



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-280

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 Ezra Zonana, 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 denied her request that respondent (the district) fund the costs of her son's privately provided special education itinerant teacher (SEIT) services and related services delivered by Yeled v'Yalda ECC (Yeled) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has received a diagnosis which indicated that he was below average size, resulting in low muscle tone and exhibited cognitive, social/emotional and language delays (Dist. Ex. 5 at p. 1). On August 10, 2022, a Committee on Preschool Special Education (CPSE) convened to develop an IEP and recommended that the student receive nine 60-minute sessions per week of direct SEIT services in a group (2:1); one 30-minute session per week of indirect SEIT services; two 30-minute sessions per week of speech-language therapy in a group (2:1); two 30-minute sessions per week of occupational therapy (OT) in a group (2:1); two 30-minute sessions per week of physical therapy (PT) in a group (2:1); and a 1:1 health paraprofessional (Parent Ex. B at pp. 1, 14). The student attended a private preschool program during the 2022-23 school year (Dist. Ex. 1 at p. 1).

The CSE convened on May 17, 2023, determined the student was eligible for school-age special education as a student with an orthopedic impairment, and developed the student's IEP for the 2023-24 school year to be implemented beginning September 2023 (see generally Dist. Ex. 1).¹ The May 2023 CSE recommended that the student receive five periods per week of integrated co-teaching (ICT) services each for math, English language arts (ELA), social studies, and sciences in the general education classroom (*id.* at p. 19). The CSE also recommended related services including two 30-minute sessions per week of group counseling services, two 30-minute sessions per week of group OT, two 30-minute sessions per week of individual PT, and two 30-minute sessions per week of group speech-language therapy (*id.* at p. 20). Additionally, the CSE recommended individual paraprofessional services for health, activities of daily living (ADL), toileting, and spinal compression (*id.*).

The district sent the parent a prior written notice dated May 19, 2023 that summarized the May 2023 CSE's recommendations (Dist. Ex. 2). By letter dated June 15, 2023, the district notified the parent of the public school site the student was assigned to attend for the 2023-24 school year (Dist. Ex. 9). The parent disagreed with the recommendations contained in the May 2023 IEP and, as a result, in a letter dated September 6, 2023, notified the district of her intent to unilaterally place the student at a nonpublic school and seek reimbursement or direct payment from the district for the student's special education program and related services (see Parent Ex. C). The student attended a nonpublic school during the 2023-24 school year and Yeled delivered the student's special education services (Parent Ex. H at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated March 14, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). Specifically, the parent asserted that the May 2023 CSE failed to recommend an appropriate placement for the student, as he needed the individualized support provided by a SEIT program and the May 2023 CSE's ICT recommendation would not provide the student with the special education he needed in order to make meaningful progress (*id.* at pp. 2, 3). The parent further argued that the student needed a 12-month program in order to avoid regression, and that the May 2023 CSE inappropriately recommended a ten-month program (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 8, 2024 (Tr. pp. 14-59).² In a decision dated May 28, 2024, the IHO found that the May 2023 IEP offered the student a FAPE for the 2023-24 school year (IHO Decision at p. 9). The IHO declined to make a finding regarding the parent's claim that the student required services on a 12-month basis, determining that the student received services during summer 2023 through his August 2022 CPSE IEP and that the issue of whether the student required 12-month services during the 2024-25 school year was not ripe (*id.* at p. 8). The IHO stated that the May 2023 CSE's

¹ The student's eligibility for special education as a student with an orthopedic impairment is not in dispute (see 34 CFR 300.8[c][8]; 8 NYCRR 200.1[zz][9]).

² A prehearing conference was held on April 17, 2024 (Tr. pp. 1-13).

recommendation for ICT services, along with 1:1 health paraprofessional services, was appropriate to meet the student's unique needs (id. at p. 7). The IHO held that the parent's argument that the district failed to provide the parent with a timely school location letter was not in the parent's due process complaint and that the district did not open the door to that line of inquiry, therefore, it was outside of the scope of the hearing (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in holding that the May 2023 IEP offered the student a FAPE for the 2023-24 school year, due to the removal of 12-month and SEIT services.³ The parent also argues that the district's failure to produce a witness in defense of its May 2023 IEP should preclude the district from meeting its burden of proof under the Burlington-Carter analysis. Further, the parent alleges that the IHO erred by determining the parent had the burden to show the lack of a school location letter from the district, and the parent asserts it is the district's burden to prove that the parent received one. Additionally, the parent asserts that the services provided by Yeled were specifically tailored to meet the student's needs. The parent requests that the IHO's decision be reversed and that the district be ordered to directly fund the student's SETSS, speech-language therapy, OT and PT.

In an answer, the district argues that the IHO correctly determined that the district provided the student with a FAPE for the 2023-24 school year. The district further argues that there is no merit to the parent's claim that the district failed to provide the parent with a school location letter and that the IHO correctly determined that such issue was outside the scope of review. The district requests that the IHO's decision be affirmed.

The parent responds to the district's answer in a reply.⁴

³ The parent submitted her request for review pro-se; however, the parent was represented by counsel throughout the impartial hearing (see Parent Ex. A; Tr. pp. 1, 14). The parent's attorney who filed the due process complaint notice signed the parent's notice of intention to seek review dated June 18, 2024 (SRO Ex. 1). Although the parent's attorney asserted that his representation of the parent was discontinued after filing the notice of intention to seek review, it is notable that on August 6, 2024, the parent's attorney's office filed a letter signed by the parent's attorney requesting an extension of time to respond to the district's answer and asserting that the attorney's office was representing the parent (SRO Ex. 2). The Office of State Review responded by letter dated August 8, 2024, which explained that practice regulations require that if an attorney is representing a party then "[a]ll pleadings and papers submitted to a State Review Officer in connection with an appeal must be endorsed with the name, mailing address, and telephone number of the party's attorney (8 NYCRR 279.7[a])" (SRO Ex. 3). The Office of State Review notified the parent's attorney's office that if they were appearing on behalf of the parent, they were to disclose whether they participated with the client in preparing her request for review, and if yes, sign and refile it (id.). The parent's attorney replied via a letter dated August 8, 2024, that they "do not represent the [parent] in connection with any Request for Review nor have [they]" and that the law office's submission of an extension request on behalf of the parent was "inadvertently submitted... as a courtesy" (SRO Ex. 4).

⁴ Although the parent prepared, served, and filed a reply to the district's answer in this case, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

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]).⁵

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).

⁵ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion

A. Scope of Impartial Hearing

At the outset, the parent argues on appeal that the IHO erred by declining to consider the parent's claim that the district failed to send her a school location letter prior to the start of the school year. The IHO found that the due process complaint notice did not make that allegation, nor did the parent's letter rejecting the May 2023 IEP or her affidavit make such a claim (IHO Decision at p. 8). Additionally, the IHO found that the district did not "open the door" to this issue, and the district entering the school location letter into evidence was "merely background information based on the claims" raised in the due process complaint notice (id.). The IHO also held that the parent "knew or should have known" about the lack of receipt of the school location letter when she filed her due process complaint (id.).

Review of the parent's due process complaint notice shows that the IHO correctly found that this claim was not raised and therefore, was outside the scope of the hearing (IHO Decision at p. 8; see Parent Ex. A).⁶ 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]).

The hearing record contains a school location letter dated June 15, 2023, which identified the specific public school site the district assigned the student to attend for the 2023-24 school year to receive his special education programming (see Dist. Ex. 2). The parent argues on appeal that the district's proffer of the school location letter into evidence "opened the door to questions on it." 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-

⁶ The IHO correctly noted that the parent's notice to the district rejecting the May 2023 IEP and her affidavit testimony also did not raise the issue of the district's failure to notify the parent of the assigned school site (IHO Decision at p. 8; see Parent Exs. C; J).

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]]. Here, the evidence supports the IHO's determination that the parent's allegation that the district failed to send her an assigned school location prior to the beginning of the school year was not properly raised. In any event, contrary to the parent's assertion on appeal, issues about the assigned school site are not relevant to whether the May 2023 IEP offered the student a FAPE, which is discussed below.⁷

B. May 2023 IEP

Next, the parent asserts on appeal that the IHO erred in finding that the district met its burden to show that the May 2023 IEP offered the student a FAPE, because the district did not call any witnesses who personally knew the student to testify about the recommended programming, and because the CSE "removed the summer support" as well as the nine hours per week of SEIT "individualized support" the student required. As discussed below, in this instance witness testimony was not required to support the IHO's finding that the May 2023 IEP offered the student a FAPE.

1. The Student's Needs

While not in dispute, a discussion of the student's special education needs provides context for the issue on appeal, namely whether the May 2023 IEP appropriately addressed those needs and was reasonably calculated to enable the student to receive educational benefit. The May 2023 IEP indicated that at that time, the student was attending a nonpublic preschool and receiving SEIT, PT, and 1:1 health paraprofessional services (Dist. Ex. 1 at p. 1). According to the May 2023 IEP, the student was authorized for but did not receive speech-language therapy and OT services (*id.*). The May 2023 IEP noted the student's disposition was best described as generally happy and his preferred learning style appeared to be kinesthetic/tactile (*id.*).

With regard to the student's cognitive skills, on April 26, 2021 a psychologist administered the Stanford-Binet Intelligence Scales, Fifth Edition to the student, and in conjunction with observation and clinical opinion, concluded that the student displayed low average skills in the nonverbal and verbal domains (Dist. Ex. 1 at p. 1). The May 2023 IEP indicated the student could match basic shapes and tell what to do in simple situations such as if one was tired or hungry, but he struggled with telling the order of his day or recounting his daily activities (*id.*). The student had difficulty categorizing and sorting objects, struggled to remember the daily schedule and sustain attention, and had difficulty with opposite concepts and recognizing patterns (*id.*).

⁷ The parent alleges that the district failed to establish that the program offered to the student was appropriate in part due to the failure to provide her with a school location letter, as "[t]here was no program provided to [her]." However, the parent attended the May 2023 CSE meeting at which the student's special education programming was recommended, the district issued prior written notice notifying the parent of that programming, and the parent rejected the May 2023 IEP at the start of the 2023-24 school year (see Parent Ex. C; Dist. Exs. 1 at pp. 1, 19-20, 27; 2).

Additionally, the student had trouble understanding the function of objects and benefited from visual schedules to assist him in determining what was next and what he could use (id.). At the May 2023 CSE meeting, the student's teacher shared that the student had difficulty comprehending instructions in class, could become distracted in class, and provided responses that were opposite of what was being asked (id.). The teacher also reported that the student struggled with concepts such as more, alike/different, and relative positions such as near and far away (id. at p. 2).

Academically, the May 2023 IEP indicated the student's functional/instructional levels were at the pre-kindergarten level for both reading and math (Dist. Ex. 1 at p. 25). According to the IEP, the student had delayed reading readiness and phonemic awareness skills, he could not predict or tell the end of a story, and he had difficulty rhyming words and isolating initial sounds of words (id. at p. 2). In the area of math readiness skills, the student made progress with rote counting, in that he was able to rote count up to ten, but he struggled to count with one-to-one correspondence past three (id.). The student identified heavy and light-weight objects, but had difficulty arranging objects from biggest to smallest (id.). His ability to follow three-step patterns was emerging (id.).

Socially, the May 2023 IEP indicated that the student enjoyed socializing with peers but would often play by himself and not join the group (Dist. Ex. 1 at p. 3). He had difficulty advocating for himself and having a reciprocal conversation (id.). The student demonstrated deficits with trying new activities, sharing toys, and participating in turn taking (id.). At the May 2023 CSE meeting, the student's teacher shared that the student had difficulty relating to peers and initiating friendships (id.). He was observed by the teacher to reach out and touch peers' heads when wanting to interact instead of verbally asking to play (id.). With regard to speech-language skills, the student had difficulty retelling the story when looking at the picture book and generally spoke in short sentences (id. at p. 2). According to the May 2023 IEP, the student struggled to answer WH-questions and retell past events (id.). He also demonstrated challenges with social language, such as participating in a reciprocal conversation, as well as using appropriate language to request something (id.).

With regard to the student's physical development, the May 2023 IEP indicated that his prewriting skills were deficient, limiting his ability to color within the lines of a picture and draw circles and lines, and he was unable to cut using scissors without significant guidance (Dist. Ex. 1 at p. 4). Based on OT progress reports, the student presented with attention span/task completion, visual motor/perception, postural control, strength/endurance, and fine motor deficits, and sensory processing delays (id.). Specifically, the student demonstrated decreased hand strength, which impacted his ability to complete tasks, and with in-hand manipulation skills (id.). He exhibited difficulty utilizing/maintaining appropriate pressure on writing utensils and frequently used decreased pressure on crayons while coloring (id.). The May 2023 IEP reflected concerns in the area of the student's ADL skills, including dressing and using the bathroom independently (id. at p. 2). The student needed a provider to help when needed and use positive reinforcement techniques to encourage the student to complete the ADL tasks he could do on his own (id.). Regarding gross motor skills, the May 2023 IEP further noted that the student demonstrated decreased balance and required support/assistance to remain upright on elevated/unsteady surfaces

during tasks (*id.* at p. 5). He had limited postural control and strength, tired easily, and often required breaks from sitting upright or participating in tasks requiring increased effort during therapy sessions (*id.*). Additionally, the student required constant supervision due to an increased risk of spinal compression and limited mobility (*id.*).

2. Integrated Co-Teaching Services

The parent argues that the district's ICT services recommendation removed the "individualized support [the student] needed in the form of 9 hours of SEIT services" per week.⁸ The district asserts that ICT services would provide the student with special education support "in math, ELA, social studies and science twenty times per week." 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]).

The May 2023 IEP reflects that during the CSE meeting the parent "shared that she would like [the student] to be in a class that [wa]s not exclusively composed of students with IEP[s] as it [wa]s beneficial for him to be with typically developing peers," and that the "[least restrictive environment (LRE)] was discussed and it was decided that ICT with related services [wa]s the least restrictive environment for [the student]" (Dist. Ex. 1 at p. 3). The May 2023 IEP further reported that the parent commented that the student had done "well with the 1:1 S[EI]T support in preschool" (*id.*).⁹ In an affidavit, the parent testified that she "believe[d] that with the appropriate support services, [the student] c[ould] succeed in a mainstream classroom setting" (Parent Ex. J ¶ 5).

As stated previously, the May 2023 CSE recommended that the student receive five periods per week of ICT services in each academic subject, and the support of related services including group counseling, group OT, individual PT, and group speech-language therapy services (Dist. Ex. 1 at pp. 19-20). As additional support, the CSE recommended strategies to address the student's management needs and full time individual paraprofessional services to address the student's ADL, toileting, and spinal compression needs (*id.* at p. 20).

⁸ 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-services-preschool-children-disabilities>).

⁹ I note that the August 2022 CPSE IEP recommended that the student's SEIT services be delivered in a group of two (Parent Ex. B at p. 13).

The IHO identified the parent's challenge to the ICT services recommendation as a claim that the student "required more individualized instruction than could be offered in an ICT setting" (IHO Decision at p. 5). In the decision, the IHO reviewed the student's May 2023 IEP present levels of performance and annual goals and determined that there was "no impediment to an ICT program implementing the three academic goals developed for the student by the CSE" (*id.* at pp. 4, 7; *see* Dist. Ex. 1 at pp. 8-18). The IHO held that the May 2023 CSE "did not 'reduce' the [s]tudent's services by switching its recommendation from a general education class with SEIT services to an ICT class because ICT services 'provide[] the student with small group special education support for the entire time the student received instruction in ELA and math'" (IHO Decision at p. 6).

Review of the hearing record supports the IHO's finding that the recommendation for ICT services to be delivered to the student each day in math, ELA, social studies, and science provided him with access to a special education teacher in a small group for 20 periods per week in a general education setting—in conjunction with related and 1:1 paraprofessional services—was appropriate and met the parent's preference for the student to be educated with typical peers (*see* Dist. Ex. 1 at pp. 3, 19). The ICT services recommendation provided more frequent special education teacher instruction than the nine hours of SEIT services the student received as indicated in the parent's testimony by affidavit (*compare* Parent Ex. J ¶ 10, *with* Dist. Ex. 1 at p. 19).

Regarding the parent's claim that the IHO erred in finding that the May 2023 IEP was appropriate despite the lack of a recommendation for 12-month services, the IHO correctly found that students, including the student in this matter, receive services through the CPSE during the summer preceding the transition to CSE 10-month services in September (IHO Decision at p. 8). In relevant part, State law dictates that a "child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school pursuant to section [3202] of this chapter" (Educ. Law § 4410[1][i]). The student in this case turned five years old in June 2023; as a result, the student remained eligible to receive special education services under the CPSE through August 2023 (*see* Parent Ex. J ¶ 1). As such, the student's August 2022 CPSE IEP, which recommended that he receive 12-month services, remained in effect during summer 2023 (Parent Ex. B at p. 13-14). The IHO also correctly determined that the student's CSE annual review was not due until May 2024, and therefore, it would have been premature for the May 2023 CSE to determine whether the student would be eligible for extended school year programming in summer 2024 (IHO Decision at p. 8; Dist. Ex. 1 at p. 1).

In consideration of all of the above, the evidence in the hearing record supports the IHO's finding that the district offered the student a FAPE for the 2023-24 school year.

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.

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
August 30, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**