The University of the State of New York

The State Education Department
State Review Officer
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No. 24-199

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 to be reimbursed for her son's tuition at the Big N Little: Ziv Hatorah Program (Ziv Hatorah) for the 2022-23 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 Ziv Hatorah for the 2020-21 and 2021-22 school years in a special class of up to 12 students with one teacher and one assistant (see Parent Ex. A at pp. 1-2). A CSE convened on March 30, 2022 and determined that the student was eligible for special education

services as a student with an emotional disability (Parent Ex. B).[1, 2] In the resulting IEP, which had a projected implementation date of September 5, 2022, the CSE recommended that the student attend a 12:1+1 special class for English language arts (ELA), math, science, and social studies, and receive one 40-minute session per week of group counseling, one 40-minute session per week of individual counseling, one 40-minute session per week of individual occupational therapy (OT), two 40-minute sessions per week of individual speech-language therapy, and one 40-minute session per week of group speech-language therapy, all on a 10-month basis (id. at p. 17). The March 2022 CSE also recommended that the student receive group paraprofessional services for behavior support and indicated that the student required positive behavioral interventions, supports, and strategies and a behavioral intervention plan (BIP) (id. at pp. 4, 18).

In a letter dated June 17, 2022, the parent informed the district that her son had not "received a proper or adequate educational and school placement" for the 2022-23 school year and, as a result, that the parent intended to unilaterally place the student at Ziv Hatorah for the 2022-23 school year and seek funding from the district (see Parent Ex. H). The district sent the parent a prior written notice of recommendation on August 11, 2022, citing the March 2022 IEP, advising the parent of the recommended placement and services for the student for the 2022-23 school year, and identifying the public school location where the student's program would be provided (Dist. Exs. 3 at pp. 1-5; 4). The parent executed a contract with Ziv Hatorah on June 20, 2022 for the student's attendance for the 2022-23 school year (Parent Ex. C at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated September 30, 2022, the parent alleged that the district denied the student a FAPE for the 2022-23 school year because the district failed to provide the student with an "appropriate program and . . . placement" (Parent Ex. A at p. 3). Specifically, the parent asserted that the student required placement in a 12:1+1 special class for the 12 month, extended school year that included "individualized support, modified and simplified instruction and direction, repetition, review, modeling, prompting, a behavior plan, social skills instruction, counseling, occupational therapy, and speech-language therapy" (id. at p. 2). For relief, the parent

[1] Both parties entered into the hearing record copies of the March 30, 2022 IEP (see Parent Ex. B at pp. 1-24; Dist. Ex. 1 at pp. 1-23). The discrepancy in pagination between the parties' exhibits appears to occur between pages 2 and 3. The district's copy included a portion of the social development section of the IEP on page 2 of the document, whereas the parent's copy started the social development section on page 3 (compare Dist. Ex. 1 at pp. 2-3, with Parent Ex. B at pp. 2-3). For purposes of this decision, Parent Exhibit B will be cited when referring to the March 30, 2022 IEP.

[2] The March 2022 IEP uses the term "emotional disturbance"; however, as the State changed the term "emotional disturbance" to "emotional disability" as of July 27, 2022, the term "emotional disability" is used in this decision (see 8 NYCRR 200.1[zz][4]; see also "Permanent Adoption of the Amendments to Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance," Office of Special Educ. Mem. [July 2022], available at https://www.nysed.gov/sites/default/files/special-education/memo/emotional-disability-replacement-term-for-emotional-disturbance.pdf). The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

requested direct funding or reimbursement for the student to remain in the Ziv Hatorah program for the 12-month extended 2022-23 school year (id. at p. 3).

B. Impartial Hearing Officer Decision

On December 20, 2022, the district agreed that, for the duration of the proceedings, the student's pendency placement was the 12-month programming at Ziv Hatorah based upon a prior IHO decision dated August 15, 2022 (see Pendency Imp. Form). The parties proceeded to an impartial hearing on January 30, 2023, which concluded on March 8, 2024, after 20 days of proceedings inclusive of prehearing and/or status conferences (Tr. pp. 1-320).

In a decision dated April 12, 2024, the IHO determined that the district "thoughtfully and thoroughly" considered numerous factors in assessing the student and did not substantively deny the student a FAPE for the 2022-23 school year (IHO Decision at p.18). The IHO found that extended school year services were not warranted because there was no evidence that the student would exhibit substantial regression during July and August (id. at pp. 16-17). The IHO also found that the district relied on appropriate evaluative data to develop the student's program, including information provided by Ziv Hatorah (id. at p. 17). Additionally, the IHO found that the March 2022 IEP included "appropriate, objective and measurable goals" that addressed the student's needs (id. at p. 18). According to the IHO, evidence in the hearing record—namely, the district's prior written notice and school location letter—controverted the parent's claim that the district failed to offer the student an assigned school (id. at p. 17). As the IHO determined the district provided the student a FAPE for the 2022-23 school year, she did not proceed with a further analysis of the appropriateness of the parent's unilateral placement or discuss equitable considerations (id. at p. 18). Accordingly, the IHO dismissed the parent's due process complaint notice and denied the parent's request for tuition reimbursement at Ziv Hatorah (id. at p. 19).

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 notice.[3] Specifically, the parent argues that the IHO erred because the district failed to create an "appropriate IEP" and provide the student with a public school placement for the 12-month extended 2022-23 school year. The parent argues that the district's evidence and testimony failed to justify the appropriateness of the CSE's recommendations in the March 2022 IEP. The parent also contends that the district did not adequately demonstrate that it sent its school location letter to the parent and failed to show it was capable of implementing the March 2022 IEP. The parent argues that the IHO should have found that the unilateral placement was appropriate as the student made demonstrated progress and that equitable considerations favored the parent such that there was no bar to the requested relief.

[3] Since the parent seeks tuition reimbursement or funding from the district for the costs of the student's unilateral placement at Ziv Hatorah for the 2022-23 school year and there is no evidence that the parent sought an individualized education services plan (IESP) instead of an IEP from the district, the parent's citation to Education Law § 3602-c is misplaced (see Req. for Rev. ¶ 10). 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]).

In an answer, the district requests the IHO's decision be affirmed on the basis that the IHO correctly held that the district offered the student a FAPE for the 2022-23 school year. The district argues the parent failed to raise the issue that the assigned school could not implement the March 2022 IEP in her due process complaint notice. Further, the district argues there is no support in the hearing record that the student exhibited "substantial regression" requiring an extended school year.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support

services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

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

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

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. Assigned School

As a preliminary matter, I will address 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 a 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).[5] While the parent alleged that she notified the district in her June 17, 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 2022-23 school year and nowhere does the parent mention the inability of the assigned public school to provide the services recommended in the IEP (id. at p. 2; see Parent Ex. H). The language of the parent's June 2023 letter 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 (without any specificity as to why), or was complaining that the educational placement set forth in the IEP was inadequate (Parent Ex. H). This is not sufficient to put the district on notice that it would be

[5] During the impartial hearing, the district's attorney indicated at the first opportunity that he would not consent to an expansion of the scope of the hearing beyond what was stated in the due process complaint notice (Tr. p. 31).

called upon to prove that it sent a school location letter or that the assigned school was capable of implementing the IEP.[6]

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]).

Originally, the district indicated it intended to prove, through a witness from the assigned public school, that the district had assigned the student to attend a particular public school and that such school could implement the IEP (Tr. pp. 30, 43); however, the district did not ultimately call the witness from the public school. While the district's witness, who was the district representative at the CSE meeting (see Parent Ex. B at p. 24), testified that the prior written notice and school

[6] Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F., 2016 WL 3981370, at *13; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

location letter were generated and sent to the parent, this testimony was in response to questions concerning the content of the IEP and the documents the district relied on in creating the IEP (Tr. pp. 127-42). It does not appear, however, that the district opened the door district during direct questioning of a district witness at the impartial hearing for the purpose of defending against a claim relating to notice of an assigned school location.

Thereafter, the parent presented testimony by affidavit, which included a statement with language identical to that discussed above, namely that she sent the June 2023 letter advising the district that it had not provided the student "with a proper or adequate educational and school placement for the upcoming extended twelve-month 2022-2023 school year" (Parent Ex. J at ¶ 3; see Parent Exs. A at p. 2; H). In response to the affidavit testimony, there was a discussion on the record about whether the language in the parent's affidavit was a statement that the parent had not received a school location letter, in which case the district requested the opportunity to present rebuttal evidence on such issue but also questioned whether such a claim had been raised in the due process complaint notice (Tr. pp. 233-38). Ultimately, the IHO addressed the question, finding that the district's documentary evidence controverted any claim by the parent that she did not receive notice of an assigned public school site (see IHO Decision at p. 17).

Based on the foregoing, even if the question of the district's provision of a notice of assigned school was an issue within the scope of the impartial hearing and that the parent denied receiving the notice, the district presented evidence that such notice was mailed and the office procedures followed in the regular course of business pursuant to which the notices were mailed (see Parent Ex. J at ¶ 3; see also Tr. pp. 127-28; Dist. Exs. 3, 4). Thus, the district has no further obligation to prove that it provided the parent the documents as the documents and testimony in the record are enough to establish a presumption that those documents were mailed to the parent (Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829-30 [1978]; see V.A. v. City of New York, 2022 WL 1469394, at *6 [E.D.N.Y. May 10, 2022]). The parent's argument that the district needed to do more to prove it sent the required documentation is without merit.

B. March 30, 2022 IEP

The parent argues that the IHO erred in finding that the district offered the student a FAPE for the 2022-23 school year. The district argues that the SRO should affirm the IHO's correct finding that the district offered the student a FAPE.

The March 2022 CSE recommended a 10-month program in a 12:1+1 special class for math, ELA, social studies, and science and related services of one 40-minute session per week of individual counseling, one 40-minute session per week of counseling in a group, one 40-minute session per week of individual OT, two 40-minute sessions per week of individual speech-language therapy, and one 40-minute session per week of speech-language therapy in a group (Parent Ex. B at pp. 16-18, 22-23; Dist. Ex. 3 at pp. 1-2). In addition, the CSE recommended for the student a full-time behavioral support paraprofessional, a BIP, and identified strategies and resources to address the student's management needs that included additional time when learning new concepts, manipulatives/math tools, audio text, preferential seating, immediate feedback, extended response time, graphic organizers, checklists, repetition/redirection, and opportunities for hands-on learning (Parent Ex. B at pp. 4, 18, 23; Dist. Ex. 3 at pp. 1-2).

Notably, the September 30, 2022 due process complaint notice describes the programming the parent felt was appropriate for the student as a "a full time Special Education Program of up to 12 students, one, teacher, and one assistant" in a class that offers "individualized support, modified and simplified instruction and direction, repetition, review, modeling, prompting, a behavior plan, social skills instruction, counseling services, occupational therapy and speech language therapy for the extended twelve-month 2022-23 school year" (Parent Ex. A at p. 2). With the exception of extended school year services, the March 2022 IEP includes the programming described by the parent (compare Parent Ex. A at p. 2, with Parent Ex. B at pp. 4, 16-18, 22-23). 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).

Turning to the parent's assertion on appeal that the March 2022 IEP failed to provide a full-time 12-month extended school year, 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).

The district argues that there is no support in the hearing record that the student was likely to suffer from substantial regression should he not be provided with summer services.

The March 2022 CSE had available a student information packet from Ziv Hatorah which included an August 2021 Functional Behavioral Analysis (FBA), a September 2021 treatment plan, a then-current assessment of adaptive behavior, a September 2021 BIP, a first marking period first grade report card, an October 2021 teacher's progress report, a November 2021 speech progress report, and a November 2021 OT progress report (Dist. Ex. 5 at pp. 1-41). The reports identified the student's maladaptive behaviors (physical aggression, tantrums, destruction of possessions, non-compliance) and expressive and receptive communication delays, and noted his attention deficits, distractibility, and impulsivity (id. at pp. 2-26). The student's first grade report card and progress reports identified the student's difficulty with math word problems, blending letters to form words, distinguishing between long and short vowel sounds in words, providing support from the text for a claim, written expression, turn taking, pragmatics, articulation, phonology, processing information, social skills, letter formation, and his need for assistance in attending and focusing, redirection and prompting, and reminders for proper behavior (id. at pp. 27-41). However, the reports do not include documentation that the student required reteaching due to his difficulty retaining learned material or of his inability to maintain developmental levels

due to a loss of skill or knowledge (see id. at pp. 1-41). Further, the documents before the March 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 March 2022 IEP did not provide for 12-month extended school year services (see Parent Ex. B at pp. 16-18). Consistent with the documents considered, the present levels of performance of the student's March 2022 IEP detailed a number of supports and strategies to address the student's management needs but did not include any need for reteaching due to lost learning or regression (id. at p. 4). The district social worker testified that, in order for a 12-month program to be recommended, the school would have to present clear evidence of regression and demonstrate why interruption of services would be detrimental to the student's development (Tr. p. 126). The district social worker's testimony in this regard in overly broad in that it is the district's, not the private school's, obligation to ensure that the student is appropriately assessed in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii). Nevertheless, the information before the CSE did not include anything that would have triggered the district to seek out evidence of regression. On this point, the social worker also testified that she did not believe there was any evidence of regression presented with respect to the student's year and that the parent said that "the speech had improved" and that the student liked the school and had friends there (Tr. p. 126; see Parent Ex. B at p. 2; Dist. Ex. 5 at p. 39).

The Ziv Hatorah supervisor testified that the student required a 12-month program, that was "comprehensive in style and nature, [and] consistent in order to prevent regression" (Tr. p. 170). Nowhere else in her testimony does she speak to the student's need for re-teaching due to learning loss or reference any regression concerns (see Tr. pp. 151-79, 188-90, 214-17). Thus, while the program supervisor opined that the student would regress absent a 12-month program, such a general statement does not establish that the student's loss of skill or knowledge over the summer months would be so severe as to require an inordinate period of review at the start of the new school year. Moreover, the supervisor's 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. Accordingly, upon an independent review of the hearing record, I find no reason to disturb the IHO's finding that the hearing record lacked evidence that the student would experience substantial regression such that he would require an extended school year program.

Based on the foregoing, the March 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 and testimony provided a cogent and responsive explanation for its recommendations set forth in the March 2022 IEP, and that the district satisfied its burden to demonstrate that it offered the student a FAPE for the 2022-23 school year. 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 Ziv Hatorah was an appropriate unilateral placement for the 2022-23 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**
July 12, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER