U.S. at 402).

VI. Discussion

A. Scope of the Impartial Hearing

I will turn first to the parent's arguments on appeal that the IHO's decision should be overturned because the district did not prove that the assigned public school site could implement the IEP and provided no proof that it sent the required prior written notice and school placement letter.

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]). 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 parent's arguments that she did not receive notice of an assigned public school and that the assigned public school site was incapable of implementing the IEP are absent from the due process complaint notice (see Parent Ex. A). While the parent alleged that she notified the district in her June 19, 2023 letter that the student had not received a "proper or adequate educational and school placement," the parent did not claim that the district failed to provide the required prior written notice and school placement letter for the 2023-24 school year and nowhere does the parent mention the inability of the assigned public school to provide the services recommended in the IEP (id.). For that matter, review of the language in the June 2023 letter, which the parent referenced in the due process complaint notice, that the parent had "not received a proper or adequate educational and school placement" is not explicit in saying that the parent received no school location letter and, instead, the language in the letter referring to the properness or adequacy of the school could be read to state that the parent was aware of and assessed the assigned school location but found it lacking, or was complaining that the educational placement set forth in the IEP was inadequate (Parent Exs. A; I). This is not sufficient to put the district on notice that it would be called upon to prove that it sent a school location letter or that the assigned school was capable of implementing the IEP.

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-

28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

In its opening and closing statements, the district indicated that it timely issued a prior written notice and school location letter for the student, and the hearing record includes those documents (Tr. pp. 20-21, 59; Dist. Exs. 7; 8). The school location letter was received without objection from the parent (Tr. p. 14). However, the district did not present any testimonial evidence and, therefore, could not have opened the door to claims relating to the prior written notice, school location letter, or the assigned public school through questioning of its witnesses. Instead, it was the parent who brought up the issue in her affidavit testimony when she indicated that she did not receive a response from the district to her June 2023 10-day notice or notice of a school location letter identifying a public school for the student for the 2023-24 school year (Parent Ex. N ¶ 4). The attorney for the parent first specified arguments that the district failed to provide a school location letter and that the district was incapable of implementing the IEP in her closing argument after the evidentiary phase of the impartial hearing had concluded (Tr. pp. 63-64). The IHO did not issue a ruling on these two points.

Therefore, as the issues pertaining to the school location letter and capacity of the assigned school to implement the IEP did not appear in the due process complaint notice and were not raised properly at the hearing by way of agreement or otherwise, they are not properly before me and will not be addressed herein.

B. October 2022 IEP

With regard to the 2023-24 school year, the parent indicated in her July 2023 due process complaint notice that the student "remain[ed] in need of his placement in the . . . Stars of Israel Program in the full time 12 month extended special education classroom to meet all of his academic, social, and behavioral needs" (Parent Ex. A at p. 2). As noted above, in the present matter, the CSE convened on October 6, 2022 to develop an IEP with a projected implementation date of October 6, 2022 and a projected annual review date of October 6, 2023 (Parent Ex. B at pp. 1, 26). Accordingly, the October 2022 was the operative IEP at the time of the due process complaint notice and at the start of the 2023-24 school year.

After noting that prior due process proceedings had been filed for previous school years with regard to the student, the parent provided description of the student in the due process complaint notice (Parent Ex. A at p. 2). The evidence in the hearing record also provides a further description of the student. According to the June 2023 prior written notice, in developing the student's October 2022 IEP the CSE considered a May 2016 classroom observation, an August 25, 2021 functional behavioral assessment (FBA), a March 7, 2022 OT progress report (OT report), a September 2, 2022 speech and language progress report (speech and language report), and a September 2, 2022 teacher report (Dist. Ex. 7 at p. 2).⁸

⁸ The hearing record includes all of these documents except for the May 2016 classroom observation (Dist. Exs. 2 at pp. 2-8; 4; 5; 6). Although the prior written notice stated that the Stars of Israel speech and language report was dated September 2, 2022, the report itself noted the date the service began (September 2, 2021), but was otherwise undated (Dist. Ex. 5). It is likewise notable that the Stars of Israel OT report appears to be two separate

According to the October 2022 IEP, the student's present levels of performance reflected the results of April 2022 State test scores, as well as September 2022 teacher estimated functional grade levels (Parent Ex. B at p. 1). In addition, the IEP included speech and language present levels of performance from the September 2022 speech and language report, social and behavior development present levels from the August 2021 FBA, as well as physical development present levels of performance from the March 2022 OT report (*id.* at pp. 2-5; *see* Dist. Exs. 2 at pp. 2-8; 4 at pp. 1-3; 5 at pp. 1-2; 6 at pp. 1-2). Generally, with respect to the student's needs, the IEP stated that the student demonstrated weaknesses in receptive and expressive language development, social/emotional development, executive functioning, and fine motor skills, and he required a high degree of teacher support as well as a multisensory approach to instruction (Parent Ex. B at p. 6).

The IEP indicated that the student scored "1" on both the New York State Testing Program English language arts (ELA) and mathematics assessments which indicated that his performance was "significantly below proficiency level for grade level expectations" (Parent Ex. B at p. 1). The IEP further indicated that based on teacher estimates the student was functioning at a third-grade level for written organization and a fourth-grade level for decoding; reading comprehension; fluency; spelling, grammar, and punctuation; and math computation and problem solving (*id.*). In addition, the student's listening comprehension was estimated by his teacher to be at the fifth-grade level (*id.*).

According to the IEP, at the time it was written the student was in sixth grade and was attending a non-State approved private special education program in an 8:1+1 special class with speech and language therapy and OT as related services (Parent Ex. B at p. 1). The IEP stated that, according to a review of educational records, restrictive settings posed a great challenge for the student, that he had restricted interests and was "self-regulated," that he often refused to participate in classroom activities and routines, and that he struggled to maintain attention (*id.* at p. 2). The IEP indicated that the student worked slowly, was unmotivated to put in effort to complete his schoolwork, and that his low frustration tolerance resulted in inappropriate behavior within the school setting which compromised his ability to absorb lessons during class (*id.*).

With respect to academic skills, the October 2022 IEP indicated that the student demonstrated poor reading skills, struggled to decode multi-syllabic words, and his accuracy and fluency when reading were disrupted by his decoding deficits which hindered his comprehension skills (Parent Ex. B at p. 2). The IEP stated that the student struggled to answer questions related to the text, to summarize information read, and to retell a story, and that his attention deficits made it challenging for him to pay attention during reading tasks (*id.*). In addition, the IEP noted that the student tended to leave off the last syllable of multi-syllabic words, that his vocabulary and reading fluency skills were below grade expectancy, and that he refused to read at home (*id.* at pp. 2-3). The IEP indicated that with respect to writing skills, the student struggled to organize his thoughts and express them in writing, and that he did not employ proper grammar when writing, nor did he use proper punctuation and capitalization (*id.*). In addition, the student confused verb tenses, demonstrated poor encoding skills, and did not use correct spelling in context (*id.*). With respect to mathematics, the IEP noted that the student had poor number concepts and struggled to compute math examples (*id.* at p. 2).

one-page reports, with one dated March 7, 2022, and the second report dated June 26, 2011 which appears to be a typographical error (Dist. Ex. 6 at pp. 1-2).

The IEP indicated that with respect to expressive language skills, the student demonstrated difficulty using appropriate syntax and sentence structure, retelling stories, providing information based on text, and using previously learned vocabulary, and that he often asked for the definitions of words read (Parent Ex. B at p. 2). With respect to receptive language, the IEP stated that the student demonstrated difficulty identifying the main idea of a written passage and discriminating between salient and unimportant details/information, as well as understanding new concepts in stories read and he often needed to have information reread or further explained (id.).

Turning to the student's social development, the IEP indicated that the student struggled to maintain attention for long periods of time which impeded his ability to function in a classroom setting (Parent Ex. B at pp. 2-3). He presented as stubborn and rigid which made it difficult for him to adapt to unexpected occurrences in his surroundings and to participate in nonpreferred activities, and he was oppositional in his response to classroom intervention (Parent Ex. B at pp. 2-3). As a result, the student engaged in a wide range of maladaptive behaviors in "restrictive" settings, instigated arguments, and mistreated his peers due to his lack of social skills, indifference to peers' feelings, and desire for control (id. at p. 3). According to the IEP, of the student's inability to control his emotions and anger manifested itself in temper tantrums and outbursts of fury (id.). The IEP stated that a review of the student's educational records indicated that he lacked perspective taking skills, displayed self-directed behaviors and manipulated his peers to do as he desired (id.). The IEP noted that the student became easily frustrated in response to his peers, tended to be critical of peers' shortcomings, and became verbally aggressive towards peers by calling them names and mocking them in public (id.). The IEP stated that the student lacked basic social skills, asked teachers private questions without realizing his behavior was inappropriate, and presented with a low self-image and lack of confidence in his abilities (id.). In school, the student was disruptive and explosive, engaged in physical fights with his peers as a result of being unable to modulate his emotional response to stress and frustration (id. at p. 4). In addition, the IEP noted that the student's "issues with self-esteem" were due to academic difficulties, that he lacked confidence in accomplishing tasks, and that he demonstrated self-doubt in both small and large group settings (id.).

The October 2022 IEP included two narratives related to the student's physical development (Parent Ex. B at p. 5). The first narrative indicated that the student presented with poor attention span and participation in tasks, required verbal and visual cues to maintain proper pencil grasp while writing, and was working on his writing with a focus on size, space, alignment, orientation and formation (Parent Ex. B at p. 5). The second physical development narrative was primarily duplicative of the first, stating that the student continued to present with fine motor difficulties, as well as poor writing skills, and poor attention span (id.). It added that the student demonstrated difficulty maintaining a dynamic tripod grasp and required verbal and tactile cues to maintain the grasp while writing and noted the student fatigued quickly while writing, which caused his writing to become "sloppy and disorganized" (id.). The IEP noted that the student was working on transition skills from in and out of the classroom and focusing on sitting upright in class while writing and completing given activities (id.). In addition, the IEP stated that the student worked on executive functioning skills/organizational skills during OT sessions (id.).

As supports for the student's management needs, the October 2022 CSE recommended strategies that included pre-teaching vocabulary, paraphrasing, demonstrating, using pictures, and providing multiple exposures to assist with comprehension (Parent Ex. B at p. 6). In addition, the CSE recommended focusing on vocabulary building, and use of "sheltered English techniques"

including, visuals, manipulatives, gestures and facial expressions (id.). The CSE also recommended repeated explicit practice in decoding and phonemic awareness and providing the student with frequent opportunities to use oral language in the classroom (id.). Further, the IEP indicated that repeated reading, teacher modeling, progress monitoring, and comprehension strategies (use of different levels of questions when discussing text, use of think aloud supports) were recommended by the CSE (id.). Other supports recommended by the CSE included ensuring directions were understood by having the student paraphrase directions, a system of positive reinforcement, a reward system, structured movement breaks, preferential seating, a BIP, a multi-sensory approach to instruction, visual cues, and additional processing time (id.). The IEP noted that the student required strategies, including positive behavioral interventions, supports, and a BIP to address behaviors that impeded his learning or that of others (id. at p. 7). In addition, the IEP noted that to support the student's behavioral regulation, he would benefit from a token economy, positive reinforcement such as praise, attention, access to a favorable activity, as well as scheduled breaks, teaching replacement behaviors, a visual schedule, a visual timer, "behavior momentum," flexible thinking, social skills training, a prompt hierarchy, and extinction and response block to decrease maladaptive behaviors (id. at p. 4). The IEP stated that to address the student's executive functioning/organizational skills, the development of a calendar and a planner was recommended (id. at p. 5).

As noted, the CSE recommended that the student attend a 10-month program in a 12:1+1 special class placement in a non-specialized school (Parent Ex. B at pp. 21-22, 26).

Notably, the July 2023 due process complaint notice describes the programming the parent felt was appropriate for the student as a 12-month extended school year program including a special class with "individualized support, modified and simplified instruction and direction, repetition, review, modeling, prompting, social skills instruction, related services, and the development and implementation of a behavioral plan" (Parent Ex. A at p. 2). With the exception of extended school year services, the October 2022 IEP includes the programming described by the parent (compare Parent Ex. A at p. 2, with Parent Ex. B at pp. 6-7, 21-22). In addition, the IEP notes that during the meeting the parent agreed with the CSE's recommendations (Parent Ex. B at p. 27). While the parent was not precluded from later challenging the appropriateness of the October 2022 IEP, the due process complaint notice did not include any procedural claims challenging the evaluative process, the procedures that the CSE used for developing the IEP or, for that matter, most of the substantive content of the IEP. As explained by the Supreme Court, the IDEA imposes "extensive procedural requirements" that requires the participation of both parties in the development in the IEP and these "demonstrate the legislative conviction that adequate compliance with prescribed procedures will in most cases assure much, if not all, of what Congress wished in the way of substantive content in an IEP" (Rowley, 458 U.S. at 183, 206).

Thus, on appeal, although the parent argues that the IHO erred in finding that the district offered a FAPE without testimonial evidence, for purposes of the impartial hearing, the dispute between the parties was limited and, as discussed below, the documentary evidence was sufficient to demonstrate that the district did not deny the student a FAPE due to the lack of a recommendation for 12-month services. The parent's contention that the district was required to produce testimonial evidence was little more than an ambiguous generalized assertion that was not leveled at any particular facts that were relevant to the disputed issues. But if the parent felt that there were particular facts or events during the CSE process that were relevant that should have come to light and were not captured by the documentary evidence offered by the district, the parent,

as a participant in the impartial hearing process, was free to try to establish a different version of the facts, offer contrary documentation, or "compel the attendance of witnesses and to confront and question all witnesses at the hearing" such as other witnesses, including but not limited to district personnel that participated in the October 2022 CSE (8 NYCRR 200.5[j][3][xii]).⁹ To be clear, there was no procedural requirement that the district was obligated to call witnesses at the impartial hearing in order to address the parent's due process complaint notice, especially after the district submitted extensive documentation that is required under the procedures of the IDEA itself.

Turning to the parent's assertion on appeal that the student required 12 month services, State regulations provide that, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," at p. 3, Office of Special Educ. [Updated June 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2023.pdf>).

As summarized above, the documents before the October 2022 CSE did not include information that the student experienced regression, i.e., that the student had achieved skills and then lost them to the degree that it would take an inordinate period of review to reestablish them. The evidence shows that the parent reported concerns that the student refused to read at home, lack of self esteem due to academic difficulties, and lowered motivation; however, neither the parents nor the staff from his nonpublic school reported that he had lost skills that he had learned previously (see Parent Ex. B at pp. 2-6)

During the impartial hearing in May 2024, the Stars of Israel program supervisor testified that the student required a 12-month extended school year in order to prevent substantial regression (Parent Ex. M at ¶ 19). She opined that "[i]f [the student] were not in the program during the summer months he would be unable to maintain developmental levels due to a loss of skills during the summer months and would require an inordinate period of review at the beginning of the school year to reestablish and maintain goals and objectives mastered at the end of the previous school year" (id.). However, the program supervisor did not provide did not attend the CSE meeting and the staff from Stars of Israel did not report such concerns either. According to the program supervisor, Stars of Israel "follow[ed] a data collection program" on a consistent basis and that, when the student was absent, or after a weekend, he regressed further than his special education peers (Tr. p. 39). She testified that the student was already behind in all academic areas and stated that Stars of Israel staff believed if the student was off for the full summer "there would be further regression" (id.). The program supervisor explained that Stars of Israel staff "t[ook] data on the student's scores and how he respond[ed to] instruction on an hourly basis" and "the data generate[d] graphic images and displays and percentages of acquisition that you see in charts" (Tr. p. 40). She indicated that, based on the program's data collection, Stars of Israel could track

⁹ The IHO was authorized to issue subpoenas for this purpose if necessary (8 NYCRR 200.5[j][3][iv]).

how much progress the student was making on each goal (id.). She stated that based on the student's memory and cognition, when absent or after school breaks, the student's "progress went backwards, much further back" than his peers (id.). However, the data which the program director described and referred to is not in the hearing record and was not before the CSE and, therefore, may not be relied upon to assess the October 2022 IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]]).

Thus, while the program supervisor testified during the impartial hearing that the student experienced substantial regression, the view was not presented to the CSE and the IHO was not required to defer to that viewpoint over the documentary evidence in the hearing record.

Based on the foregoing, the October 2022 CSE detailed the student's needs in the IEP and recommended a special class placement in a non-specialized school along with related services, supports to address his individual management needs, as well as annual goals and accommodations and that recommend program as a whole was designed to confer educational benefit upon the student. Therefore, I find no reason to disturb the IHO's findings that the district's documentary evidence provided a cogent and responsive explanation for their recommendations in creating the October 2022 IEP and satisfied their burden. Therefore, the appeal must be dismissed.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district did not deny the student a FAPE, the necessary inquiry is at an end and it is not necessary to reach a determination of whether Stars of Israel was an appropriate unilateral placement for the 2023-24 school year or whether equitable considerations support the parent's request for relief (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). 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
June 26, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**