



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 12-147

**Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]**

### Appearances:

Law Offices of Neal H. Rosenberg, attorneys for petitioner, Neal H. Rosenberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at the Resources for Effective Educational Development Academy (REED Academy) for the 2011-12 school year. Respondent (the district) cross-appeals from the IHO's decision awarding reimbursement for the costs of the student's home-based applied behavior analysis (ABA) and transportation services for the 2011-12 school year. The appeal must be dismissed. The cross-appeal must be sustained in part.

### II. Overview—Administrative Procedures

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 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]).<sup>1</sup>

### III. Facts and Procedural History

The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.<sup>2</sup> Briefly, the CSE convened on June 1, 2011, to develop the student's IEP for the 2011-12 school year (see generally Dist. Ex. 2 at pp. 1-20). The parent disagreed with the recommendations in the June 2011 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2011-12 school year, and as a result, notified the district of her intent to unilaterally place the student at REED Academy (see Parent Ex. C). In a due process complaint notice, dated July 18, 2011, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, and as relief, asserted the student's right to remain at the REED Academy funded by the district as his pendency placement, and further requested round-trip transportation services and reimbursement for the costs of the student's related services and tuition at the REED Academy for the 2011-12 school year, as well as home-based ABA services (see Parent Ex. B at pp. 1-2).

On July 29, 2011, the IHO conducted a prehearing conference, and on August 23, 2011, the parties proceeded to an impartial hearing, which concluded on May 25, 2012 after six days of proceedings (see Tr. pp. 1-379; IHO Decision at p. 3).<sup>3,4</sup> In a decision dated June 19, 2012, the IHO determined that the district offered the student a FAPE for the 2011-12 school year, and thus, declined to address whether the REED Academy was an appropriate unilateral placement for the student (see IHO Decision at pp. 8-18). The IHO denied the parent's request for reimbursement for the costs of the student's tuition at the REED Academy for the 2011-12 school year; however, the IHO ordered the district to reimburse the parent for the costs of the student's home-based ABA and transportation services for the 2011-12 school year (*id.* at pp. 18-20).

---

<sup>1</sup> The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (see, e.g., Application of the Dep't of Educ., Appeal No. 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

<sup>2</sup> Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolve the issues presented in this appeal.

<sup>3</sup> On August 31, 2011, the IHO issued an interim order regarding the student's pendency (stay-put) placement, which found that the REED Academy constituted the student's pendency placement and which directed the district to continue to fund the student's placement at the REED Academy, including the costs of round-trip transportation (see Interim IHO Decision at pp. 2-3).

<sup>4</sup> At the time of the impartial hearing, the student had attended the REED Academy for approximately seven years (see Tr. p. 253).

#### IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's petition for review, the district's answer and cross-appeal, and the parent's answer to the district's cross-appeal thereto is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal is whether the June 2011 CSE considered sufficient evaluative information and properly relied upon teacher estimates to determine the student's functional levels in the development of the June 2011 IEP; whether the annual goals were appropriate, measurable, and capable of implementation in the district's recommended program; whether the IHO erred in failing to find that the absence of home-based ABA services and parent counseling and training in the IEP resulted in a failure to offer the student a FAPE; and whether the June 2011 CSE failed to provide the parents with an opportunity to participate in the decision-making process at the meeting and impermissibly engaged in pre-determination. In its cross-appeal, the district specifically argues that the IHO erred in awarding reimbursement for the costs of the student's home-based ABA and transportation services. The parties additionally argue the merits of the appropriateness of the assigned public school site. Further, the parent also alleges that the REED Academy was an appropriate unilateral placement and equitable considerations weighed in favor of the parent's request for relief.

#### 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. 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]; 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. Mamaronck 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [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, 361 Fed. App'x 156, 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, 293 Fed. App'x 20, 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, 486 Fed. App'x 954, 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. New York City Bd. 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 final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter \_\_\_\_\_, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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. Preliminary Matters—Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. First, a review of the hearing record reveals that the IHO exceeded her jurisdiction by sua sponte addressing and deciding issues in the decision regarding whether the June 2011 CSE failed to recommend parent counseling and training in the June 2011 IEP because the parent did not raise it as an issue in dispute in the due process complaint notice (compare IHO Decision at p. 14, with Dist. Ex. 1 at pp. 1-2).

Second, a review of the hearing record also reveals that the parent now raises the following issues in the petition—which she did not raise in the due process complaint notice and upon which the IHO did not issue findings—for the first time on appeal: whether the special education teacher who attended the June 2011 CSE meeting met the regulatory criteria; whether the June 2011 CSE failed to conduct a triennial evaluation and a classroom observation of the student; whether the June 2011 IEP failed to include short-term objectives; whether the recommended 6:1+1 special class placement at a specialized school was appropriate absent a recommendation for ABA and parent counseling and training in the June 2011 IEP; and whether the June 2011 CSE failed to recommend a transition plan to assist the student in navigating the assigned public school site (compare Pet. ¶¶ 14-17, 19, 22-23, 25-26, 29, with Dist. Ex. 1 at pp. 1-2).

With respect to the issues raised and decided sua sponte by the IHO in the decision as well as the allegations now raised by the parent in the petition for the first time on appeal, 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. 13-151; Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its 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[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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshe n Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at \*4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at \*23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 77-78 [2d Cir. 2014]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL

3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the issues raised and decided sua sponte by the IHO regarding whether the June 2011 CSE failed to recommend parent counseling and training in the June 2011 IEP, or the challenges identified above that have been raised in the parent's petition for the first time on appeal (see Dist. Ex. 1 at pp. 1-2). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-379; Dist. Exs. 1-14; Parent Exs. A-G; IHO Ex. i).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues, or seek to include these issues in an amended due process complaint notice, these issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"); M.R., 2011 WL 6307563, at \*13). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at \*6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at \*13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded her jurisdiction by addressing in the decision whether the June 2011 CSE failed to recommend parent counseling and training in the June 2011 IEP, and this particular finding must be annulled. In addition, the parent's allegations identified above and raised now, for the first time, on appeal are outside the scope of my review, and therefore, these allegations will not be considered (see N.K., 961 F. Supp. 2d at 584-86; B.M., 2013 WL 1972144, at \*6; C.H., 2013 WL 1285387, at \*9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL

3398256, at \*8; Snyder v. Montgomery Co. Pub. Schs., 2009 WL 3246579, at \*7 [D. Maryland Sept. 29, 2009]).<sup>5,6</sup>

### **A. June 2011 IEP**

Upon careful review, the evidence in the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 8-18).<sup>7</sup> The IHO

---

<sup>5</sup> To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "open[s] the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-29 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; 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., 2013 WL 3975942, at \*9; B.M., 2013 WL 1972144, at \*5-\*6), the issues raised and addressed sua sponte by the IHO in the decision and the allegations raised in the parent's petition for the first time on appeal—in particular, the absence of recommendations for ABA and parent counseling and training in the June 2011 IEP—were initially raised by counsel on cross-examination of a district witness, or through testimony of witnesses for the parent (see, e.g., Tr. pp. 56-59, 146, 178, 210-11). With respect to the parent's allegation that the June 2011 IEP failed to include short-term objectives, a review of the hearing record indicates that although the district solicited testimony to develop the hearing record and to provide background and contextual information (see Tr. p. 37), this examination elicited general background information as part of routine questioning and did not serve to "open the door" to this issue under the holding of M.H. (see A.M., 2013 WL 4056216, at \*10-\*11; J.C.S., 2013 WL 3975942, at \*9; B.M., 2013 WL 1972144, at \*6).

<sup>6</sup> Even if the parent properly raised the lack of parent counseling and training in the June 2011 IEP as an issue in the due process complaint notice, the failure to recommend this service in the June 2011 IEP would not result in a failure to offer the student a FAPE. State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Regulations define parent counseling and training as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training in an IEP does not constitute a denial of a FAPE where a district provided a "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 1, 2014]).

<sup>7</sup> Given the determination concurring with the IHO that the district offered the student a FAPE for the 2011-12 school year, the IHO's finding with respect to reimbursement for the costs of the student's home-based ABA services must be annulled. It is well settled that an award of reimbursement or further services must be predicated upon a finding that the district failed to offer the student a FAPE (see 34 CFR 300.148[a]; see also Application of a Student with a Disability, Appeal No. 11-032; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 08-078). Thus, this portion of the district's cross-appeal is sustained.

accurately recounted the facts of the case, addressed the majority of the specific issues identified in the parent's due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2011-12 school year, and applied that standard to the facts at hand (*id.*). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (*id.*). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (*see* 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

With regard to the June 2011 IEP, the CSE considered sufficient evaluative information and properly relied upon teacher estimates to determine the student's functional levels in the development of the IEP. Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; *see* 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning. When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (*S.F. v. New York City Dep't of Educ.*, 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011] [indicating that based upon 20 U.S.C. § 1414 (c)(1)(A), a CSE is required in part to "review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers"]). In particular, a review of the evidence in the hearing record shows that the IHO correctly determined that the June 2011 CSE considered and relied upon sufficient evaluative information—and accurately and adequately described and identified the student's needs in the present levels of performance in the June 2011 IEP based upon that evaluative information, including teacher estimates—in the development of the June 2011 IEP (*see* Tr. pp. 1-379; Dist. Exs. 1-14; Parent Exs. A-G; IHO Ex. i; IHO Decision at pp. 8-12).

More specifically, the evidence in the hearing record demonstrates that the June 2011 CSE considered and relied upon the following evaluative information to develop the student's IEP: an April 2010 psychoeducational evaluation, an April 2010 occupational therapy school function evaluation, an April 2010 social history update, an April 2011 REED Academy present level of academic achievement and functional performance, a May 2010 speech-language

evaluation, a September 2010 and a January 2011 functional behavioral assessments (FBAs), a September 2010 behavioral intervention plan (BIP), and a November 2010 REED Academy progress report (see Tr. p. 31-35; 73-74; Dist. Exs. 5-7; 9-14). At the impartial hearing, the district school psychologist who attended the June 2011 CSE meeting testified that the CSE also considered input provided by the student's REED Academy special education teacher, the REED Academy director, and the REED Academy assistant director to ascertain the student's functional levels, strengths, and areas of delay (see Tr. p. 42, 73-74; see also Dist. Ex. 2 at p. 2; 3 at p. 1). Accordingly, the evaluative information considered by the June 2011 CSE provided it with sufficient functional, developmental, and academic information about the student and her individual needs to enable it to develop the student's IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

With regard to whether the annual goals were appropriate, measurable, and capable of implementation in the district's recommended program, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Additionally, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]). Finally, the IDEA does not require that annual goals be drafted at a CSE meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*8 [S.D.N.Y. Sept. 29, 2012]).

A review of the June 2011 IEP shows that the CSE developed approximately 27 annual goals to address the student's identified needs in the areas of self-care and personal hygiene skills, social and pragmatic skills, reading skills, self-management skills, mathematics skills,

language skills, fine motor skills, and sensory integration skills (see Dist. Ex. 2 at pp. 6-11). Specifically, to address reading skills, the June 2011 IEP targeted the student's ability to read functional signs and a list of sixth grade level "priority sight words" (id. at pp. 6, 9). The June 2011 IEP also targeted the student's writing and keyboarding skills and addressed her ability to type letters "U" through "Z" and to "press the enter key" (id. at p. 7). With regard to mathematics skills, the June 2011 IEP targeted the student's ability to identify coins; count, recognize, represent, name and order the number of given objects; and tell time on a digital clock (id. at pp. 6, 8, 9). Additionally, the June 2011 IEP included an annual goal to improve the student's ability to match correct answers to questions about the month, day, and year of the calendar (id. at p. 7).

Regarding whether the June 2011 CSE failed to provide the parents with an opportunity to participate in the decision-making process at the meeting and impermissibly engaged in predetermination, the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paoletta v. Dist. of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]).<sup>8</sup> A review of the evidence in the hearing record shows that the June 2011 CSE considered and rejected other placement options for the student, including a general education setting and a special education class at a community school, a 12:1+1 special class placement, and a 12:1+4 special class placement in a specialized school, a nonpublic day school, and a nonpublic residential school, which the June 2011 CSE ultimately rejected as either not sufficiently supportive or too restrictive for the student (see Dist. Exs. 2 at p. 13; 3 at p. 2). Based upon my review of the hearing record, the district did not predetermine the student's program or placement for the 2011-12 school year and the parent was afforded an opportunity to meaningfully participate in the IEP development process (T.P., 554 F.3d at 253; see M.W., 869 F. Supp. 2d at 333-34; R.R., 615 F. Supp. 2d at 294).

Moreover, the evidence in the hearing record supports the IHO's finding that the 6:1+1 special class placement—together with related services; the services of a full-time, 1:1 behavior paraprofessional; management needs; and annual goals—ofered the student a FAPE for the

---

<sup>8</sup> The IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F., 2013 WL 4495676, at \*17 [noting that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

2011-12 school year. State regulations provide that a 6:1+1 special class placement is designed for those students "whose management needs are determined to be highly intensive and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6 [h][4][ii][a]). According to the evidence in the hearing record, at the time of the June 2011 CSE meeting, the student exhibited significant deficits in academics, receptive, expressive, and pragmatic language skills; sensory processing skills, including self-regulation; fine motor skills; and self-care and hygiene skills (see Dist. Exs. 2 at pp. 3-5, 20; 3; 5-7; 9-14). Consistent with the student's needs as identified in the evaluative information considered and relied upon by the June 2011 CSE, and in conformity with State regulations, the June CSE recommended that the student be placed in a 12-month school year program consisting of a 6:1+1 special class placement at a specialized school with the services of a full-time 1:1 crisis management paraprofessional to assist in addressing the student's management needs (Dist. Ex. 2 at pp. 1, 14). Consequently, the IHO did not err in failing to find that the absence of home-based ABA services and parent counseling and training in the IEP resulted in a failure to offer the student a FAPE.

Finally, with respect to the parent's claims relating to the assigned public school site, which the IHO did address and which the parties continue to argue on appeal, in this instance, similar to the reasons set forth in other decisions issued by the Office of State Review (see, e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parent's assertions are without merit. The parent's claims regarding the class size at the assigned public school site and the functional grouping of the students in the proposed classroom (see Parent Ex. A at p. 4), turn on how the June 2011 IEP would or would not have been implemented and, as it is undisputed that the student did not attend the district's assigned public school site (see Parent Ex. B), the parent cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. June 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the REED Academy was an appropriate placement or whether equitable considerations weighed in favor of the parent's request for relief. I have considered the

remaining contentions and find it is unnecessary to address them in light of my determinations above.<sup>9</sup>

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated June 19, 2012, is modified by reversing that portion which directed the district to reimburse the parent for the costs of the student's home-based ABA services for the 2011-12 school year.

**Dated: Albany, New York  
December 15, 2014**

\_\_\_\_\_  
**CAROL H. HAUGE  
STATE REVIEW OFFICER**

---

<sup>9</sup> With respect to the district's cross-appeal of the IHO's decision awarding the parent reimbursement for the costs of the student's round-trip transportation services to the REED Academy during the 2011-12 school year, the district mistakenly relies upon section 3635 of the Education Law as a basis to annul the IHO's finding. Here, the district was obligated to provide the student with transportation pursuant to section 4402(4)(d) of the Education Law. Consequently, this portion of the district's cross-appeal is denied. It must be further noted, however, that the parent was entitled by operation of law to the payment of the costs of the student's tuition at the REED Academy for the 2011-12 school year—as well as round-trip transportation—pursuant to the IHO's interim order on pendency through the date of this decision (see Interim IHO Decision at pp. 2-3).