



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-184

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:

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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered her son an appropriate educational program for the 2023-24 school year and denied her request that the district fund the costs of services delivered to her son at specified rates for the 2023-24 school year. The district cross-appeals from the IHO's determination that failed to limit the scope of the impartial hearing to the allegations in the due process complaint notice. The appeal must be dismissed. The cross-appeal must be sustained in part.

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 in detail. According to the parent, the student received a diagnosis of autism spectrum disorder (ASD) at the age of five (Dist. Ex. 2 at p. 1). The Committee on Preschool Special Education (CPSE) convened on April 28, 2021 and found the student eligible for special education as a preschool student with a disability (see generally IHO Ex. V). The April 2021 CPSE recommended 12-month services during July and August 2021 of 13 hours per week of group (2:1) special education itinerant teacher (SEIT) services together with two 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), three 30-minute

sessions per week of individual physical therapy (PT), two 30-minute sessions per week of small group counseling, and 1:1 crisis paraprofessional services (IHO Ex. V at pp. 1, 25-26).¹

Next, on April 29, 2021, the CSE convened, found the student eligible for special education as a student with autism, and developed an individualized education services program (IESP) for the student for the 2021-22 school year, to be implemented beginning September 13, 2021 (IHO Ex. I at p. 1).^{2, 3} The April 2021 CSE recommended a program of 10 periods per week of direct group special education teacher support services (SETSS), two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of group speech-language therapy, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, and full-time paraprofessional services for behavior support (*id.* at pp. 13-14).⁴ The CSE also recommended four 60-minute sessions per year of parent counseling and training (*id.* at p. 14).

The parent filed a due process complaint notice on September 9, 2021, in which the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for

¹ State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; *see* "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-teacher-seit-services-and-related-services-preschool>. A list of New York State approved special education programs, including SEIS programs, can be accessed at: <https://www.nysed.gov/special-education/approved-preschool-special-education-programs>. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; *see* Educ. Law § 4410[1][k]).

² It is not clear from the hearing record why the April 2021 CSE developed an IESP; however, when a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an IESP under the State's so-called "dual enrollment" statute (*see* Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely 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 §§ 3602-c; 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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]).

³ The student's eligibility for special education as a student with autism is not in dispute (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

⁴ SETSS is not defined in the State continuum of special education services (*see* 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

the 2021-22 school year (Parent Ex. B at p. 3). On March 11, 2022, the IHO in that matter found that the district failed to implement the student's recommended program and, for the 2021-22 school year, the student was entitled to 13 hours per week of group SEIT services, two 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual PT, two 30-minute sessions per week of small group counseling, three 30-minute sessions per week of individual OT, and individual paraprofessional services (id. at pp. 8-9).⁵

On March 28, 2023, the CSE convened, determined the student continued to be eligible for special education as a student with autism, and developed an IEP for the 10-month 2023-24 school year, which recommended that the student receive integrated co-teaching (ICT) services in math, English language arts (ELA), social studies and science, one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, three 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual speech-language therapy, together with four 60-minute sessions per year of parent counseling and training to be implemented beginning on September 7, 2023 (Dist. Ex. 3 at pp. 1, 15-16).

In a letter dated September 7, 2023, the parent informed the district that she disagreed with the recommendations contained in the student's March 2023 IEP and that she intended to parentally place the student at a nonpublic school where he would receive "the prior recommended services" and that she would seek reimbursement or direct funding of the unilaterally obtained special education and related services (see Parent Ex. C).

In a due process complaint notice, dated December 28, 2023, the parent alleged that the district failed to offer the student a FAPE for the 2023-24 school year (see Parent Ex. A). The parent asserted that the recommendation for ICT services without individual support was not appropriate for the student and that the student required either a continuation of SEIT services or "an appropriate placement in a hybrid special education/general education program" (Parent Ex. A at p. 3). As relief, the parent sought funding of the recommendations contained in the March 2022 IHO Decision for the 2023-24 school year, as well as compensatory education services for any services the student was not provided during the 2023-24 school year (id. at pp. 2, 4).⁶

After a prehearing conference on January 29, 2024, an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on March 11, 2024 (Tr. pp. 1-115). In a decision dated April 2, 2024, the IHO determined that the district offered the student a FAPE for the 2023-24 school year and denied the parent's request for direct funding of special education and related services (IHO Decision at pp. 2, 7-10).

⁵ The parties agreed that the services ordered in the unappealed IHO decision dated March 11, 2022 constituted the student's last agreed upon program.

⁶ Throughout the hearing record, the terms SEIT services, SETSS, and special education teacher services are used interchangeably. For ease of reference in this decision, the services of a special education teacher for the student during the 2023-24 school year will be referred to as SETSS.

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal is also presumed and, therefore, the specific allegations and arguments will not be repeated. The main issue presented on appeal is whether the district's recommended program was appropriate for the student for the 2023-24 school year. As relief, the parent seeks direct funding of the SETSS, speech-language therapy, PT, counseling, OT, and paraprofessional services she obtained for the student for the 2023-24 school year.

In its answer, the district generally denies the material allegations contained in the request for review. The district asserts that the recommendation for ICT services was based on the student's needs and was the least restrictive environment (LRE) for the student. Additionally, the district cross-appeals arguing that the IHO exceeded her authority in permitting the issues of whether the student required PT and a paraprofessional to be addressed at the impartial hearing, asserting that these issues were not properly raised in the due process complaint notice. Furthermore, the district contends that the parent did not sustain her burden with respect to the appropriateness of the unilaterally obtained services and that equitable considerations did not favor an award of direct funding. The district requests that the IHO decision be upheld.

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" (Andrew 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

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

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 Matter

1. Scope of Impartial Hearing

Turning first to the district's cross-appeal, the district argues that the IHO exceeded her authority and improperly expanded the scope of the impartial hearing by including issues not raised in the due process complaint notice regarding PT and 1:1 paraprofessional services. The parent did not respond to the district's cross-appeal but, in her request for review, she argues the student required a 1:1 paraprofessional and PT services for the 2023-24 school year.

The IHO addressed this issue in her decision stating that the parent made "broad assertions" in her due process complaint notice (IHO Decision at p. 7). The IHO specifically referred to the allegations in the due process complaint notice that "the CSE failed to recommend an appropriate placement for [the student] and reduced [the student's] recommendations from 13 periods of SEIT which were delivered on an individual basis to an ICT program with no individualized support" and that an "ICT is essentially a mainstream setting with 25 students per class. Without the individualized support of a SEIT program, [the student] would not be able to make meaningful progress" (IHO Decision at p. 7; Parent Ex. A at p. 3). Based on these allegations the IHO held that the district "was on notice that anything relating to the 'appropriate placement' of [the] [s]tudent will be considered when determining whether the [district] gave [the] [s]tudent a FAPE" (IHO Decision at p. 7).

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

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).

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]).

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], appeal dismissed [2d Cir. Aug. 16, 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]).

During its opening statement, the district specifically stated that the "scope of the impartial hearing [wa]s limited to the allegations raised in the due process complaint" notice which pertained to SEIT/SETSS services not being offered to the student (Tr. p. 28). The district objected to cross-examination of the school psychologist regarding the related services recommendations asserting they were outside the scope of the impartial hearing (Tr. pp. 49-50). Additionally, the school psychologist was specifically asked on cross-examination about the fact that PT and paraprofessional services were not recommended for the student, and the district objected arguing that there were no allegations in the due process complaint notice that the student required PT or a paraprofessional (Tr. p. 53). In response, the IHO noted that the due process complaint notice requested the services that were recommended in the March 2022 IHO decision regarding the prior school year, which included PT and 1:1 paraprofessional services, and therefore, the IHO found that the due process complaint notice "put those services in issue" (id.). Initially, although the due process complaint notice did request an order that the recommendations made in the prior March 2022 IHO decision be funded for the 2023-24 school year, the due process complaint notice did not contain any specific allegations regarding paraprofessional services or PT services (see Parent Ex. A). Additionally, as described above, the due process complaint notice contained specific allegations as to the parent's problems with the March 2023 IEP (Parent Ex. A at p. 3). In particular, the parent contended that the CSE reduced the student's services from 13 periods per week of SEIT services delivered on an individual basis to ICT services "with no individualized support," that the student need a continuation of the SEIT program or an appropriate placement in a hybrid special education and general education program, and that the student would not make meaningful progress without the individualized support of SEIT services (id.). Based on this,

while I agree with the district that the parent's allegations that the student was not recommended for sufficient individual supports was broad, the issue was sufficiently raised so that it could also encompass whether the student required 1:1 paraprofessional services as a part of this hearing. Accordingly, the issue of the whether student's educational program was sufficiently supportive to address the student's needs, including whether the student required 1:1 paraprofessional services, will be further discussed below.

However, absent from the allegations in the due process complaint notice is whether the student required PT services (see generally Parent Ex. A). Based on the above, the issue pertaining to PT was not properly raised within the due process complaint notice, and as such was beyond the scope of the impartial hearing (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]).

B. March 28, 2023 IEP

1. Student's Needs

Although the student's present levels of performance, as detailed in the March 2023 IEP, are not in dispute on appeal, a brief discussion of the student's needs is necessary to evaluate the parent's claims regarding the appropriateness of the March 2023 CSE's recommendation for ICT services.

A review of the student's March 2023 IEP shows that the CSE relied on the student's nonpublic school progress reports and the January 2022 psychoeducational evaluation report when developing the student's special education program for the 2023-24 school year (see Dist. Exs. 1-2; 3 at p. 1; 4 ¶ 10). The March 2023 IEP reflected results of the January 2022 psychoeducational evaluation which showed that administration of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) to the student yielded a full-scale IQ of 98, in the average range, with nonverbal IQ and verbal IQ both falling in the average range (Dist. Ex. 3 at p. 1).

Speaking to the student's academic performance, the March 2023 IEP reflected that according to the progress reports the student had deficits in reading (Dist. Ex. 3 at p. 2). Specifically, the student could not delete initial sounds, manipulate phonemes in the middle of a word, did not know any long vowel sounds, had just begun reading consonant-vowel-consonant (CVC) words with prompting and visual cues, and could not read consonant digraphs, final "e" and common vowel team conventions (id.). The March 2023 IEP noted that the student could independently write 20/26 capital letters and 14/26 lower case letters, but often wrote letters and numbers in reverse (id.). He could not print his name without a model to copy or print letters or produce grade appropriate text with legible handwriting, and did not use proper capitalization, punctuation, and spelling (id.). In math, the student added and subtracted within 10 and counted by 2, 5, and 10 but could not add or subtract within twenty, was not fluent in adding doubles, could not tell or write time from an analog clock, and did not know the name or values of coins (id.).

Regarding the student's speech and language skills, the March 2023 IEP noted that although the student was recommended for speech-language therapy, he was not receiving the services at the nonpublic school (Dist. Ex. 3 at p. 2). The March 2023 IEP indicated that the student

"present[ed] with significant deficits in the language domain" and had difficulty putting items into categories, identifying prepositions, identifying associations, using descriptive language, answering "wh" questions, describing objects, and explaining directions (*id.*). According to the March 2023 IEP, the student benefitted from using a visual descriptive strip, conversation starters, and games involving following directions and prepositions to strengthen his language skills (*id.*).

In terms of the student's social/emotional skills, the March 2023 IEP reflected that according to the student's classroom teacher, he was a very sensitive student who became easily upset if someone took something that belonged to him (Dist. Ex. 3 at p. 3). When the student was having fun, he enjoyed playing with his peers, but when frustrated or when things did not go his way, he would "tantrum," screaming or crying, "and sometimes he [would] kick/throw whatever [wa]s closest to him" and he needed supervision while playing with peers (*id.*). The March 2023 IEP also related that according to the student's counseling provider, he had difficulty staying on topic, talking about non-preferred subjects, following the rules of a game, and losing a game graciously, and that he would often make up rules in a game in order to win (*id.*). The March 2023 IEP indicated that, according to the student's counseling provider, he had weakness in attention span and needed to improve his "frustration tolerance" (*id.*). The student often called out in class, struggled to maintain eye contact, talked excessively, and interrupted or intruded on others (*id.*). The March 2023 IEP related that according to the parent, the student lacked social skills and required support and supervision when playing with peers (*id.* at p. 4). The parent also reported that the student liked routines, did well playing with younger peers, and liked it when things went his way and he made the rules (*id.*).

Regarding the student's physical development, the March 2023 IEP related that according to his occupational therapist, the student could not remain on task for more than five minutes, struggled to start a task when asked, required "a lot of verbal cueing" especially if there were distractions such as loud noises and crowded spaces, and could not attend and follow multi-step related verbal directions (Dist. Ex. 3 at p. 4).⁸ According to the March 2023 IEP, the student's fine motor skills were "deficient," which limited him from producing legible handwriting, with weaknesses noted in letter formation, sizing, and tracing complex shapes with four or more sides (*id.*). He required support with holding a tripod grasp, as the pencil tended to fall from his hand, he did not have a mature grasp when using scissors, needed help when using bilateral function to shift paper using his non-dominant hand, could not cut along the lines of a shape, and lacked spatial awareness (*id.*). Regarding the student's physical strengths, the March 2023 IEP related that the student could ride a scooter but, according to the parent, the student had weak upper body strength (*id.*). Additionally, the IEP noted the student was able to get dressed on his own but needed help with buttons (*id.*).

2. ICT Services

To address the student's above stated needs, the March 2023 CSE recommended that the student attend a general education class with the support of ICT services for 10 periods per week

⁸ The student's deficits in attention reflected in the March 2023 IEP were derived from the progress report (compare Dist. Ex. 1, with Dist. Ex. 3).

in math, 10 periods per week in ELA, three periods per week in social studies, and two periods per week in science (Dist. Ex. 3 at p. 15).⁹

The parent asserts that the school psychologist knew "shockingly little" about the student and the district failed to offer a "clear and cogent explanation" for recommending ICT services without individual academic support and paraprofessional services (Req. for Rev. at pp. 2, 3, 5). She argues that 13 hours per week of individual SETSS was more supportive for the student than ICT services (*id.* at pp. 3, 5). Furthermore, the parent contends that "[a] mainstream setting with an additional teacher cannot make up for the support he received from 13 hours of individualized academic instruction in a classroom with only 12 other students" (*id.*).

Turning to the merits of whether the March 2023 CSE's recommendation for ICT services was appropriate, State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

According to the school psychologist, the March 2023 CSE recommended ICT services for the student based on its review of the student's January 2022 psychoeducational evaluation report, which showed that the student's cognitive skills were within the average range (Dist. Ex. 4 ¶ 15). She testified that based on the cognitive assessment results, it was "expected" that the student could "access education similar to students" who were not eligible for special education and "work on grade level assignments" in an "integrated co-teaching classroom" (*id.*). The school psychologist testified that at the time of the March 2023 CSE meeting, the student was receiving special education services from a private provider and "attending a general education class in a general education school (*id.* ¶¶ 16, 17). According to the school psychologist, the student was making progress in the nonpublic "general education classroom with other supports," and she believed that he was capable of making progress in a district general education classroom "if [he] received the appropriate special education supports," including ICT services (*id.* ¶ 17). The school psychologist further testified that the student's strengths were well documented in the records reviewed and discussed during the CSE meeting, and based on the results of the psychoeducational evaluation, the student had average cognitive skills, performed on grade level for academics, and exhibited average ability to solve verbal and nonverbal problems using inductive or deductive reasoning (*id.* ¶ 18). In addition, she testified that the student exhibited working memory, math, and oral language skills that were within the average range (*id.*).

The school psychologist identified that the student demonstrated challenges in reading, writing, some math skills, attention/focus, social/emotional skills, and fine motor skills (Dist. Ex. 4 ¶ 19). To address the student's difficulties in each of the areas, the school psychologist testified

⁹ As noted above, the March 2023 IEP also recommended that the student receive related services, including counseling, OT, and speech-language therapy; however, the sufficiency of the related services recommendations is not in dispute in this proceeding.

that both teachers in the classroom would work with the student to achieve his annual goals in each of the identified areas of need (*id.* ¶¶ 20-25). A review of the March 2023 IEP showed that there were 10 annual goals focused on the student's receptive and expressive language skills, attention and focusing skills, impulsive and compulsive behaviors, self-regulation, peer relationships, fine motor control, visual motor coordination and visual-perceptual skills, handwriting, reading, and math (Dist. Ex. 3 at pp. 6-14).

Regarding the parent's assertion that the student would be "completely lost" in a class of 25 students with no individualized academic support, the school psychologist testified that the March 2023 CSE provided individual supports for the student through the individual related service sessions, which would have provided three and one-half hours of individual instruction per week (Tr. pp. 51-52; Dist. Ex. 4 ¶¶ 26-27). The school psychologist testified that the recommended related services of one 30-minute session of individual counseling per week, one 30-minute session of group counseling per week, three 30-minute sessions of individual OT per week, and two 30-minute sessions of individual speech-language therapy per week would have addressed the student's attention/focusing, social/emotional, speech-language, and fine motor challenges (Dist. Exs. 3 at pp. 15-16; 4 ¶¶ 21-25).

Further, the school psychologist testified that in addition to the individual related services, the "integrated co-teaching classroom" also allowed for individual supports, and "[s]ince the class ha[d] two teachers and a smaller number of students than a general education classroom, the teachers ha[d] opportunities to work with the students individually if needed" (Dist. Ex. 4 ¶¶ 14, 27). For example, she testified that in a classroom where ICT services are delivered, instruction could be provided using parallel teaching strategies, where the special education and regular education teachers worked together to teach the lesson in small groups, through whole class instruction with the regular education teacher providing instruction "while the special education teacher assist[ed] the special education students with individual support," or through use of a teaching station model in which the teachers rotate through small groups of students (*id.* ¶¶ 13-14). The school psychologist stated that "[s]ince there [we]re two teachers in the classroom with only a maximum of twenty-five students, teachers [we]re also able to work with [a] student on an individual basis if needed" (*id.* ¶ 14). She further testified that to ensure the student was making progress toward meeting his annual goals, the teacher would work with him individually to monitor his progress (*id.* ¶¶ 14, 27). During cross-examination, the school psychologist additionally testified that while the student was "affected by distractors," the "integrated co-teaching classroom" had two teachers in the room and part of the role of the special education teacher was to refocus the student (Tr. pp. 40-41).

Regarding the student's need for 1:1 paraprofessional services, the parent claims that at the nonpublic school the student had a "crisis paraprofessional to keep him safe" and a behavior intervention plan (BIP) "which help[ed] his teachers ensure that he d[id] not elope from the classroom and cause harm to himself and others as a result of his maladaptive behaviors" (Req. for Rev. at p. 4).¹⁰ The parent also claims that a board-certified behavior analyst (BCBA) used applied

¹⁰ The BIP referenced by the parent was not included in the hearing record, nor is there any indication a BIP was provided to the March 2023 CSE and the IEP indicated that the student did not have a BIP (Dist. Ex. 3 at p. 21).

behavior analysis (ABA) to help the student with his behaviors (*id.* at p. 1).¹¹ She additionally asserts that "[t]he school would not permit [the student] to attend without his crisis paraprofessional which indicate[d] the extent to which he relie[d] on his cris[is] paraprofessional" (*id.*). Nonetheless, none of the evaluative information the March 2023 CSE reviewed and considered mentioned the student's need for a crisis paraprofessional, and the hearing record does not include information about any paraprofessional support provided to the student in the nonpublic school (*see* Dist. Exs. 1-3).¹² When initially asked on cross-examination why 1:1 paraprofessional services were not recommended for the student, the school psychologist stated "[l]east restrictive environment" without further explanation (Tr. pp. 52-53).¹³ Then, she further

However, the student had been recommended for a BIP as a part of the earlier April 2021 CSE meeting (IHO Ex. V at p. 10).

¹¹ The progress reports indicated that the student's SETSS provider was "trained in ABA methodology" but there is no further information in the hearing record regarding the use of ABA methodology with the student (Dist. Ex. 1 at pp. 3-4; *see* Tr. pp. 1-115; Parent Exs. A-C; E-O; Dist. Exs. 1-4).

¹² State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; *see* 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012 contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at <https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disabilitys-need-for-a-one-to-one-aide.pdf>).

¹³ The assignment of a one-to-one paraprofessional in order for a student to attend a general education classroom would likely exceed what LRE requires (particularly if it resulted in the student receiving primary instruction separately from and without engaging with the nondisabled students in a meaningful way) and would, instead, tend toward maximization of services, which is not required under the IDEA (*Grim*, 346 F.3d at 379 [quoting *Rowley* and noting that a school district need "not . . . furnish every special service necessary to maximize each handicapped child's potential"]; *see Rowley*, 458 U.S. at 199). Further, "the IDEA does not require regular education instructors 'to modify the regular education program beyond recognition'" (*Killoran v. Westhampton Beach Sch. Dist.*, 2021 WL 4776720, at *11 [E.D.N.Y. Oct. 11, 2021], *aff'd*, 2023 WL 4503151 [2d Cir. July 13, 2023], quoting *P. v. Newington Bd. of Educ.*, 512 F. Supp. 2d 89, 107, [D. Conn. 2007]; *see Daniel R.R.*, 874 F.2d at 1048-49 ["[M]ainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student."]).

testified that the March 2023 IEP noted that the student could get "off topic" and "frustrated but there [we]re no extreme concerns that he require[d] a paraprofessional" (Tr. pp. 53-54).

When asked if the student's receipt of 13 hours of SETSS in the nonpublic school played any role in the March 2023 CSE's recommendation for ICT services, the school psychologist testified that the fact that the student was getting 13 hours of SETSS per week showed that the student required support beyond what a general education class could provide and, therefore, the March 2023 CSE recommended ICT services "to allow [the student] to receive special education supports and instruction for the entire school day" (Dist. Ex. 4 ¶ 37). The school psychologist testified that the March 2023 CSE considered instruction in a general education classroom and determined he required more support than a general education could provide for the student (Dist. Exs. 3 at p. 22; 4 ¶ 38). The March 2023 CSE also determined that general education with SETSS would not be appropriate for the student because the student's challenges required that he "have the support of a special education teacher during [] all instructional periods, twenty-five periods per week" and, therefore, SETSS "for only a portion of the week or school day, would not address all of his challenges" (Dist. Exs. 3 at p. 22; 4 ¶ 40). Additionally, SETSS "require[d] a student to be removed from his [] classroom environment," which "prevent[ed] the student from having opportunities to learn from [his] peer models, which [wa]s important for the student's development of independence and social skills" (Dist. Exs. 3 at p. 22; 4 ¶ 40). The school psychologist testified that the March 2023 CSE also considered recommending a 12:1+1 special class in a district community school but determined this placement to be too restrictive for the student based on his average cognitive ability and the "benefits from receiving instruction with general education peers" (Dist. Exs. 3 at p. 22; 4 ¶ 41). She further testified that it was important for the student to have access to his nondisabled peers because the student had challenges with "socialization, emotions, and communication," and would be able to see how other students used strategies to cope with their emotions and develop his own strategies, to learn and develop communication skills, and make friends (Dist. Ex. 4 ¶ 44). Ultimately, the school psychologist testified that ICT services and related services would "address all of [the student's] challenges" and with the mandated "targeted instruction and individual support" the student would make progress (*id.* ¶ 45).

As discussed above, the parent's allegation that the CSE was unfamiliar with the student is not supported by the evidence in the hearing record and I agree with the conclusions of the IHO that the district offered "a cogent and responsive explanation for [its] decisions" in creating the March 2023 IEP. The evidence in the record also supports the IHO's finding that the recommendation for placement in a general education class with the support of ICT services and related services would have provided the student with full time special education teacher support and individualized instruction to meet his identified needs.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the privately obtained SETSS and related services were appropriate unilateral services or whether equitable considerations weighed in favor of the parent's requested relief.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 2, 2024, is modified only to the extent that the scope of the impartial hearing did not include a challenge to the lack of a recommendation for physical therapy.

Dated: **Albany, New York**
 June 7, 2024

STEVEN KROLAK
STATE REVIEW OFFICER