



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-150

**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:**

Legal Services NYC-Bronx, attorneys for petitioner, Oroma Homa Mpi, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 determined that the educational programs and related services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2011-12 school year were appropriate. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

Pursuant to a December 2010 IEP, the student attended a 12:1+1 special class placement for instruction in mathematics, English language arts (ELA), social studies, and science at a district community school (see Parent Ex. K at pp. 1-2, 17-19; see also Parent Exs. I; J at pp. 1-7). The student also received the services of a full-time, 1:1 health paraprofessional and the following related services: one 30-minute session per week of counseling in a small group, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of speech-language therapy in a small group (see Parent Ex. K at p. 19).

On November 15, 2011, the CSE convened to conduct the student's annual review and to develop an IEP with a projected implementation date of November 30, 2011 (sixth grade) (see

Dist. Ex. 2 at pp. 1, 17; Parent Ex. K at p. 1). Finding the student remained eligible for special education programs and related services as a student with a learning disability, the November 2011 CSE recommended a 12:1 special class placement for instruction in mathematics, ELA, social studies, and science at a community school (see Dist. Ex. 2 at pp. 1, 12-13, 17).<sup>1,2</sup> The November 2011 CSE also recommended the services of a full-time, 1:1 health paraprofessional, as well as the following related services: one 40-minute session per week of individual counseling; one 30-minute session per week of individual OT; and two 40-minute sessions per week of speech-language therapy in a small group (id. at p. 13). The November 2011 CSE also created annual goals to address the student's needs (id. at pp. 6-12).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated February 9, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) from "2010 through the upcoming 2012-2013 academic year" (Parent Ex. A at p. 1). In support of her contentions, the parent alleged that based upon a comparison of the student's testing results from 2010 and 2011, the student failed to improve in reading, and the "gap between her math performance and her grade level" did not decrease (id. at p. 2). The parent also asserted that the student's "literacy teacher" did not attend the November 2011 CSE meeting to discuss "learning strategies and methodologies" (id.). The parent also asserted that the November 2011 CSE failed to discuss or recommend special education teacher support services (SETSS) to improve the student's academic skills (id.). Next, the parent asserted that the November 2011 IEP only included "one, single" annual goal for OT, which did not address the student's memory difficulty (id. at p. 4). Furthermore, the parent asserted that the annual goal in the November 2011 IEP for speech-language lacked "any measurability" and did not include short-term objectives (id.). Finally, the parent expressed concern for the student's "memory and lack of satisfactory academic improvement from year to year" (id.). As relief for the failure to offer the student a FAPE, the parent requested that the district "prospectively pay for 720 hours of home-based, intensive and individualized 1:1 multi-sensory remedial tutoring from EBL Coaching," and issue a Nickerson letter for the 2012-13 academic year (id.).

### **B. Impartial Hearing Officer Decision**

On April 9, 2012, the parties proceeded to an impartial hearing, which concluded on May 11, 2012 after three days of proceedings (see Tr. pp. 1-373).<sup>3</sup> By decision dated June 29, 2012, the IHO concluded that based upon the November 2011 IEP the district offered the student a

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<sup>1</sup> The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 200.8[c][10]; 8 NYCRR 200.1[zz][6]).

<sup>2</sup> Although the November 2011 IEP identified the student's placement on the continuum as a 12:1 special class, a district assistant principal testified that the student attended a 12:1+1 special class placement pursuant to the November 2011 IEP and further explained that the "12:1" student-to-teacher ratio must have been a typographical error (see Tr. pp. 270-72).

<sup>3</sup> Throughout the impartial hearing, the student continued to attend a 12:1+1 special class placement at a district community school and to receive the special education programs and related services recommended in the November 2011 IEP (see Tr. pp. 115, 125-30, 198-200, 204, 227-31; Dist. Exs. 5-9; 11).

FAPE, and thus, the IHO denied the parent's request for 720 hours of compensatory educational services and the issuance of a Nickerson letter (see IHO Decision at pp. 17-23).

Initially, the IHO found that the November 2011 CSE was properly composed (see IHO Decision at p. 17). The IHO then determined that the November 2011 CSE developed a program in a 12:1+1 special class placement to provide "instruction, goals, and management provisions" to address the student's academic and social/emotional needs (id.). Next, the IHO described the testimonial evidence provided by the student's then-current ELA teacher, the student's then-current mathematics teacher, and the student's speech-language provider, revealing how they each addressed the student's needs and how they each provided services to the student (see id. at pp. 17-19). In addition, the IHO described the speech-language therapy services and counseling services the student received and the focus of those related services; generally, the IHO also indicated that the student made progress (id. 18-19). In summary, the IHO concluded that the evidence supported a finding that the November 2011 IEP was both "procedurally and substantively valid, and that the program and placement offered to the [s]tudent were reasonably calculated to enable the [s]tudent to make progress" (id. at pp. 19-21).<sup>4</sup> Consequently, the IHO denied the parent's requested relief (id. at p. 23).

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

The parent appeals on the ground that the IHO erred in finding that the district offered the student a FAPE. Generally, the parent asserted that the due process complaint notice challenged the educational programs recommended for the 2010-11 and 2011-12 school years, as well as the IEP that "contained recommendations for the 2012-2013 school year." The parent also generally asserted that the IHO did not explicitly address her request to convene a "new IEP meeting" and to recommend a "deferral to the Central Based Support Team [CBST] for nonpublic school placement."<sup>5</sup> Next, the parent alleges that the IHO's decision was not supported by the evidence, and more specifically, that the "academic intervention services"—such as peer tutoring, extended school day services, and note-taking by the student's 1:1 health paraprofessional—offered by the district were not "tailored" to the student's individual needs and were not sufficient support

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<sup>4</sup> The IHO also found that the district offered the student appropriate accommodations—including note-taking by the student's 1:1 health paraprofessional, posting homework on the internet, extended time to complete missed assignments and assistance from either the 1:1 health paraprofessional or the teacher to complete missed assignments, peer tutoring, and extended school day services (focusing on literacy and math)—in light of the student's medical absences under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 [1998]) (see IHO Decision at pp. 21-22).

<sup>5</sup> In the opening statement at the impartial hearing, it appears that the parent requested a "new IEP meeting" in order to recommend a "deferral" to the Central Based Support Team (CBST) for a "nonpublic school placement" for the student as an alternative form of relief (Tr. pp. 31-36).

services to address the student's reading needs.<sup>6</sup> The parent argues that the student required "more intensive, 1:1 academic instruction" to improve her reading skills and the district did not offer "any 1:1 remedial tutoring services or resource room services" for the student. In addition, the parent argues that the student required "more intensive 1:1 speech therapy" to assist with her reading delays. Next, the parent asserts that district failed to make "adequate recommendations" to address the student's reading delays, and the IHO did not appropriately consider the recommendations of the student's "psychotherapist and physician" when in determining whether the services offered were adequate to address the student's needs. The parent further argues that the district failed to discuss or offer SETSS for the student.

In addition, the parent contends that the IHO erred in relying upon testimony about the student's improved exam scores to conclude that the student made progress during the 2010-11 and 2011-12 school years. Next, the parent asserts that the November 2011 IEP was "substantially and procedurally deficient," and further, that the IHO erred in finding that the November 2011 CSE was properly composed. The parent also alleges that the student has not made progress in the "placement and services" recommended in the November 2011 IEP, the November 2011 IEP did not include additional services to meet the student's special education needs, and the November 2011 IEP failed to recommend any individual speech-language therapy or a 12-month school year program. Next, the parent asserts that the IHO erred in making a distinction between the student's "learning disability and emotional disability" in determining whether the district offered the student a FAPE, and the district failed to consider whether the student's behaviors—such as inattentiveness and lethargy and lack of motivation—impeded her "learning in the classroom." The parent alleges that the IHO incorrectly found that the student's lack of progress did not constitute a failure to offer the student a FAPE. With respect to relief, the parent asserts that the evidence supports an award of 720 hours of compensatory educational services in the form of 1:1 tutoring, and equitable considerations weighed in favor of the parent's request for relief.

In an answer, the district responds to the parent's allegations, and generally argues to uphold the IHO's finding that the district offered the student a FAPE. Additionally, the district asserts that the parent's due process complaint notice—which included "descriptions of the [s]tudent's placement and performance levels" for the 2010-11 and 2011-12 school years—did not otherwise contain any specific claims related to the 2010-11 or 2011-12 school years, and thus, the parent did not establish a prima facie claim for compensatory educational services. As a result, the district contends that the parent's appeal must be limited to those issues explicitly articulated in the due process complaint notice.<sup>7</sup> The district further contends that it offered the student a FAPE for the 2010-11 and 2011-12 school years. More specifically, the district argues

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<sup>6</sup> To the extent that these allegations in the parent's petition challenges the IHO's findings with respect to the section 504 accommodations provided to the student related to her medical absences—including peer tutoring, extended school day services, and note-taking by the student's 1:1 health paraprofessional—New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]; see also Educ. Law § 4404[2] [providing that SROs review determinations of IHOs "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]; Pet. ¶¶ 21-24). As a result, the section 504 allegations in the parent's petition will not be addressed in this decision.

<sup>7</sup> The district also asserts that an SRO has no jurisdiction to review an IHO's findings on section 504 issues.

that the November 2011 IEP offered sufficient services to address the student's reading needs, and the student made progress. Next, the district asserts that the November 2011 CSE was properly composed and that the November 2011 IEP—as written—offered the student a FAPE without the peer tutoring or extended school day services offered to the student. Finally, the district contends that the parent failed to explain how the IHO committed an "error of law by making an 'improper distinction' between the [s]tudent's learning and emotional disabilities."

In a reply to the district's answer, the parent argues that the February 2012 due process complaint notice included explicit allegations regarding both the 2010-11 and 2011-12 school years. The parent also argues that she properly stated a claim for compensatory educational services.

## 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. 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., 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 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 Review**

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. A review of the hearing record 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: the district failed to recommend "more intensive, 1:1 academic instruction," the district failed to recommend "any 1:1 remedial tutoring services or resource room services," the district failed to recommend "more intensive 1:1 speech therapy," the district failed to recommend any individual speech-language therapy, the district failed to recommend a 12-month school year program, and the district failed to consider whether the student's behaviors—such as inattentiveness and lethargy and lack of motivation—impeded her "learning in the classroom" (compare Pet. ¶¶ 22, 34, 36-38, with Parent Ex. A at pp. 1-3).

With respect to 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. Goshen 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., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; 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]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the issues now raised in the parent's petition for the first time on appeal (see Parent Ex. A at pp. 1-3). 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. 1-373; Dist. Exs. 2-11; Parent Exs. A-E; G-N).

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 allegations raised now, for the first time by the parent 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>8</sup>

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<sup>8</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 "opens 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., 2013 WL 4056216, at \*9-\*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, \*9; B.M., 2013 WL 1972144, at \*5-\*6), the issues raised in the parent's petition for the first time on appeal were initially raised by counsel for the parent in the opening statement or upon cross-examination of a district witness (see, e.g., Tr. pp. 33, 35, 167, 237-38, 240-42 299-300). Accordingly, the district did not initially elicit testimony, and therefore, the district did not "open the door" to these issues under the holding of M.H.

## **B. December 2010 IEP**

Contrary to the IHO's finding, the parent asserts that although it appeared the student made progress based upon her standardized tests scores, the student did not make meaningful progress during the 2010-11 school year. The district rejects the parent's assertions, and argues, initially, that the due process complaint notice did not include specific allegations related to the 2010-11 school year, therefore, the parent's contentions related to the December 2010 IEP or the 2010-11 school year are beyond the scope of permissible review. Alternatively, the district asserts that the IHO properly concluded that the student made progress. A review of the evidence in the hearing record does not support the parent's contentions.

First, while the district correctly asserts that the parent's due process complaint notice did not raise specific issues related to the substantive or procedural adequacy of the December 2010 IEP or its implementation, the parent's due process complaint notice can be reasonably read to raise issues related to the student's rate of progress in both reading and mathematics while being educated under the December 2010 IEP (see Parent Ex. A at pp. 1-2).<sup>9</sup> However, as explained below, a review of the evidence in the hearing record demonstrates that the student made meaningful progress in the district placement under the December 2010 IEP (Mrs. B., 103 F.3d at 1121 [noting that a "child's academic progress must be viewed in light of the limitations imposed by the child's disability"]; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at \*13-\*14 [S.D.N.Y. May 24, 2012], aff'd, 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013]). In this instance, the student's fifth grade report card shows that overall the student improved her ability to understand text (see Parent Ex. I). In addition, the student's progress report indicated that the student exhibited progress in her mathematics, reading, and writing annual goals, and it was anticipated that the student would meet these annual goals (see Parent Ex. J at pp. 1-3). With regard to the student's annual goals related to speech-language therapy and OT, the student went from "little progress made" in March 2011 to "progress made; goal not yet met" in June 2011 (id. at pp. 4-5). The student also demonstrated progress in one of her counseling goals (id. at p. 6). Therefore, while I sympathize with the parent's concern about the student's rate of progress in reading and mathematics in a district program, the IDEA guarantees access to an appropriate public education, not specific results (see Rowley, 458 U.S. at 192; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 195; Walczak, 142 F.3d at 132).

## **C. November 2011 CSE Process**

### **1. CSE Composition**

Contrary to the IHO's finding, the parent argues that the November 2011 CSE was not properly composed due to the absence of the student's ELA teacher. The district asserts that the student's ELA teacher was not a required member of the November 2011 CSE, and the IHO's finding should not be disturbed. Upon review, the evidence in the hearing record supports the IHO's finding that the November 2011 CSE was properly composed.

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<sup>9</sup> See A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

At the time of the November 2011 CSE meeting, the IDEA required a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student, or where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).<sup>10</sup> However, as noted above, 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 parent's 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]).

In this case, the evidence in the hearing record indicates that the following individuals attended the November 2011 CSE meeting: a district special education teacher (the student's then-current mathematics teacher), a district regular education teacher, a district school psychologist (who also served as the district representative), a district speech-language pathologist (the student's then-current provider), a district occupational therapist (the student's then-current provider), a district guidance counselor, a "[p]ara/ [t]ranslator, the student's clinical social worker (via telephone), the parent's attorney, and the parent (compare Dist. Ex. 2 at p 21, with Tr. pp. 4, 79, 84-85, 106-07, 149, 197-203, 210, 227-30).<sup>11</sup>

Without pointing to any legal authority, the parent argues that given the student's significant reading delays, the student's ELA teacher should have attended the November 2011 CSE meeting to discuss the annual goals she created for the student, as well as the CSE's "ultimate recommendations," based upon her belief that "all of [the student's] teachers and services providers should attend the meeting to discuss the IEP." However, even assuming for the sake of argument that the student's ELA teacher qualified as an "other person[] having knowledge or special expertise regarding the student," the attendance of such individual—as noted above—is left to the "discretion" of either the parent or the district. The hearing record does not contain evidence that the parent, individually, or through her attorney who also attended the November 2011 CSE meeting, requested the attendance of the student's ELA teacher; in

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<sup>10</sup> The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). However, the language in the Official Analysis of Comments indicating that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP does not constitute a binding requirement, but rather provides aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see id.; Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

<sup>11</sup> While somewhat misplaced, the district correctly argues that the absence of the student's ELA teacher cannot be construed to violate regulations requiring the attendance of a special education teacher at the November 2011 CSE meeting, because the evidence sufficiently demonstrated that the special education teacher who attended the November 2011 CSE meeting held a special education license, a "double Master's degree in education," and she was the student's then-current mathematics teacher (Tr. pp. 197-200).

addition, the parent did not challenge the annual goals identified in the November 2011 IEP as relating to "ELA" in the due process complaint notice (see Tr. pp. 125-28, 137-38, 152-53, 165-66; compare Parent Ex. A at pp. 1-3, with Dist. Ex. 2 at pp. 9-10). Consequently, even if the absence of the student's ELA teacher constituted a procedural violation, the evidence in the hearing record does not support a finding that such procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits resulting in a failure to offer the student a FAPE. Therefore, there is no reason to disturb the IHO's conclusion that the November 2011 CSE was properly composed.

#### **D. November 2011 IEP**

##### **1. Academic Needs**

The parent asserts that district failed to make "adequate recommendations" to address the student's reading delays, and failed to discuss or offer SETSS or additional services in the November 2011 IEP to meet the student's special education needs. In addition, the parent contends that the IHO did not appropriately consider the recommendations of the student's "psychotherapist and physician" when in determining whether the services offered were adequate to address the student's needs. The district rejects the parent's contentions. A review of the evidence in the hearing record supports the IHO's finding that the November 2011 IEP offered the student a program that provided "instruction, goals, and management provisions" to address the student's academic and social/emotional needs.

In the November 2011 IEP, the student's present levels of performance and individual needs section reflected a description of the student's cognitive and academic abilities, as well as her social/emotional functioning, which were consistent with information provided in the October 2011 psychoeducational evaluation and input from the CSE members (compare Dist. Exs. 2 at pp. 1-5, with Parent Ex.. G at pp. 1-6).<sup>12</sup> The November 2011 IEP included the results from the Woodcock Johnson-Third Edition Tests of Achievement (WJ-III ACH) that indicated the student achieved standard scores of 83 in broad reading, 92 in broad mathematics, 86 in basic reading skills, 98 in mathematics calculation skills, 87 in reading fluency, 100 in calculation, 94 in mathematics fluency, 88 in passage comprehension, 88 in applied problems, and 92 in word attack (compare Dist. Ex. 2 at pp. 1-2, with Parent Ex. G at pp. 4-5). The November 2011 IEP also included results from an administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student, which yielded standard scores of 98 (average range) in verbal comprehension, 86 (low average range) in perceptual reasoning, 80 (low average range) in

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<sup>12</sup> Although it is unclear whether the November 2011 CSE reviewed an October 2011 letter drafted by "EBL Coaching," a review of the October 2011 EBL letter indicates that the student's abilities and needs described in the letter were consistent with the student's academic needs as described in the October 2011 psychoeducational evaluation report, which the November 2011 CSE did review and consider (compare Parent Ex. G at pp. 1-6, with Parent Ex. E). For example, both the October 2011 psychoeducational evaluation and the October 2011 EBL letter indicated that the student demonstrated delays in reading, writing, and spelling based on standardized assessments (id.). Whereas the October 2011 EBL letter indicated that the student presented with a mid-fourth grade level in mathematics, the October 2011 psychoeducational evaluation report indicated that the student fell within the average range, but exhibited difficulty with more complex mathematics that involved the application of operations to key concepts in sequential steps (compare Parent Ex. G at p. 3, with Parent Ex. E).

working memory, 109 (average range) in processing speed, and a full-scale IQ of 90 (average range) (compare Dist. Ex. 2 at p. 2, with Parent Ex. G at p. 5). The November 2011 IEP reflected that the student's difficulties in reading—including decoding, encoding, sight word knowledge, and reading comprehension—and that she benefited from reading comprehension strategies, such as "paraphrasing text, highlighting details read, self questioning and predicting what [will] happen" (compare Dist. Ex. 2 at p. 3, with Parent Ex. G at p. 3). The November 2011 IEP also reflected that the student achieved a "Level 2" on both the spring 2011 ELA and the spring 2011 mathematics State assessments (Dist. Ex. 2 at p. 2).<sup>13</sup>

With respect to mathematics, the November 2011 IEP described mathematics calculations as an area of strength for the student, noting that she could add and subtract multi-digit numbers with regrouping, she could multiply multi-digit numbers, and she could apply operations to fractions with common denominators (compare Dist. Ex. 2 at p. 3, with Parent Ex. G at p. 3). In contrast, the November 2011 IEP described written expression as an area of weakness for the student, which included difficulty with sentence and paragraph organization, generation of ideas, and spelling (*id.*). The November 2011 IEP also indicated that although the student experienced difficulty with oral comprehension skills—such as when given a "great deal of verbal information"—the student had "well developed" pragmatic and informal language (compare Dist. Ex. 2 at pp. 3-4, with Parent Ex. G at p. 3). In the area of cognition, the November 2011 IEP indicated the student demonstrated average verbal comprehension and processing speed skills and low average perceptual reasoning and working memory abilities (compare Dist. Ex. 2 at pp. 2-4, with Parent Ex. G at p. 5). The November 2011 IEP also indicated that when focused, the student "should be able to keep up the pace with the work in the classroom" (compare Dist. Ex. 2 at p. 3, with Parent Ex. G at p. 2). The November 2011 IEP indicated that the student exhibited well-developed basic language abilities, including "excellent abilities" in forming language-based concepts, generalizing, and identification of similarities between language-based concepts (*id.*). The November 2011 IEP reflected the student demonstrated difficulties with processing visual and oral information (compare Dist. Ex. 2 at p. 4, with Parent Ex. G at p. 2). Although the student demonstrated average vocabulary skills, the November 2011 IEP noted that she needed to continue to develop her vocabulary skills (compare Dist. Ex. 2 at p. 3, with Parent Ex. G at p. 2).

At the impartial hearing, the student's then-current mathematics teacher (mathematics teacher)—who attended the November 2011 CSE meeting as the district special education teacher—testified that the CSE developed the present levels of performance and individual needs section of the November 2011 IEP during the meeting (*see* Tr. p. 207). The mathematics teacher further testified that all of the CSE members participated at the November 2011 CSE meeting, and the CSE reviewed the evaluative information available to the CSE, including the student's progress and annual goals, and furthermore, the November 2011 CSE discussed the student's mathematics and reading skills (*see* Tr. pp. 208-09, 220-21).

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<sup>13</sup> State regulation defines "academic intervention services," or AIS, as "additional instruction which supplements the instruction provided in the general curriculum and assists student in meeting the State learning standards" (8 NYCRR 100.1[g]). State regulation requires that AIS are made "available to students with disabilities" (8 NYCRR 100.1[g]; *see B.C. v. Mt. Vernon City Sch. Dist.*, 2014 WL 4468082, at \*1-\*2 [S.D.N.Y. Aug. 28, 2014]). All students who score below a Level 3 on State assessments are eligible to receive AIS (*see* "Academic Intervention Services: Questions and Answers," Office of P-12 Mem. at pp. 3-5 [Jan. 2000], available at <http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf>).

To address the student's academic needs, the evidence in the hearing record demonstrates that the November 2011 CSE recommended a 12:1 special class placement, together with related services, management needs, annual goals, supplementary aids and services, and testing accommodations (see Dist. Ex. 2 at pp. 5-15). State regulation provides that a 12:1 special class placement is designed for students "whose special education needs consist primarily of the need for specialized instruction" (8 NYCRR 200.6[h][4]).<sup>14</sup> To specifically address the student's reading needs, the November 2011 CSE recommended 10 sessions per week of ELA instruction (40 minutes per session) within the 12:1 special class placement (see Dist. Ex. 2 at p. 12; see also Tr. p. 128). In addition, to further support the student's academic, reading, and memory management needs, the November 2011 CSE recommended the following strategies and supports: memory aids and repetition, many opportunities to relearn material, further explanations, mnemonics, study guides, comprehensions checks, refocusing, reminders to stay on task, and homework review (see Dist. Ex. 2 at p. 5). To support the student's expressive writing, the November 2011 CSE recommended the use of graphic organizers, a word bank for spelling, using writing logs for idea generation, and reviewing sentence and paragraph organization (id.). To specifically address the student's reading comprehension needs, the November 2011 CSE recommended the following: paraphrasing, summarizing, highlighting details, predicting and assistance with self-questioning when reading, study guides, and finding areas of interest to increase the student's reading time (id.).

At the impartial hearing, the student's then-current ELA teacher (ELA teacher) testified about the instruction, supports, and services she provided to the student in the ELA class and pursuant to the November 2011 IEP (see Tr. pp. 128-30, 135-40, 142-49, 159, 179-80). According to the ELA teacher, the student's reading skills in the areas of vocabulary, use of contextual cues, and prediction, all improved throughout the 2011-12 school year (see Tr. pp. 138-39). The ELA teacher also testified that the student exhibited "big gains" in the area of writing, including grammar and written expression (Tr. p. 140). In addition, the ELA teacher testified that she addressed the student's reading and writing needs as indicated in the student's present levels of performance and individual needs section of the November 2011 IEP, such as phonological awareness and writing concepts (see Tr. p. 142). The ELA teacher—who, as noted previously, created the student's annual goals related to reading and writing—also testified that she addressed the student's annual goals every day in class, including reading comprehension and reading strategies (see Tr. pp. 155-56). Finally, the ELA teacher testified that she collaborated with both the student's occupational therapist and speech-language pathologist to address the student's needs (see Tr. pp. 150, 163, 234).

Similarly, to address the student's needs in mathematics, the November 2011 CSE recommended nine sessions per week of instruction in a 12:1 special class placement, as well as that the student receive models of problem solutions to assist her with applied mathematics reasoning (see Dist. Ex. 2 at pp. 5, 12). At the impartial hearing, the mathematics teacher testified about the instruction, supports, and services she provided to the student in mathematics class and pursuant to the November 2011 IEP (see Tr. pp. 211-12). The mathematics teacher

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<sup>14</sup> To the extent that neither party disputed that the student attended a 12:1+1 special class placement, State regulation provides that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]).

further testified that the student demonstrated progress throughout the school year, and more specifically, the student exhibited improvement in work product, increased her participation, and improved her skills in the areas of socialization, organization, and self-advocacy (see Tr. pp. 199-201). According to the mathematics teacher, the student demonstrated strong computation skills, with the exception of multiplication facts, but noted that the student's multiplication skills improved with the use of mathematics strategies (see Tr. p. 202).

To address the student's receptive and expressive language, as well as social/emotional and fine motor skills, the November 2011 CSE recommended related services consisting of two 40-minute sessions per week of speech-language therapy in a small group, one 40-minute session per week of individual counseling, and one 30-minute session per week of individual occupational therapy (OT)(see Dist. Ex. 2 at pp. 4, 13). Additionally, the November 2011 CSE recommended the services of a full-time, 1:1 health paraprofessional to assist the student throughout the school day (id.). At the impartial hearing, the student's then-current speech-language pathologist—who attended the November 2011 CSE meeting—testified that the student did not require additional speech-language services because the student was meeting all of her annual goals (see Tr. pp. 238-39). According to the speech-language pathologist, the student benefited more from group therapy rather than individual therapy because she responded well to her peers in a group and was on a similar skill level as her peers (see Tr. p. 242). The speech-language pathologist also testified that she addressed the student's memory deficits within the student's group therapy sessions and that the student exhibited progress (see Tr. pp. 230-33, 235-37). Specifically, the student's speech-language pathologist testified that the student demonstrated progress during the 2011-12 school year in the areas of memory, vocabulary, receptive and expressive language, and comprehension (see Tr. pp. 230-33).

With respect to social/emotional functioning, the November 2011 IEP indicated that the student became more active in socializing with peers as the year progressed (see Dist. Ex. 2 at p. 4). The November 2011 IEP reflected that the student's anxiety and concerns regarding her self-image and school performance may have negatively affected her ability to maintain attention during class (id.). However, the November 2011 IEP also noted that the student processed information at an average pace, demonstrated insight regarding her emotional needs, and exhibited good social judgment (id.). To address the student's social/emotional functioning, the November 2011 CSE recommended one 40-minute session per week of individual counseling and created an annual goal to improve the student's ability to seek assistance with complex tasks (id. at pp. 12-13).

Contrary to the parent's argument, the evidence in the hearing record indicates that the November 2011 CSE considered SETSS. More specifically, the November 2011 IEP reflects that the CSE considered but rejected a "[g]eneral [e]ducation setting" because the student's academic delays could not be "adequately addressed" in that setting (Dist. Ex. 2 at p. 19). Similarly, the November 2011 CSE considered and rejected a "general education setting with [SETSS]" because the student's "reading, math, and attentional needs" could not be addressed in such a setting (id.; see Tr. pp. 221-22). And while a review of the evidence in the hearing record supports the parent's contention that the November 2011 CSE did not consider "additional services"—such as "1:1 academic instruction" or "1:1 remedial tutoring services"—to address the student's academic needs, the hearing record does not contain sufficient evidence that the

student otherwise required such services in order to receive a FAPE (see Tr. pp. 1-373; Dist. Exs. 2-11; Parent Exs. A-E; G-N).

## 2. Progress

Finally, the parent argues that the student has not made progress in the "placement and services" recommended in the November 2011 IEP, and further, that the IHO erred in finding that the student's absences—as opposed to her "emotional disability" and "constellation of different disorders"—impeded the student's ability to learn and make progress. Initially, the November 2011 IEP accurately documented the student's seizure disorder, asthma, and heart murmur in the physical development section (see Dist. Ex. 2 at pp. 4-5). At the time of the November 2011 CSE meeting, the student was absent only three times—excluding the seven absences prior to September 19, 2011, while the district located a barrier-free school site for the student (see Dist. Ex. 11; see also Tr. pp. 261, 364-66). Additionally, the evidence in the hearing record does not indicate that the parent expressed concerns about the student's absences prior to or during the November 2011 CSE meeting, or that the parent expressed concerns at the November 2011 CSE meeting regarding the student's "emotional disability" (see Tr. pp. 1-372; Dist. Exs. 2-11; Parent Exs. A-N).

The parent argues that letters from the student's social worker—who also attended the November 2011 CSE meeting—as well as the social worker's testimony provided "extensive evidence" about the student's "emotional/psychiatric disability;" however, only two documents in the hearing record include the social worker's signature: a letter dated March 22, 2012, which did not exist at the time of the November 2011 CSE meeting; and a psychiatric treatment summary, dated July 11, 2011 (see Parent Exs. B at pp. 1-4; L at pp. 1-3). A review of the July 2011 psychiatric summary reveals no concerns about the student's absences moving into the 2011-12 school year or, as alleged by the parent, behaviors related to the student's "emotional disability" such as "inattentiveness, lethargy and lack of motivation" that impeded the student's ability to learn or make progress (Parent Ex. L at pp. 1-3). Moreover, according to the July 2011 psychiatric summary, the student appeared to be "doing well emotionally" and her health had "stabilized" (id. at p. 3).<sup>15</sup>

In any event, a review of the evidence in the hearing record reveals that despite the student's increased absences following the November 2011 CSE meeting, the ELA teacher, the mathematics teacher, the speech-language pathologist, and the assistant principal all testified that the student made progress under the November 2011 IEP (see Tr. pp. 137-40, 158-59, 199-203, 214-15, 230-33, 235, 237, 246, 259, 291). In addition to the progress noted previously, the student increased her score on the ELA predictive assessment from 15 percent in November 2011 to 67 percent in March 2012, which the ELA teacher described as a "substantial improvement" (see Tr. pp. 168-69; Dist. Ex. 8 at p. 1).<sup>16</sup> Similar to her performance on the ELA predictive assessment, the student increased her score on the mathematics predicative assessment from 31 percent in February 2012 to 42 percent in March 2012 (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 6 at p. 1; see also Tr. p. 214). The assistant principal testified that the student exhibited

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<sup>15</sup> It is unclear whether the November 2011 CSE reviewed the July 2011 psychiatric summary.

<sup>16</sup> Predictive tests are practice tests that indicate the student's possible performance on the State test (see Tr. p. 291).

academic and social progress during the 2011-12 school year (see Tr. p. 246). In addition, although a review of the student's progress reports related to the annual goals in the November 2011 IEP reveal varying degrees of progress, the progress reports also indicate that the providers anticipated that the student would meet the annual goals (see Dist. Ex. 2 at pp. 6-11).

Based upon the foregoing, the evidence in the hearing record supports the IHO's finding that the November 2011 IEP offered the student a program that was reasonably calculated to enable the student to receive educational benefits, and thus, offered the student a FAPE.

## **VII. Conclusion**

In summary, an independent review of the evidence in the hearing record supports the IHO's conclusion that the district sustained its burden to establish that it offered the student a FAPE in the LRE. As such, the necessary inquiry is at an end and there is no need to reach the issues related to the parent's requested relief (Burlington, 471 U.S. at 370).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
September 30, 2014**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**