



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-131

Application of the XXXXXXXX for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Stroock & Stroock & Lavan, LLP, attorneys for respondent, Kerry T. Cooperman, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for a portion of their son's tuition costs at the Seton Foundation for Learning (Seton) for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the

opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[i]).

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

At the time of the impartial hearing, the student was seven years old and eligible for special education programs and related services as a student with autism (Tr. p. 228; Parent Ex. C at p. 1).^{1 2} The hearing record reflects that the student has received a diagnosis of a pervasive

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

developmental disorder (PDD) (Tr. p. 229; Parent Ex. T at p. 7). The student is reported to exhibit: "significant receptive, expressive, and pragmatic language delays;" deficits with auditory comprehension and expressive language; deficits with sensory processing skills and fine and gross motor skills; non-compliant behaviors, as well as difficulties with attention and socialization (Parent Ex. T at pp. 3-4, 6-8). The student initially attended Seton's preschool program, and he has continuously attended Seton's school-age program since that time (see Tr. pp. 169, 198, 286-87).

On May 27, 2011, the CSE convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (see Parent Ex. C at pp. 1-2). The CSE recommended a 12-month school year program consisting of, among other things, a 6:1+1 special class in a specialized school with the support of a full-time 1:1 behavior management paraprofessional and related services consisting of group counseling, individual and group occupational therapy (OT), individual physical therapy (PT), and individual speech-language therapy (id. at pp. 1, 21).

By final notice of recommendation (FNR) dated June 4, 2011, the district summarized the recommendations made by the May 2011 CSE and notified the parents of the particular public school site to which it had assigned the student (see Parent Ex. K).

By letter dated June 10, 2011, the student's mother notified the district of her intention to unilaterally place the student at Seton for July and August 2011 and requested that the district provide him with the transportation services and related services recommended in the student's May 2011 IEP (see Parent Ex. U). On June 16, 2011, the mother visited the public school identified in the FNR (see Parent Ex. L at p. 1). On June 24, 2011, the district telephoned the mother, who indicated that she had not "decided yet if she want[ed] [the public school site] for Sept[ember]" (Parent Ex. U; see Tr. pp. 267-68).

By letter dated June 27, 2011, the mother advised the district that, based upon her visit and observations, she found that the assigned school was not appropriate because: it was not the student's least restrictive environment (LRE); related services were provided in the hallways or as "push-in" services in the classroom; and the "crowded classrooms [and] hallways would distract [the student], exacerbate his anxiety, and create an unreasonable risk to his physical safety" (Parent Ex. L at pp. 1-2). As a result, the student's mother informed the district that she intended to place the student at Seton for the 2011-12 school year at public expense and sought transportation and related services from the district (id. at pp. 2-3). The Commissioner of Education has not approved Seton as a school with which school districts may contract to instruct school-age students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² There are a number of duplicate exhibits in the hearing record. The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5 [j][3][xii][b]). I also remind the IHO of his obligation to exclude from the hearing record what he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5 [j][3][xii][c]). Where exhibits are duplicated, I have cited to the corresponding parent exhibit.

On July 1, 2011, the student's mother executed a tuition agreement with Seton for the student's attendance during the 2011-12 school year in a 12-month elementary school program (see Parent Ex. E). The student began attending Seton in July 2011 for the summer session (see Tr. pp. 274-75, 285, 287-88, 405; Parent Ex. E).

A. Due Process Complaint Notice

In an amended due process complaint notice dated August 23, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year because assigned public school site was not appropriate to meet his needs (see Parent Ex. B at pp. 2-3).³ Specifically, the parents alleged that the assigned school was not appropriate because the administrator could not "assure her that there would be a space for [the student]" in the fall; the assigned school provided OT, PT, and speech-language therapy services as either "push-in" services in the classroom or in the hallways and the student's IEP indicated that he required the provision of related services in a separate location; the classroom observed by the student's mother was "small and overcrowded with push-in therapists and paraprofessionals;" and, as a one-story school building, the assigned school could not provide the student with "stairs training" (id.).

With respect to the student's unilateral placement at Seton, the parents alleged that it was appropriate to meet the student's needs because: he received his related services in a separate location and "almost never" received related services in the "hallways;" the curriculum was specifically tailored to the student's individualized needs; Seton's three-story building allowed the student to "practice climbing and descending staircases at least five times per day;" and the student had the "benefit" of interacting with nondisabled peers located on the "same campus as Seton's elementary school" (Parent Ex. B at pp. 3-4). Next, the parents alleged that equitable considerations weighed in their favor and sought an order from an IHO directing the district to fund the student's tuition costs at Seton for the 2011-12 school year (id. at pp. 2, 4).

B. Impartial Hearing Officer Decision

On November 9, 2011, the parties proceeded to an impartial hearing, which concluded on February 28, 2012, after five days of testimony (see Tr. pp. 1-526). By decision dated May 16, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year "based upon the failure to secure an appropriate placement" (see IHO Decision at pp.

³ By the original due process complaint notice, dated July 1, 2011, the parents alleged that the district's unilateral revocation of the student's related services for summer 2011 "egregiously contravene[d]" the previous IHO decision, dated May 9, 2011 (Parent Ex. A at pp. 1-2; see IHO Ex. I at pp. 1-9). As a result, the parents requested an impartial hearing based upon the district's "violations" of the May 2011 IHO decision, and further requested that the "case be referred" to the previous IHO for adjudication (Parent Ex. A at p. 1). As relief, the parents sought the provision of the student's related services in the May 27, 2011 IEP during summer 2011 and payment of their attorney's costs and fees (id. at p. 2). The student's mother testified at the impartial hearing that the student began receiving these related services pursuant to pendency during summer 2011 (see Tr. pp. 270-71; see also Tr. pp. 9-10; Dist. Ex. 9 at pp. 1-12). Accordingly, aside from the parents' request for payment of their attorney's costs and fees, the parties resolved all of the "violations" of the May 2011 IHO decision alleged by the parents in the July 1, 2011 due process complaint notice (see Tr. pp. 9-10). The issues addressed in this decision stem from the amended due process complaint, not the original complaint, because the IHO permitted the parents to submit an amended due process complaint notice (see Parent Ex. O at pp. 1-2).

6-8). Initially, the IHO indicated that he was "constrained from addressing" claims raised by the parents about the annual goals in the May 2011 IEP because the parents had not raised the claims in their due process complaint notice (id. at p. 6). The IHO also noted that while "numerous procedural violations raised by the parent appear[ed] meritorious," the violations did not render the IEP inadequate or rise to the level of a denial of a FAPE and, upon "close inspection," the IEP offered the student an "appropriate program" (id. at pp. 6-7).

Consequently, the IHO predicated his conclusion that the district failed to offer the student a FAPE on the "inappropriate placement itself" (IHO Decision at pp. 6-8). After noting the testimony provided by the student's mother and his teacher at Seton regarding the assigned school, and the mother's expression of her concerns about the assigned school in a letter to the district, the IHO determined that the district's failure to reconvene a CSE meeting to address the mother's concerns denied the student a FAPE (id. at pp. 7-8).

Turning to the parents' unilateral placement of the student at Seton, the IHO indicated that the evidence supported a finding that it was appropriate to meet the student's needs (see IHO Decision at pp. 8-9). The IHO noted that: the student made progress at Seton, both academically and socially; he received his related services in separate rooms and not in hallways or in classrooms; the student practiced using the stairs at Seton four times per day; and he had the opportunity to interact with his nondisabled peers who attended a different school on the Seton campus and also during field trips (id. at p. 9).

With respect to equitable considerations, the IHO determined that although the mother provided timely notice to the district of her intention to unilaterally place the student at Seton for the 2011-12 school year, the "tuition contract" she executed with Seton was "illusory in that the obligation of the parent . . . [was] inconsistent with the payments actually made" (IHO Decision at pp. 9-10). In addition, the IHO found that the Seton tuition was "inflated" since Seton did not provide any related services to the student (id. at p. 10). Consequently, the IHO ordered the district to pay 70 percent of the costs of the student's tuition at Seton for the 2011-12 school year (id.).

IV. Appeal for State-Level Review

The district appeals, arguing, among other things: that the district offered the student a FAPE for the 2011-12 school year; that Seton was not an appropriate placement for the student for the 2011-12 school year; and that equitable considerations favor the district and preclude granting the parent's request for relief. Specifically, the district argues that the question of whether the assigned public school site would have been able to implement the student's 2011-12 IEP was speculative given that the student did not attend the assigned school. However, the district asserts that, had the student attended the public school site, it would have been appropriate for him. In addition, the district argues that the IHO erred in concluding that the district failed to offer the student a FAPE because it did not reconvene a CSE meeting to address the mother's concerns about the assigned public school after she rejected it.

The district also contends that Seton was not appropriate for the student because it did not provide a 1:1 paraprofessional and the provision of counseling, OT, PT, and speech-language

therapy during the 2011-12 school year, as required by the student's May 2011 IEP; relying, instead, on the district's provision of such services. The district also argues that equitable considerations preclude granting the parents' request for relief because the parents never intended to enroll the student in a public school placement. In addition, the district argues that, although the student's mother provided a 10-day notice to the district of her intention to unilaterally place the student at Seton for the 2011-12 school year, she objected only to the assigned public school site and did not specify any objections to the student's May 2011 IEP. Finally, the district asserts that, in addition to the IHO's findings about the "illusory" nature of the mother's tuition agreement with Seton and Seton's "inflated" tuition costs, the parents failed to present sufficient evidence to establish that they were legally obligated to pay the full cost of the student's tuition. Thus, based upon the foregoing, the district seeks reversal of the IHO's decision in its entirety.

The parents answer the district's petition, countering, among other things: that the district failed to offer the student a FAPE for the 2011-12 school year; that Seton was an appropriate placement for the student for the 2011-12 school year; and that equitable considerations favor the parents' request for relief. Initially, the parents generally assert that the petition "ignores the totality of circumstances" of the student's education, "fails to dispute the key facts in this case, and mischaracterizes the law." The parents argue that the petition fails to offer sufficient evidence to challenge the IHO's decision that the district failed to offer the student a FAPE. In particular, the parents note that: the district failed to produce evidence that a second grade classroom existed at the assigned public school; the evidence revealed that the assigned school could not meet the student's "academic, related-service, and safety needs;" and the CSE "generated an IEP riddled with errors and inappropriate goals."

Next, the parents indicate that, contrary to the district's argument and legal authority, Seton need not "sign the paychecks" of the student's related services providers in order for the IHO to properly conclude that Seton was appropriate to meet the student's needs. According to the parents, the evidence in this case revealed that Seton "custom-tailor[ed]" the student's instruction, provided "extensive extra-academic and life-skills programs," offered the student opportunities to interact with nondisabled peers, and enabled the student to receive his related services and to make progress.

The parents also assert that equitable considerations weigh in their favor because the mother cooperated with the district, responded promptly to correspondence, participated in CSE meetings, visited the assigned school, timely notified the district that the assigned school was not appropriate, and participated in the impartial hearing process. Finally, in a paragraph titled "Counter-statement of the Case," the parents deny any and all remaining assertions in the petition (paragraphs 26 through 49), and refer the SRO to the accompanying memorandum of law for a "counter-statement of facts" to support their legal argument seeking to dismiss the petition.

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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In this case, the following conclusions of the IHO were adverse to the parents: that the parents' claim about the annual goals in the May 2011 IEP could not be considered due to the parents' failure to raise the issue in the due process complaint notice; that the "procedural violations" did not render the IEP inadequate or rise to the level of a denial of a FAPE and the May 2011 IEP offered the student an appropriate program;⁴ that the tuition contract with Seton was illusory and induced the inference that the tuition was inflated; and that the tuition award to the parents should be reduced by thirty percent (IHO Decision at pp. 5-7, 10). Although the IHO granted the parents some of the relief they requested, the IHO rendered findings that were adverse to the parents that they elected not to cross-appeal, and, therefore, such issues are not properly before me for review. Notably, this leaves no issues remaining regarding the adequacy of the student's IEP to be determined at this stage of the proceedings.

A party who fails to obtain a favorable ruling with respect to an issue decided by an IHO is bound by that ruling unless a party asserts an appeal or a cross-appeal (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 [S.D.N.Y. Nov. 27, 2012] [finding that "parties contesting the validity of an IEP may cross-appeal an IHO's adverse particular findings even if they obtained all of their requested relief"]; see also Parochial Bus. Sys., Inc. v. Bd. of Educ., 60

⁴ Although not raised by either party, the IHO exceeded his jurisdiction in considering—and in making findings—with respect to the "numerous procedural violations" raised by the parents that were not asserted in the initial or the amended due process complaint notices, not included as additional issues to address at the impartial hearing through an agreement by the district to expand the scope of the impartial hearing, or not otherwise introduced by the district "opening the door" in accord with M.H., 685 F.3d at 250-51 (compare Parent Ex. A at pp. 1-2, and Parent Ex. B at pp. 1-4, with IHO Decision at pp. 5-7). It is altogether unclear why the IHO chose to render findings on these unidentified "numerous procedural violations" since he concluded that he could not address any issues regarding the annual goals in the student's 2011-12 IEP because those issues were not raised by the parents in the initial or the amended due process complaint notices (IHO Decision at p. 6).

N.Y.2d 539, 545-47 [1983]).⁵ While the IDEA provides that "any party aggrieved by the findings and decision" of an IHO may pursue an appeal to the SRO (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]), State regulations provide that a respondent may seek review of "all or a portion" of an IHO's decision by asserting a cross-appeal in the answer (8 NYCRR 279.4[b]). Prior SRO decisions have determined that State regulations preclude a respondent from raising additional issues in an answer without a cross-appeal, explaining that to do otherwise would deprive the petitioner of the opportunity to file responsive papers on the merits because State regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6; see Application of the Dep't of Educ., Appeal No. 12-086; Application of the Dep't of Educ., Appeal No. 12-079; Application of the Dep't of Educ., Appeal No. 12-067; Application of the Dep't of Educ., Appeal No. 12-055; Application of the Dep't of Educ., Appeal No. 12-035; Application of the Dep't of Educ., Appeal No. 12-034; Application of the Dep't of Educ., Appeal No. 12-030; Application of the Dep't of Educ., Appeal No. 11-156; Application of the Dep't of Educ., Appeal No. 11-118; Application of the Bd. of Educ., Appeal No. 11-072; Application of the Dep't of Educ., Appeal No. 11-066; Application of the Dep't of Educ., Appeal No. 11-050).

Based upon the foregoing, I find that the parents elected not to cross-appeal any adverse finding of the IHO and thereby have waived their right to pursue those issues, and, consequently, I lack the jurisdiction to review them (see Parochial Bus. Sys., Inc., 60 N.Y.2d at 545-47; J.F., 2012 WL 5984915, at *9; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Furthermore, the parent's attorney is reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6). Thus, to the extent that the parents or their attorney have incorporated or argued additional grounds upon which to uphold the IHO's decision solely within the memorandum of law, the arguments have not been properly asserted and I decline to consider or address them, except to the extent that they relate to allegations properly set forth in the parents' answer.

B. Challenges to the Public School site

I will next turn to the parties' contentions surrounding the appropriateness of the assigned public school site. Initially, challenges to an assigned school are generally relevant to whether

⁵ While this case concerns whether a respondent must cross-appeal adverse findings rendered by an IHO, recent district court decisions have reviewed the scope of a respondent's right to cross-appeal issues that were not addressed by the IHO (J.F., 2012 WL 5984915, at *9-*10 [concluding that there was no adverse finding for the parents to cross-appeal, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *14 [S.D.N.Y. Feb. 14, 2013] [acknowledging the lack of uniformity within the district courts as whether a respondent must cross-appeal but remanding issues not addressed by the IHO]; D.N. v. New York City Dep't of Educ., 905 F.Supp.2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]).

the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[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 F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the

district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program)].⁶

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see N.K. and L.W. v. New York City Dep't of Educ., 12-cv-05038, slip opn. at *17 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because '[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'])). In view of the forgoing and under the circumstances of this case, I find that the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's May 2011 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F.3d at 186 [2d Cir. 2012]; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273) . In this case, the district developed the student's 2011-12 IEP and offered the student a timely placement.

In this case, the parents rejected the IEP and unilaterally placed the student prior to the time that the district became obligated to implement the student's IEP (see Parent Exs. E, L; U). Consequently, the district correctly argues that because the parents rejected the proposed IEP, and removed the student from the public school before the IEP was executed, district was not required to establish that the student's IEP was implemented in the proposed classroom.

However, I have reviewed the evidence in the hearing record in order to discuss what alternative findings could be made, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site. As further explained below, the evidence in the hearing record would not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation. As further described below, the evidence would nevertheless show that the 6:1+1 special class at the assigned district school was capable of providing the student with a suitable classroom environment and all of the related services mandated for the student on the April 2011 IEP, including the use of stairs to work on the relevant OT goal, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492,

⁶ The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

502 [S.D.N.Y. 2011]; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 850 F. Supp. 2d 1315, 1319 [S.D.Fla. 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

1. IEP Implementation

During the impartial hearing, the mother and the student's teacher from Seton⁷ testified that they observed classrooms at the assigned school and noted that they were crowded with children and adults, including paraprofessionals, and that activities, such as push-in therapy sessions, were taking place during class (Tr. pp. 262-63, 389). The mother expressed concern about the overcrowded and small classroom, relative to the student's distractibility (Tr. p. 263). However, the special education teacher⁸ of the assigned 6:1+1 special class⁹ testified that she would have implemented several techniques to address the student's needs related to distractibility including positive reinforcement, modeling, redirection, and verbal praise (Tr. pp. 436-437). Moreover, the May 2011 IEP mandated that the student be assigned a behavior management paraprofessional, which the mother and the Seton teacher acknowledged helped the student with his distractibility (Tr. pp. 296, 351; Parent Ex. C at p. 21). Finally, I note that, based upon the May 2011 IEP's related services mandates, the student himself would not be receiving related services in the classroom (Parent Ex. C at p. 21; see Tr. p. 100). In light of the above, I find that the hearing record does not indicate the student could not have been educated appropriately within the assigned class.

The mother and the Seton teacher also testified that they observed students receiving physical therapy in the hallways of the school (Tr. pp. 265-66; 391). The mother expressed that this practice concerned her, given the student's delays with fine and gross motor skills (Tr. p. 266). Although students ride bicycles in the hallways to promote therapy goals or assist with transitions, the special education teacher at the assigned school testified that the related service providers utilize two to three large therapy rooms to provide related services to students and that both the OT and PT rooms contain therapy equipment (Tr. pp. 447-50). The hearing record indicates that not all related services were provided in hallways and that the therapy utilizing the

⁷ According to the hearing record, the Seton teacher visited the assigned school in Spring of 2011 for the purpose of touring the school that some Seton pre-K students might attend after graduating from Seton and not for the purpose of evaluating the appropriateness of the school for the student (Tr. pp. 387, 396).

⁸ In their Answer, the parents allege that the student was in the second grade during the 2011-12 school year, whereas the special education teacher that testified at the impartial hearing stated that she taught a kindergarten/first grade program at the assigned school (see Answer at p. 2). On the contrary, however, in referencing kindergarten and first grade, it is clear that the teacher was offering testimony as to the academic or instructional grade levels of the students in the assigned class and not the chronological grade of the classroom (see Tr. pp. 425, 427-28).

⁹ According to the special education teacher, only five students actually attended the assigned class as of the beginning of the 2011-12 school year (Tr. pp. 426, 427).

bicycles was the only type of therapy provided in the hallways of the assigned school (Tr. pp. 450-51). The special education teacher further testified that the student's related service needs and annual goals would have been addressed at the assigned school (Tr. pp. 427-37). Thus, I find that the student would have received his related services in an appropriate manner and that the assigned school's use of therapy bicycles in the hallways would not have impeded the student's ability to succeed at the assigned public school.

The parents also assert the student's motor needs would not have been addressed at the assigned school because the building did not contain stairs (Tr. pp. 249-50). The student's May 2011 IEP contained a short-term objective that incorporated the use of stairs to address the student's motor needs (Dist. Ex. 10 at p. 12). The special education teacher at the assigned school testified that the OT rooms were equipped with mock stairs, which could be utilized to address the student's OT related annual goals (Tr. pp. 445-46). Thus, in review of the hearing record, I find no indication that the student's motor needs could not have been addressed at the public school site.

Based on the foregoing, I do not find support in the hearing record for the conclusion that the assigned classroom would have been too small or crowded, such that the student's needs could not be met. Although I can fully appreciate that the parents may have preferred a school with larger classrooms more similar to Seton (see Tr. p. 389), I find that the hearing record does not support a finding that, had the student attended the assigned public school site, the district was obligated to provide a physically larger classroom with fewer adults or that the district was incapable of addressing the student's distractibility issues sufficiently to enable him to receive educational benefits. Moreover, the parents' speculations that the student would not received his mandated related services in an appropriate environment, based on the mother's observations of other students receiving related services at the assigned school and the fact that the school is a one-story building, are unsupported by the hearing record and constitute exactly the sort of speculations discouraged by R.E., 694 F.3d at 195. Finally, even if the parents' concerns were supported by the record, such conditions would not result in a deviation from substantial or significant provisions of the student's May 2011 IEP in a material way, thereby precluding the student from the opportunity to receive educational benefits (A.P., 2010 WL 1049297; see Van Duyn, 502 F.3d 811; Houston Indep. Sch. Dist., 200 F.3d at 349).

2. District's Obligation to Reconvene the CSE

Finally, I will address the IHO's finding that the CSE's failure to reconvene to offer the parent an alternative placement for the student after the parent rejected the FNR constituted a deprivation of FAPE (IHO Decision at p. 8). The concerns expressed by the parent in her letter of June 27, 2011 were directed only to changing the assigned public school site, not toward seeking modification of the program set forth in the written IEP (Parent Ex. L). Thus, if the CSE were to reconvene to address the parent's concerns, as the IHO deemed necessary, such a meeting would presumably be for the sole purpose of selecting a public school site with the parent's input, a type of meeting to which the parents were not entitled.

The IDEA requires "that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child" (20 U.S.C. § 1414[e]; 34

CFR 300.501[c][1]).¹⁰ To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating a district's delay does not violate the IDEA so long as a placement is found before the beginning of the school year]). As set forth above, the parents rejected the assigned public school site and enrolled the student at Seton prior to the beginning of the school year (see Parent Exs. E, L; U) when the district became obligated to implement the April 2011 IEP (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]).¹¹ The IDEA does not require districts to maintain classroom openings or, as in this case, seek out alternative classroom openings for students enrolled in nonpublic schools (see Application of the Dep't of Educ., Appeal No. 12-070; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 11-008; see also S.F., 2011 WL 5419847, at *12). Moreover, there is no legal authority requiring districts to produce an IEP at the time that the parents demand; districts must only ensure that a student's IEP is in effect at the beginning of each school year and that the parents are provided with a copy (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

Accordingly, the IHO erred in finding that the district was required to reconvene the CSE to address the parent's concerns expressed in her June 29, 2011 letter, which related to the public school site (see T.Y., 584 F.3d at 416, 419-20; J.L., 2013 WL 625064, at *10; S.F., 2011 WL 5419847, at *12; C.F., 2011 WL 5130101, at *8-*9).¹²

¹⁰ The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d 412, 419-20 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]; see A.L., 812 F. Supp. 2d at 504; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], report and recommendation adopted, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, R.E., 694 F.3d 167; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). Moreover, the Second Circuit in R.E. found that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site," and that "[t]he [district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (694 F.3d at 191-92; see S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *5 [N.D.N.Y. Feb. 28, 2013]; J.L. v. City Sch. Dist. of City of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; F.L., 2012 WL 4891748, at *12); K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. 2011]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12, *14 [S.D.N.Y. Nov. 9, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-*9 [S.D.N.Y. Oct. 28, 2011]; A.L., 812 F. Supp. 2d at 504).

¹¹ As a matter of State law, the school year runs from July 1 through June 30 (Educ. Law § 2[15]).

¹² The Second Circuit has also made clear that just because a school district is not required to place details such as the particular school site or classroom location on a student's IEP, a school district is not free to choose any random classroom and services that deviate from the provisions set forth in the IEP (see T.Y., 584 F.3d at 420 [explaining that a school district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). Thus, in reaffirming T.Y., the Court held that, a school district "may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (R.E., 694 F.3d at 191-92).

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year must be reversed, as the parents asserted no viable challenge to the IEP when they unilaterally placed the student at Seton. Additionally, I find, in the alternative, that the IHO's conclusions regarding the implementation of the IEP at the public school site were not supported by the evidence hearing record and did not rise to the level of a denial of a FAPE. It is therefore unnecessary to reach the issue of whether Seton was appropriate for the student or whether equitable considerations support the parent's claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D. D-S, 2011 WL 3919040, at *13).

I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 16, 2012, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to reimburse the parents for a portion of the student's tuition at the Seton for the 2011-12 school year.

Dated: **Albany, New York**
 August 19, 2013



JUSTYN P. BATES
STATE REVIEW OFFICER