



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 12-197

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the
XXXXXXXXXXXXXX**

Appearances:

Friedman & Moses, LLP, attorneys for petitioners, Elisa Hyman, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2012-13 school year was 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 Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A]-[B], [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 279.4[b], 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

With regard to the student's educational history in this case, the student previously attended a State-approved nonpublic school and received related services, as well as 10 hours per week of after-school applied behavior analysis (ABA) services, pursuant to a CPSE

recommendation during the 2010-11 school year and pursuant to an order of pendency in a prior administrative proceeding during the 2011-12 school year (see Dist. Ex. 6 at p. 1; Parent Ex. B at pp. 3, 7, 10).

On April 19, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 5 at pp. 1, 14). Finding the student eligible for special education and related services as a student with autism, the April 2012 CSE recommended a 12-month school year program in a special class placement in a State-approved nonpublic school (id. at pp. 1-2, 10-11).¹ The April 2012 CSE also recommended the following related services to be delivered on an individual basis: two 30-minute sessions per week of speech-language therapy, two 30-minute sessions per week of physical therapy (PT), and two 30-minute sessions per week of occupational therapy (OT) (id. at pp. 10-11).

In a final notice of recommendation (FNR) dated May 3, 2012, the district summarized the related services recommended in the April 2012 IEP and identified the State-approved nonpublic school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 12). The parents signed the FNR on May 3, 2012 indicating that they "agree[d] with the recommended services" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated June 28, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year by failing to include a recommendation for 10 hours per week of ABA/special education itinerant teacher (SEIT) services to be delivered in the student's home "or a comparable program" in the April 2012 IEP (Parent Ex. A at p. 2).² The parents averred that such services were "critical for the student to learn to generalize and carry over skills between school and home environments" (id. at p. 2). Additionally, the parents contended that the April 2012 CSE removed the home-based services without any "educational basis" (id.). The parents also noted that, at the commencement of the 12-month 2012-13 school year, neither Kolianu nor any other State-approved nonpublic school had a seat available for the student but that Kolianu would have an available spot for the student as of September 2012 (id.). For relief, the parents sought a pendency order providing the student with "27 hours per week" of an "ABA program and related services" for the summer of 2012 "until a seat open[ed] for the student" at the State-approved nonpublic school, as well as 10 hours per week of "ABA/SEIT" services (id.). Additionally, the parents sought to add 10 hours per week of home-based ABA/SEIT services to the April 2012 IEP (id.).

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

² While the due process complaint notice is dated December 3, 2012, an advocate for the parents clarified at the impartial hearing that this was a typographical error and that the correct date was June 28, 2012 (Tr. pp. 3-4).

B. Impartial Hearing Officer Decision

Following a hearing to determine the student's pendency placement on July 9, 2012, an impartial hearing was conducted in this matter on August 13, 2012 (Tr. pp. 1-151).³ In a decision dated August 30, 2012, the IHO found that the district offered the student a FAPE for the 2012-13 school year and denied the parents' requested relief (IHO Decision at pp. 13-16).

The IHO noted that the April 2012 CSE reviewed appropriate evaluative material and designed an IEP and placement "appropriate in the eyes of the [CSE]" (IHO Decision at p. 15). Specifically, the IHO observed that the April 2012 IEP accurately described the student's present levels of performance and contained appropriate annual goals (id.).

Next, the IHO found that the "[e]vidence d[id] not support the necessity or appropriateness of the home[-]based SEIT services" as part of the April 2012 IEP (IHO Decision at p. 15). The IHO found that, "[a]t most[,] the removal of the home[-]based services" would "hinder[]" the student's rate of progress (id.). Further, the IHO noted that no evidence was introduced at the impartial hearing indicating that the April 2012 CSE had any information about the home-based services other than that "the services were in place at the time of the [CSE] meeting" (id.). The IHO further observed that "[n]o written goals or progress reports were presented by the home providers" at the April 2012 CSE meeting (id.). The IHO commented that the "[p]arties had notice of the meeting and nothing prevented them from sending in information relative to student needs[] or family training needs" (id.). Furthermore, the IHO noted that the only evidence presented at the impartial hearing that the home-based services were properly delivered to the student came from one provider who "serv[ed] the student for five hours a week" (id.).

The IHO additionally found the program at the State-approved nonpublic school "capable of addressing [the student's] generalization skills" (IHO Decision at p. 16). The IHO observed that the student made "tremendous progress" at the nonpublic school prior to the April 2012 CSE meeting and that "responsibility" for this progress was attributable to "the school program," not "generalization in the home" (id. at p. 14). The IHO also noted that the nonpublic school "address[ed] generalization with the use of different staff, different students, and different stimuli within [the student's] own classroom" (id.).

With respect to parent counseling and training, the IHO found "no indication that parent training was raised at the [CSE] meeting," which was at odds with the school's goal to eventually cease delivery of home-based services to the student (IHO Decision at p. 14). The IHO further noted that the student's needs "should [have] prompt[ed] some discussion of parent training at the [CSE] meeting" (id.). The IHO additionally observed that the home-based provider instructed the parents on educational strategies they could employ at home, but that such "[p]arent training ha[d] been unsuccessful" (id. at p. 13). Therefore, according to the IHO, "more detailed . . . parent training may be appropriate in the place of the home services" and the nonpublic school

³ Pursuant to pendency, the IHO directed the district to provide continued funding of the placement at the State-approved nonpublic school, related services, SEIT to be delivered at the nonpublic school and at the student's home, and transportation (IHO Order on Pendency at p. 6).

could "request[], if necessary, additional parent training which could address issues that appear to be occurring in the home" (*id.* at pp. 15, 16).

IV. Appeal for State-Level Review

The parents appeal, seeking to overturn the IHO's determination that, as of the April 2012 CSE meeting, the student did not require home-based services in order to receive a FAPE. With respect to the IHO's decision, the parents argue that the IHO applied incorrect legal standards, improperly placed the burden of proof on the parents, and "misconstrued" the nature of the student's annual review. Specifically, the parents assert that the IHO failed to review the April 2012 CSE's removal of home-based services from the student's educational program as a substantial change in placement requiring that the district comply with certain procedural requirements, including a "legally sufficient reevaluation."

Regarding the disputed issue in this case, the parents initially object to the IHO's findings to the extent that he placed responsibility on the parents for the April 2012 CSE's lack of information about the student's home-based program, including the fact that the student's home providers did not attend the CSE meeting. Turning to the crux of the appeal, the parents argue that the student required 10 hours weekly of home-based ABA services in order to receive a FAPE. In support of this contention, the parents argue that the student's providers uniformly testified that home-based services were a necessary portion of the student's educational programming. Additionally, the parents note that the student made progress while receiving a program that included home-based services.

The parents also appeal factual findings made by the IHO, including that the April 2012 CSE considered reports and assessments and developed an IEP in a procedurally sound manner and that the IEP included appropriate special education services for the student. Next, the parents assert that the district did not have special education and related services in place at the beginning of the 2012-13 school year. In addition, the parents assert that the district raised several defenses in its response to the due process complaint notice, as well as during the impartial hearing, and, therefore, "opened the door" to such defenses, even though they were not raised in the parents' due process complaint notice. Specifically, the parents allege that: (1) the evaluative information before the April 2012 CSE was insufficient; (2) a March 2012 psychoeducational evaluation was not conducted in the student's native language; (3) the April 2012 CSE predetermined its recommendations for the student; (5) the district school psychologist at the April 2012 CSE meeting impermissibly wrote the student's annual goals by himself; (6) home-based services were not discussed at the April 2012 CSE meeting; (7) there is no evidence that the April 2012 CSE reconvened after an IHO issued a May 2012 decision relative to a prior administrative proceeding pertaining to the 2010-11 school year; (8) the May 2012 IHO decision rendered the April 2012 IEP void; and (9) the district did not provide prior written notice following the April 2012 CSE meeting. With respect to the April 2012 IEP, the parents allege that it was not appropriate for the student, because it: did not include any special education instruction, supports, accommodations, or modifications; did not include a research-based methodology; did not provide for parent counseling and training; and did not include a behavioral intervention plan (BIP) or other behavior management strategies.

In an answer, the district denies the parents' material assertions and argues that home-based services were not necessary for the student to receive a FAPE for the 2012-13 school year. The district further argues that the issues raised by the parents that were not contained in their due process complaint notice should not be considered on appeal. Finally, the district argues that the parents' petition is invalid for its failure to include the counsel for the parents' phone number and address as required by State regulations.

In a reply, the parents argue that their failure to include counsel's phone number and address was a harmless procedural error and, further, that this information was known to opposing counsel.

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, 180-83, 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).

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

1. Form Requirements for Pleadings

In its answer, the district challenges the parents' petition as noncompliant with the form requirements set forth in the practice regulations applicable to proceedings before the Office of State Review. Specifically, the district alleges that the parents' petition failed to include parents' counsel's address and telephone number as required by State regulation (see 8 NYCRR 275.4[a]). Here, although the petition is technically non-compliant in this respect, the district was able to formulate a response to the parents' petition. Additionally, the district does not argue that it was actually unaware of counsel's telephone number, that the exclusion of this information from the petition prejudiced the district in any way, or that the petition should be dismissed on this basis (see Answer at p. 1, n.1). Therefore, although State regulations provide that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the State Review Officer", I decline to exercise my discretion to dismiss the petition (8 NYCRR 279.8[a]). Nevertheless, I caution parents' counsel in the future to comply with the pleading requirements expressly prescribed by State regulations.⁴

2. 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 parents present numerous claims that did not appear in their due process complaint notice as bases upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see, e.g., 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

⁴ The parents sought leave to file an amended petition, representing to this office that "the [p]etition has been amended only to add the address and telephone number of . . . [c]ounsel." However, a review of the original and amended petitions reveals that that statement is not true— and that several stylistic differences and alterations were also made (e.g. compare Pet. at p. 6, ¶ 24, with Amended Pet. p. 5, ¶ 23, and compare Pet. at pp. 7-8, ¶ 29, with Amended Pet. at p. 7, ¶ 29). Counsel should not have advised this Office that they did not make any other changes when, in fact, other changes were made. However, because I will accept the original petition despite the noncompliance with form requirements, the amended petition has not been considered.

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][i][b]; see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 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-*10 [S.D.N.Y. Mar. 28, 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.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).

In this case, the parent's due process complaint notice only includes allegations related to the lack of home-based services in the April 2012 IEP and cannot be reasonably read to include any of the other claims presented on appeal (see Parent Ex. A at pp. 1-3). Further, the hearing record does not reflect that the parents requested or that the IHO authorized an amendment to the due process complaint notice to include these issues. Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, the parents cannot pursue these claims on appeal.

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 at 250-51; see N.K., 961 F. Supp. 2d at 585; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M., 2013 WL 1972144, at *5-*6), a review of the hearing record does not reveal that the district raised any of these issues at the impartial hearing as a defense to a claim that was identified in the due process complaint notice. While, the district solicited testimony regarding the April 2012 CSE and the resultant IEP and mentioned aspects of the meeting and the IEP in its' opening and closing statements (see, e.g., Tr. pp. 18, 142-43), this examination of the witnesses elicited general background information as part of routine questioning and were not raised by the district to obtain a strategic advantage (see A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *6). Moreover, district asserted generally in its opening and closing statements that the IEP, as a whole, addressed the student's generalization needs—which was a relevant defense to the claim at issue. Therefore, review of the hearing record shows that the district did not "open the door" to any of the disputed issues under the holding of M.H. Moreover, at the beginning of the impartial hearing, the parents' advocate specifically indicated that the only matter at issue was the question of the home-based services (Tr. p. 19).⁵ Therefore, a review of the hearing record reveals that the district did not open the door to any of the specific

⁵ It is not necessary to decide whether or not the content of the district's response to the parents' due process complaint notice could be deemed to "open the door" to certain issues, because, in this instance, the parents explicit statement of the issues to be addressed at the impartial hearing post-dated such response (see Tr. p. 19; Dist. Ex. 2 at pp. 1-3).

issues the parents assert on appeal as contemplated by the Second Circuit in M.H. (685 F.3d at 250-51).

Finally, although the parent's due process complaint notice did reference the fact that the particular State-approved nonpublic school did not have a seat available for the student at the time, which the parents again raise in their petition, the parents' advocate at the impartial hearing indicated in her closing statement that "[b]eing that . . . [the nonpublic school] now has a seat for the student in September, one of the issues in the parent[s] [d]ue [p]rocess [c]omplaint has been satisfied" (Tr. p. 144). Moreover, prior to such availability, the student attended the nonpublic school pursuant to pendency (IHO Order on Pendency at p. 6). Therefore, review of the hearing record reveals that this matter is no longer at issue.

3. Legal Standard and Burden of Proof

The parents argue that the April 2012 CSE's recommendation of a program that did not include home-based services constituted a "significant change in placement" and, therefore, that the IHO should have examined whether the district complied with certain procedures before making such a significant change—in particular, the parents point to the district's obligation to conduct a "legally sufficient reevaluation." As authority for the legal standard they endorse, the parents cite to SRO decisions that used the language "significant change in placement" from regulations implementing section 504 of the Rehabilitation Act of 1973 (section 504) (34 CFR 104.35[a]; see Application of a Child with a Disability, Appeal No. 99-041; Application of a Child with a Disability, Appeal No. 94-18; Application of a Child with a Disability, Appeal No. 93-22). As the instant case does not involve a section 504 claim, over which this SRO would not have jurisdiction in any event (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]), the parents' assertions have no merit. Furthermore, the OSEP letter cited by the parents, while defining a change in placement, does not support the parents' argument that the change specifically triggered any procedural obligations from the district or, for that matter, application of a distinct legal standard (Letter to Fischer, 21 IDELR 992 [OSEP 1994]).⁶ As to the district's obligations to evaluate the student regardless of any change in placement, the IDEA mandates that, with limited exceptions, a district conduct an evaluation of a student at least once every three years but not more frequently than once per year (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parents, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). An evaluation of a student must be sufficiently

⁶ A district's proposal of a change in a student's educational placement does, however, trigger the district's obligation to provide prior written notice on the form prescribed for that purpose by the Commissioner (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also <http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html>). In the present case, while not at issue for the reasons addressed above, the hearing record shows that the district should have but failed to provide the parents with a prior written notice. Nonetheless, this procedural violation would not result in a denial of FAPE as the parent did not allege that the failure to provide prior written notice 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 (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Review of the IHO's decision reveals that he properly analyzed the April 2012 IEP to determine whether or not it offered the student a FAPE and, to that end, properly stated and applied the correct legal standards (see IHO Decision at pp. 11-16). Therefore, a review of the hearing record reveals no error in this regard.

As to the parents' assertion that the IHO improperly shifted the burden of proof to the parents, review of the IHO's decision shows that he began his analysis by properly stating that the district bore the burden of proof at the impartial hearing, "except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement" and, further, a review of the decision and the complete hearing record, demonstrates that the IHO properly placed the burden on the district to prove that it offered the student a FAPE (IHO Decision at p. 13). Even if the IHO had allocated the burden of proof to the parent, the harm would be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dept. of Educ., 2013 WL 1155570 at *5 [S.D.N.Y. Mar. 19, 2013]). Moreover, as discussed more fully below, regardless of which party bore the burden of proof, an independent review of the evidence in the hearing record (see 34 CFR 300.514[b][2]) demonstrates that the district offered the student a FAPE for the 2012-13 school year (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 336 [E.D.N.Y. June 13, 2012]).

B. Home-Based Services

In order to determine whether or not the student required home-based services, a brief discussion of the student's needs at the time of the April 2012 CSE meeting is necessary.⁷ The hearing record reveals that the April 2012 CSE reviewed an April 2012 social history update, a March 2012 bilingual psychoeducational evaluation, an April 2012 PT progress report, an April 2012 OT progress note, a March 2012 speech-language therapy progress note, and an April 2012 teacher progress report (Tr. pp. 28-31, 60; Dist. Exs. 5, 7-11).

⁷ To the extent that the parent argues that an IHO's decision from the prior administrative proceeding relating to the student's 2011-12 school year should have superseded the April 2012 IEP or that the CSE should have reconvened or incorporated information garnered during the previous impartial hearing, such argument must fail. While the district is strongly encouraged to review such a decision prior to developing a student's IEP for a subsequent school year, in this instance the decision was issued after the CSE convened and the decision does not include an order directing the CSE to reconvene or to include any service in the student's future IEP (see Parent Ex. B at p. 10). The authority cited by the parents in their petition to support their argument that the IHO decision superseded the April 2012 IEP addresses, in relevant part, the "stay put" provisions of the IDEA, which are not at issue on appeal (Bd. of Educ. v. Schutz, 290 F.3d 476, 483 [2d Cir. 2002]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008]; see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]).

An April 19, 2012 social history update reported that an interview with the parents revealed concerns related to the student's low tolerance for frustration, frequent tantrums, and lack of interest in social interaction (Dist. Ex. 6 at p. 2). The parents additionally indicated to the social worker that the student was in good health (id.).

A March 2012 bilingual psycho-educational evaluation described the student as having difficulty sustaining eye contact and following verbal directions and requiring continuous redirection to stay on task (Dist. Ex. 7 at pp. 2, 5). The student exhibited a great deal of distractibility during the examination, "mov[ing] around the room" and standing inappropriately (id. at p. 2). Additionally, the evaluator noted that the student often repeated phrases and actions in an inappropriate manner, becoming upset and screaming when the examiner attempted to intercede (id.). The evaluator also reported that the student exhibited these behaviors at home, but not in school (id.).

Administration of the Stanford Binet Intelligence Scales-Fifth Edition (SB-5) yielded a full scale IQ in the borderline range, a non-verbal IQ in the low average range, and a verbal IQ in the borderline range (Dist. Ex. 7 at p. 5).⁸ The student's performance on Stanford-Binet sub-tests produced "substantial inner sub-test scatter" (id. at p. 3). According to the evaluator, the student's ability to understand sequencing and matching allowed him to achieve non-verbal fluid reasoning scores in the average range (id.). Additionally, the evaluator indicated that the student exhibited relative strengths in tasks involving rote memorization (id.). However, when the examiner presented tasks that involved more complex concepts, the student's scores "dropped markedly" (id.). For example, the student received a non-verbal quantitative reasoning score in the borderline range because the student did not understand the processes of addition and subtraction (id. at pp. 3, 4). The evaluator also surmised that the student's "inability to attend and focus" likely affected his test scores; for instance, the student could not "maintain focus long enough to imitate a [two] item tap sequence" (id. at p. 4). The evaluator concluded that the student exhibited relative strengths in visual learning and that his "difficulties . . . using language in a conceptual or . . . communicative manner" necessitated "greater levels of visual cueing" (id.). The evaluator recommended that learning tasks be "molecularized" for the student and that his teachers or providers link "language skills" to "stimuli so that [the student] will begin to make . . . connections to language in a more adaptive manner" (id. at p. 4).

The evaluator further estimated that the student functioned at a pre-kindergarten level in reading comprehension, an early kindergarten level in applied math, a mid-kindergarten level in spelling and math calculation, and a late-kindergarten level in letter word identification (Dist. Ex. 7 at p. 4).⁹ The evaluator identified spelling and visual identification of words as areas of need for the student (id.). Based upon the student's difficulty completing writing and drawing tasks, the evaluator was unable to accurately assess the student's visual perceptual skills, although he "speculat[ed]" they were at the "mid[-]four year old level" (id.). Regarding the student's social/emotional functioning, the evaluator noted that the student possessed "very poor eye

⁸ The test results portion of the psychoeducational evaluation offered a disclaimer that the results "should be viewed with caution since they were not normed for bilingual students" (Dist. Ex. 7 at p. 2).

⁹ Although not explicitly stated in the report, these scores may have been obtained from the evaluator's administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH).

contact," was unable "to engage in . . . conversation," and exhibited "substantial difficulties with transitions and changes" (id.). The examiner also reported that the student exhibited difficulties with activities of daily living (ADL) (id. at p. 5). Finally, the evaluator determined that the student scored in the "probable" range according to the Gilliam Autism Rating Scale (GARS) (id.).

According to the April 2012 PT progress note, the student was "working hard" toward accomplishing his PT goals and "demonstrate[d] improvements in his overall muscle strength and coordination skills while performing gross motor skills" (Dist. Ex. 8). According to the physical therapist, the student was able to walk up and down stairs alternating feet using a hand rail, balance on one foot for five to six seconds, and hop on one foot six times, although he exhibited "poor coordination" (id.). At the time of the progress note, the student was working on jumping off a platform independently and with both feet together, as well as throwing, catching, and kicking a ball (id.). The physical therapist identified the improvement of the student's balance, coordination, and strength, so that he could navigate the school and playground environments, as long term goals (id.).

The April 2012 OT progress note stated that the student was very easily distracted and could pay attention to a task for only three to four minutes at a time (Dist. Ex. 9). The report additionally noted that the student was "inconsistent" in his ability to follow one and two step directions (id.). The student was working on holding a pencil or marker correctly, copying shapes and letters, following simple two step directions, cutting, copying block designs, and understanding the concepts of "next to" and "in front of" (id.).

A March 2012 speech-language therapy progress note identified the student's speech-language therapy goals and the student's progress (Dist. Ex. 10). The speech-language pathologist reported that the student was working on identifying past tense verbs, describing a picture using correct prepositions, identifying initial phonemes, identifying superlative adjectives, producing the "th" sound, and taking conversational turns with a peer (id.). At the time of the note, the student had mastered a goal to "identify regular past verb tense with 80 [percent] accuracy" (id.).

An April 2012 teacher progress report reveals that the student made "significant progress" in his academic and social skills (Dist. Ex. 11 at p. 2). Specifically, the teacher reported that the student mastered the ability to recall places he had been to, using the words "first" and "then" (id. at p. 1). In addition, teacher indicated that the student was working on sequencing steps to complete common activities, improving his drawing skills, increasing his speed of task completion, counting coins, decoding certain three letter words, identifying sight words, writing upper case letters, writing numbers, and answering comprehension questions (id. at pp. 1-2). According to the teacher, the student demonstrated progress in the areas of listening, speaking, and writing (id.). Specifically, the teacher noted that the student's knowledge of sight words was increasing at a "rapid rate" and his math skills were "moving in an upward trend" (id. at p. 2). The report states that the student's conversational skills were improving in that he interacted with peers, followed directions, and participated in groups with increasing proficiency (id. at p. 3).

The evaluative information outlined above does not indicate the student's need for home-based services. To the extent that the IHO noted that the parents did not provide any documents to the April 2012 CSE to indicate such a need or facilitate the attendance of the student's home services provider (IHO Decision at p. 15), the parents correctly argue that they are not obligated to evaluate or provide evidence to the CSE regarding the student's progress or need for home-based services. However, the IDEA envisions a collaborative process whereby parents provide insights to the CSE regarding students' individual needs (Schaffer, 546 U.S. at 53 ["[t]he core of the statute . . . is the cooperative process that it establishes between parents and schools"]; see generally Cerra, 427 F.3d at 192-94). Therefore, while the parents were not obligated to present such evidence, the IHO's observations in this regard were not improper.

The April 2012 CSE incorporated the information detailed above, as well as input provided by the student's parents and the educational coordinator from the nonpublic school, into the present levels of performance portion of the April 2012 IEP (Tr. pp. 28, 31, 33; Dist. Ex. 5 at pp. 2-4; see Tr. pp. 77, 78-79, 133-34). Based upon the student's present levels of performance, the April 2012 CSE developed annual goals to target the student's areas of need. The April 2012 IEP contained 12 annual goals and 37 short-term objectives in the areas of language development, motor skills, academics, attention, behavior, and social/emotional skills (Dist. Ex. 5 at pp. 5-10). After developing annual goals and short-term objectives to target the student's areas of need, the April 2012 CSE recommended placement in a State-approved nonpublic school (id. at p. 10). A review of the hearing record reveals that it was the CSE's intent to implement the student's IEP at the State-approved nonpublic school and, further, that the student was accepted at the school at the time of the April 2012 CSE meeting (see Tr. 33-34; Dist. Exs. 3; 4). The CSE also recommended continuation of all of the related services the student received at the nonpublic school; namely, speech-language therapy, PT, and OT (Dist. Ex. 5 at pp. 10-11).

Upon review of the hearing record, the April 2012 CSE designed a program that was reasonably calculated to provide the student with educational benefit. As the district school psychologist, who attended the CSE meeting and served as the district representative, testified at the impartial hearing, "[t]he reports that we reviewed at the conference indicated that [the student] had been making significant progress socially and academically . . . within the school" (Tr. p. 52; see Dist. Ex. 5 at p. 17). Therefore, the district recommended a substantially similar program along with the related services of speech-language therapy, OT, and PT (see Dist. Ex. 5 at pp. 10-11). The parents do not dispute that the April 2012 IEP met the student's needs (see Tr. pp. 21, 135-38).

Nevertheless, the parents argue that home-based services were a necessary component of the student's educational program and that he could not receive a FAPE without them.¹⁰ However, in light of the above determination that the April 2012 IEP was reasonably calculated to provide educational benefit, the district was not required to maximize the student's potential

¹⁰ Although the parents' contention that home-based services were not discussed at the April 2012 CSE meeting was not ruled on by the IHO and is not properly presented on appeal (see Pet. ¶ 64), testimony, including that of the educational coordinator from the nonpublic school, that such a discussion took place (Tr. p. 79; see also Tr. pp. 22, 36- 37, 42, 134, 136-37) suggests that, in fact, the April 2012 CSE discussed this issue (see F.O. v. New York City Dep't of Educ., 2013 WL 5495493, at *9-*12 [S.D.N.Y. Oct. 2, 2013]).

by providing the student with additional services (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132; see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1155 [10th Cir. 2008] [holding that "[t]he Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program"]). Although the hearing record indicates that the home-based services were beneficial to the student, the IDEA does not require districts to provide "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] [noting that "[w]hile the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"] [emphasis in original], citing N.K., 961 F. Supp. 2d at 592-93; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *17-*18 [E.D.N.Y. Oct. 30, 2008] [finding that "while [the student] presented uncontradicted testimony that the ABA is helpful . . . testimony that [the student] would regress or make only trivial progress without the at-home services was speculative"]; see Grim, 346 F.3d at 379).

Upon further review of the hearing record, it appears that the home-based services received by the student focused on the generalization of skills that the student learned at school. The educational coordinator from the nonpublic school contended that the ultimate goal of the student's home services was for the purpose of generalizing between school and home (Tr. pp. 92-93). She further testified that it was crucial for the student to receive home-based services to enable him to generalize his skills into the home environment (Tr. pp. 79-80). Also, the student's home services provider testified that the student required home-based instruction because of his difficulty generalizing skills and that, unless he was able to exhibit a new skill in another environment, she did not consider the skill to have been mastered (Tr. pp. 114-15). Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist., 540 F.3d at 1151-53; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573-74 [11th Cir 1991]). Therefore, because the home-based services in this case solely focused on the generalization of skills, they may have provided a value to the student but were not necessary in order for him to receive educational benefit.

Additionally, I observe that the evidence suggests that the parents may require assistance in the supervision and custodial care of her son in the home. The hearing record reflects that the student is from a large family (Dist. Ex. 6 at p. 2). The educational coordinator from the nonpublic school testified that efforts to train the parents to practice generalization skills at home were unsuccessful due to the parents' childcare responsibilities (Tr. pp. 95-96). The educational coordinator further opined that: "I'm not sure that even if [the parents] had good intentions and tried [their] best that it would be successful" (Tr. p. 95). Although I agree that the parents needed assistance in caring for their son during non-school hours, there is insufficient evidence in the record to find that the student's supervision and custodial care during non-school hours and

on the weekends must be provided in the form of out-of-school services. It is understandable that the parents, whose son has substantial needs, desired greater educational benefits under the auspices of special education. But even an earnest and well-meaning desire to facilitate supervision, custodial care, and appropriate behavioral functioning of the student in his or her home is not itself a sufficient basis to require that home-based ABA instruction be made part of a student's educational program under the IDEA (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *7, *14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. Apr. 21, 2008]; Application of the Dep't of Educ., Appeal No. 12-086; Application of a Student with a Disability, Appeal No. 12-052; Application of a Student with a Disability, Appeal No. 11-068; Application of the Dep't of Educ., Appeal No. 10-123).

If the parents continue to need assistance to provide supervision and custodial care of their son when he is not at school, I encourage the parties to work cooperatively to assist the parents in utilizing the resources through the district's CSE and/or with the help of a social worker or a case manager to identify available respite, residential habilitation, or other services and funding which may be available through the New York State Office of People with Developmental Disabilities or local municipal agencies that could provide support services with trained providers for the child when he is not receiving educational services (see, e.g., Application of the Bd. of Educ., Appeal No. 08-074; Application of a Child with a Disability, Appeal No. 07-050).

Finally, it appears from the hearing record that the parents are not receiving counseling and training services mandated by State regulations (8 NYCRR 200.13[d]; see 8 NYCRR 200.1[kk]). I agree with the IHO's findings on this issue and order that when the next CSE reconvenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo]; 200.5[a]).¹¹

VII. Conclusion

The hearing record demonstrates that the April 2012 IEP sufficiently addressed the student's educational needs during the normal school day and, further, that home-based services were not necessary for the student to receive a FAPE. However, due to the district's apparent non-compliance with State regulations, the district is ordered, when a CSE next convenes, to comply with State regulations and consider whether it is appropriate to include parent counseling and training on the student's IEP.

¹¹ Although this issue was not contained in the parents' due process complaint notice and is not before me on appeal, this relief merely orders the district to, going forward, comply with its obligations under State law.

THE APPEAL IS DISMISSED.

IT IS ORDERED that at the next annual review regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision.

Dated: Albany, New York
June 5, 2014


JUSTYN P. BATES
STATE REVIEW OFFICER