



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-145

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

### **Appearances:**

Michael Cardozo, Corporation Counsel, and Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Law Offices of George Zelma, attorneys for respondents, George Zelma, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2012-13 school year. The appeal must be sustained in part.

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

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

On November 28, 2011, the CSE convened to conduct the student's annual review and to develop his IEP effective between November 28, 2011 and November 25, 2012—the projected date of the student's next annual review (see Dist. Ex. 4 at pp. 1, 16; see also Tr. pp. 572-73).<sup>1</sup>

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<sup>1</sup> During the 2010-11 school year as a preschool student with a disability, the student attended a 9:1+2 special

Finding that the student remained eligible for special education and related services as a student with autism, the November 2011 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school (id. at pp. 13-14, 16-17).<sup>2</sup> The November 2011 CSE also recommended the following related services: two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 13-14). In addition, the November 2011 CSE determined that the student would participate in alternate assessments, and recommended special education transportation services (id. at pp. 15-17).

Following the November 2011 CSE meeting, the student remained in the 6:1+1 special class placement he began attending in September 2011, and received the special education program and related services recommended in the November 2011 IEP through August 2012 (see Tr. pp. 79, 82-85, 119-22, 126-33, 173-75, 179-81, 183-84, 191-93, 195-96; see Dist. Exs. 2; 4; Parent Exs. B; E).<sup>3</sup>

In a letter dated August 13, 2012, the parents notified the district of their intentions to unilaterally place the student at the Rebecca School for the 2012-13 school year beginning in September 2012, and to seek funding for the costs of the student's tuition at the Rebecca School (see Parent Ex. A).<sup>4</sup> The parents indicated that they "carefully considered" the recommended

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class with the services of a full-time, 1:1 paraprofessional (see Tr. pp. 563-64; Parent Exs. F at pp. 1, 13-14; G at pp. 1-2). Consistent with State law, the student continued to attend his preschool placement and to receive services pursuant to his February 2011 CPSE IEP through July and August 2011 (Educ. Law § 4410[1][i] [indicating that a "preschool child" remains the responsibility of the Committee on Preschool Special Education for programming purposes "through the month of August of the school year in which the child first becomes eligible to attend school pursuant to section thirty-two hundred two of this chapter"]; see Parent Exs. F at pp. 1-2, 15; G at pp. 1-2). To transition from his preschool placement, the district sent the parents information about three potential public school locations so they could select a particular public school site for the student's attendance for kindergarten beginning in September 2011 (see Tr. pp. 564-65; Parent Exs. F at p. 2; G at pp. 1-2). The parents visited all three potential public school sites (Tr. p. 565). During their visit to the particular public school location ultimately selected for the student's attendance during the 2011-12 school year, the parents showed the student's most recent CPSE IEP to the district staff person responsible for new, incoming students—who advised them that if the student attended that particular school site he would not receive the services of a full-time, 1:1 paraprofessional (Tr. pp. 565-66). Because the parents "liked the school," they "accepted" that the student would not receive this service (Tr. pp. 565-67). At the time of the November 2011 CSE meeting, the student had been attending a 6:1+1 special class placement in the public school site chosen by the parents since September 2011 without the services of a full-time, 1:1 paraprofessional (see Tr. pp. 79, 82-83, 119-22, 564-66).

<sup>2</sup> The student's eligibility for special education 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]).

<sup>3</sup> Consistent with the IDEA, its implementing regulations, and State regulations, the parents agreed in writing in both April and May 2012 to amend the recommendations for OT and speech-language therapy services in the student's November 2011 IEP without convening a CSE meeting for the purpose of making those changes (see 20 U.S.C. § 1414[d][3][D]; 34 CFR 300.324[a][4]; 8 NYCRR 200.4[g][1]-[3]; Dist. Exs. 8; 10 at p. 1; see Tr. pp. 609-10).

<sup>4</sup> The Commissioner of Education has not approved the Rebecca School as a school with which school districts

6:1+1 special class with continued placement at the student's current public school; however, the parents asserted that the student's "current program and placement" did not meet his "educational, emotional and social needs" (id.). The parents further stated that the student required a "small, non-public special education school" to meet his educational needs (id.).

On September 8, 2012, the parents executed an enrollment contract with the Rebecca School for the student's attendance from September 10, 2012 through June 21, 2013 (Parent Ex. T at pp. 1,4).

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

In a due process complaint notice dated September 25, 2012, and in an amended due process complaint notice dated December 7, 2012, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Exs. B at p. 1; E at p. 1).<sup>5</sup> In particular, the parents alleged that the student did not receive the services of a full-time, 1:1 paraprofessional during the 2011-12 school year; the November 2011 CSE developed the annual goals in the November 2011 IEP without parental participation; and the annual goals in the November 2011 IEP did not address the student's needs (Parent Exs. B at p. 3; E at p. 2, 4). The parents also alleged that during the 2011-12 school year, the student did not make progress in the 6:1+1 special class placement with related services recommended in the November 2011 IEP, and the student's continued placement in the same IEP program at the same public school site for the "July 2012 to November 28, 2012 portion of the 2012-13 school year" was not appropriate to meet the student's needs (see Parent Exs. B at p. 4; Parent Ex. E at p. 4).

Next, the parents alleged that the district failed to provide a final notice of recommendation (FNR) regarding the student's recommended program and placement for the 2012-13 school year (Parent Ex. E at p. 4). In addition, the parents asserted that the district did not respond to their August 13, 2012 letter, which had indicated that the "recommended program and placement" were not appropriate for the student and that the parents disagreed with the "continuation of the program and placement" for the student (Parent Exs. B at pp. 4-5; E at pp. 4-5). The parents also asserted the district failed to convene a CSE to formulate an IEP for the student's 2012-13 school year and that no IEP existed past the expiration of the November 2011 IEP on November 28, 2012 (see Parent Exs. B at p. 4-5; E at p. 4). Finally, the parents asserted that the district failed to offer an appropriate 12-month program and placement for the student for the 2012-13 school year in a timely manner (Parent Exs. B at p. 6; E at p. 7).

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may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>5</sup> As a reminder to both the parties and to the IHO, State regulations allow a party to amend its due process complaint notice "only if" the other party consents in writing, or if the "impartial hearing officer grants permission . . . at any time not later than five days before an impartial due process hearing commences" (8 NYCRR 200.5[i][7][a]-[b]). The hearing record does not indicate when, or if, the IHO granted the parents permission to amend its September 2012 due process complaint notice.

With respect to the student's unilateral placement, the parents alleged that the Rebecca School provided the student with "educational, social and emotional benefits" and that the student made progress in a "structured, therapeutic special education setting" (Parent Exs. B at p. 7; E at p. 7). The parents further noted that they fully cooperated with the district and the CSE, therefore, equitable considerations weighed in favor of their request for tuition reimbursement (Parent Exs. B at p. 7; E at p. 8). As relief for the district's failure to offer the student a FAPE for the 2012-13 school year, the parents requested that the district either reimburse the parents or directly pay the Rebecca School for the costs of the student's tuition for the 2012-13 school year beginning September 2012, and to reimburse the parents for transportation costs (Parent Exs. B at p. 7; E at p. 8).

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

On December 20, 2012, the parties met for a prehearing conference (Tr. pp. 1-17). On January 29, 2013, the parties proceeded to an impartial hearing, which concluded on March 13, 2013 after five days of proceedings (Tr. pp. 18-617). By decision dated July 1, 2013, the IHO initially noted that based upon the parents' amended due process complaint notice, the parents had raised the following issues to be resolved at the impartial hearing: (1) the district failed to "implement" the student's February 2011 CPSE IEP by not providing the student with the services of a full-time, 1:1 paraprofessional during the 2011-12 school year; (2) the district failed to develop an IEP "covering the entire 2012-13 school year," and instead, offered an IEP that remained in effect for "one calendar year and expired November 28, 2012;" (3) the November 2011 IEP failed to offer the student a FAPE because the IEP failed to include appropriate annual goals and short-term objectives, and the November 2011 CSE's failure to discuss the annual goals and short-term objectives at the meeting deprived the parents of the opportunity to participate in the development of the student's IEP; and (5) the recommendation to continue the student's placement in a 6:1+1 special class at the same public school site was not appropriate to meet the student's needs (see IHO Decision at pp. 3-4). The IHO also noted that the impartial hearing would determine whether the Rebecca School was appropriate to meet the student's needs and whether equitable considerations weighed in favor of the parents' requested relief (id. at p. 4). Based upon these issues, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the student's unilateral placement at the Rebecca School was appropriate, and equitable considerations weighed in favor of the parents' request for tuition reimbursement, and thus, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2012-13 school year (see IHO Decision at pp. 6-19).

Turning first to the parents' allegation regarding the provision of a full-time, 1:1 paraprofessional during the 2011-12 school year, the IHO found that the district's failure to provide this service during September, October, and November 2011—in conformity with the student's February 2011 CPSE IEP—resulted in the district's failure to offer the student a FAPE for those "three months" (IHO Decision at pp. 8-9). However, the IHO also found that the parents consented to the removal of the full-time, 1:1 paraprofessional services from the student's November 2011 IEP (see IHO Decision at p. 8). Consequently, the IHO indicated that "this

FAPE violation" did not factor into his determination as to whether the district failed to offer the student a FAPE for the 2012-13 school year (see id. at pp. 9-10).

With respect to the 2012-13 school year, the IHO found that although the district had an IEP in place at the "start of the school year" for the student, the district failed to convene a CSE to "consider revising" the IEP despite having "ample reason" to do so for the 2012-13 school year (IHO Decision at p. 10). In particular, the IHO indicated that the student's IEP did not reflect changes that had been made in his related services, nor had the student's IEP been "revisited" regarding his progress (id. at pp. 10-11). Similarly, the IHO noted that the parents' provided the district with a copy of a privately obtained evaluation of the student and "requested a new CSE meeting to consider the evaluation," but that the district did not respond (id. at p. 11). Notably, the IHO did not credit a district witness's testimony that the district was "prepared to issue an amended IEP" in response to the parents' private evaluation at the start of the 2012-13 school year (id.). The IHO also found that the CSE was required to review the parents' private evaluation as part of the CSE process (id. at 12). In failing to convene a CSE meeting to consider the parents' privately obtained evaluation, the IHO concluded that the CSE was precluded from considering important new information describing the student, which deprived the parents of the opportunity to participate in the development of an appropriate education plan for the student (id.). Based upon these findings, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year (id.).<sup>6</sup>

Notwithstanding this conclusion, the IHO then analyzed whether the student made progress in the district's 6:1+1 special class during the 2011-12 school year (IHO Decision at pp. 12-14). Based upon an examination of the evidence, the IHO found that the student "ceased making progress" (id.). The IHO questioned whether the student's results on the Assessment of Basic Language and Learning Skills—Revised (ABLLS-R) constituted evidence of progress on the annual goals and short-term objectives in the November 2011 IEP, and the IHO further noted that the documentary evidence failed to demonstrate the student's "actual progress" on the short-term objectives in the November 2011 IEP (id. at p. 13).

Having concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the IHO then addressed the appropriateness of the student's unilateral placement at the Rebecca School (IHO Decision at pp. 14-16). In concluding that the student's unilateral placement was appropriate, the IHO found that the Rebecca School provided the student with a small, structured setting; a classroom setting with an appropriate student-to-teacher ratio; and related services to meet his individual needs (id. at pp. 14-15). The IHO also found that the methodology used at the Rebecca School addressed the student's developmental deficits (id. at p. 15). The IHO found that the student made progress at the Rebecca School and received educational benefit based, primarily, upon the parents' testimony and the Rebecca School's extensive progress reports (id. at pp. 15-16). As a result, the IHO found that the parents met their burden to establish that the Rebecca School was an appropriate placement because it provided the student with educational instruction specially designed to meet his unique needs, and he was

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<sup>6</sup> The IHO also found that the district failed to provide the parents with an FNR for the 2012-13 school year (IHO Decision at p. 12).

supported by such services as were necessary to permit him to benefit from instruction during the 2012-13 school year (id.).

In regard to equitable considerations, the IHO found that the parents cooperated with the district and did not obstruct the efforts of the CSE to offer the student a FAPE (IHO Decision at p. 18). The IHO found that the parents participated in the November 2011 CSE meeting and in subsequent meetings with district staff, and provided the district with the requisite 10-day notice of their intent to unilaterally place the student for the 2012-13 school year at the Rebecca School (id.). Therefore, the IHO concluded that equitable considerations did not bar the parents' request for tuition reimbursement or otherwise warrant a reduction in the amount of reimbursement awarded (id. at pp. 17-19). The IHO directed the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2012-13 school year upon proper proof of payment (id. at p. 19).<sup>7</sup>

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

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years and that equitable considerations favored the parents' request for reimbursement for the costs of the student's tuition at the Rebecca School for the 2012-13 school year.<sup>8</sup> The district argues that IHO improperly concluded that the district failed to offer the student a FAPE for both the 2011-12 and 2012-13 school years because the evidence established that (1) the parents agreed to enroll the student at the particular public school site for the 2011-12 school year without the services of a 1:1 paraprofessional, (2) the student made progress toward his annual goals during the 2011-12 school year, (3) the district did not ignore the parents' request for a CSE meeting, (4) the district was not required to send an FNR to the parents for the 2012-13 school year since the student was already enrolled in a district public school, and (5) the district had a valid IEP in place at the start of the 2012-13 school year. Additionally, the district contends that although not addressed by the IHO, the hearing record demonstrates that the annual goals in the November 2011 IEP were appropriate, and the parents participated in the development of the annual goals, which precludes a finding that the annual goals were predetermined.

Next, the district asserts that the IHO erred in finding that the equitable considerations favored the parents' request for tuition reimbursement. The district argues that at the time the parents removed the student from the public school during the 2012-13 school year, the parents knew the district planned to reconvene a CSE meeting on the first day of school in September 2012 to address their concerns regarding the student's program. The district also asserts that the

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<sup>7</sup> The IHO also concluded that although the parents established their indebtedness to the Rebecca School for the costs of the student's tuition for the 2012-13 school year, they did not establish that they could not front the costs of the tuition, which would entitle them to retroactive direct tuition payment relief (see IHO Decision at pp. 16-17).

<sup>8</sup> The district does not appeal the IHO's finding that the Rebecca School was an appropriate placement for the student for the 2012-13 school year; as such, the IHO's determination is final and binding and will not be addressed in this decision (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]).

parents' 10-day notice failed to identify specific issues related to the student's program or assigned public school site.

In an answer, the parents respond to the district's allegations. Generally, the parents contend that the IHO correctly found that that the district failed to offer the student a FAPE for the 2012-13 school year from September 2012 through June 2013 and that equitable considerations weighed in favor of the parents' request for tuition reimbursement for the student's unilateral placement at the Rebecca School from September 2012 through June 2013. In addition, the parents assert that neither the due process complaint notice nor the amended due process complaint notice sought findings or relief related to the 2011-12 school year, and characterized the IHO's finding about the failure to provide the student with 1:1 paraprofessional services from September 2011 through November 2011 as incidental to the IHO's FAPE determination related to the 2012-13 school year. The parents seek to uphold the IHO's decision in its entirety.

## **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., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied, 133 S.Ct. 2802 [2013]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-

making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. 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. Issues on Appeal and Scope of Impartial Hearing**

Given the disparate interpretations expressed by the parties regarding the IHO's decision as it relates particularly to the 2011-12 school year, a brief clarification of the issues to be reviewed on appeal is warranted before turning to the merits.

#### **1. 2011-12 School Year**

In an abundance of caution, the district appeals the IHO's decision to the extent that the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 school year from September 2011 through November 2011 based upon the failure to provide the student with the services of a full-time, 1:1 paraprofessional in accord with his February 2011 CPSE IEP (IHO Decision at pp. 9-10). As noted above, however, the parents specifically aver in the answer that neither the due process complaint notice nor the amended due process complaint notice raised issues or sought findings or relief regarding the 2011-12 school year, and otherwise characterize the IHO's finding that the district failed to offer the student a FAPE for the 2011-12 school year due to the failure to provide the 1:1 paraprofessional services for the first three months of the following school year as an incidental determination. I agree that these matters were not properly the subject of the impartial hearing.

Given the parents' clear concession in the answer that the district's obligation to offer the student a FAPE for the 2011-12 school year was not raised as an issue to be resolved at the impartial hearing through either the due process complaint notice or the amended due process complaint notice, I must grant the district's request to reverse the IHO's finding that the district failed to offer the student a FAPE for the 2011-12 school year from September 2011 through November 2011 because it failed to provide 1:1 paraprofessional services to the student, and as such, this issue will not be addressed in this decision.

## **2. 2012-13 School Year**

With respect to whether the district failed to offer the student a FAPE for the 2012-13 school year, the hearing record establishes that the student's November 2011 IEP was expected to expire on or about November 28, 2012—and that the student was educated, and continued to receive special education and related services, pursuant to the November 2011 IEP through August 2012 (see Tr. pp. 79, 82-85, 119-22, 126-33, 173-75, 179-81, 183-84, 191-93, 195-96; see Dist. Exs. 2-4; Parent Exs. B; E). Therefore, because the November 2011 IEP remained in effect from July 2012<sup>9</sup>—the beginning of the 2012-13 academic school year—through November 2012, a determination of whether the district failed to offer the student a FAPE for the 2012-13 school year necessarily encompasses a review and an analysis of the issues raised regarding the student's November 2011 IEP since the student continued to receive services under that IEP during a portion of the 2012-13 academic school year (see Educ. Law § 2 [15] [indicating that the school year runs from July 1 through June 30]).<sup>10</sup>

Next, it is undisputed that the district did not conduct an annual review or develop an IEP for the student upon the expiration of his November 2011 IEP in November 2012 (Tr. pp. 45, 88, 214-15; Parent Exs. B; E). The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). As a result, the hearing record supports a conclusion that the district failed to offer the student a FAPE during the 2012-13 school year from November 2012 through June 2013, as the parents correctly argue in the answer.

Turning now to the issues properly asserted on appeal with respect to the 2012-13 school year, a review of the entire hearing record reveals that the IHO exceeded his jurisdiction by sua sponte raising, addressing, and relying upon issues related to the parents' privately obtained evaluation and the district's failure to reconvene a CSE to review the evaluation or to otherwise

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<sup>9</sup> The IHO acknowledged in the decision that the district did, in fact, have an IEP in place for the student at the beginning of the 2012-13 academic school year in July 2012 (see IHO Decision at p. 10).

<sup>10</sup> While it may be disconcerting for parents and, at times, school district personnel when a district develops an IEP that overlaps two academic school years—as in the instant matter and as noted by the IHO in the decision—in some circumstances it may be necessary, and there is no legal authority whatsoever that precludes a district from doing so (see IHO Decision at pp. 9-12). Similarly, there is no legal authority to support the parents' argument in the answer that the November 2011 IEP automatically expired at the conclusion of the 2011-12 academic school year (June 30, 2012) such that no IEP was in place at the start of the 2012-13 school year.

revise the November 2011 IEP—which the parents did not raise in either the due process complaint notice or in the amended due process complaint notice—in order to conclude, in part, that the district failed to offer the student a FAPE for the 2012-13 school year (see Tr. pp. 1-618; Dist. Exs. 1-2; 4-11; Parent Exs. A-H; K-W). More specifically, the IHO improperly raised and relied upon the following as a basis to conclude that the district failed to offer the student a FAPE for the 2012-13 school year: the district's failure to convene a CSE meeting to revise the November 2011 IEP or to review and consider the parents privately obtained evaluation report as part of the CSE process; the district's failure to convene a CSE meeting in response to the parents' request to convene a CSE meeting; and the district's failure to review and consider the parents' privately obtained evaluation prevented it from considering important, new information describing the student and denied the parents the right to participate in the development of an appropriate education plan for the student (see IHO Decision at pp. 10-12).<sup>11</sup>

With respect to the issues raised sua sponte by the IHO, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). 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 300.507[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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; 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 [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). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

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<sup>11</sup> The hearing record contains no evidence that the parents requested a CSE meeting to either review the privately obtained evaluation report or to otherwise revise the student's November 2011 IEP (Tr. pp. 1-618; Dist. Exs. 1-2; 4-11; Parent Exs. A-H; K-W). While State regulation requires a district to consider the results of any privately obtained evaluation shared by parents in "decisions made with respect to the provision" of a FAPE, the regulation does not require the district to convene a CSE meeting in every instance due solely to the fact that a privately obtained evaluation has been conducted (see 8 NYCRR 200.5 [g][1][vi])

Upon review, I find that neither the parents' due process complaint notice nor the parents' amended due process complaint notice can be reasonably read to include any of the issues sua sponte raised, addressed, and relied upon by the IHO to determine, in part, that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Exs. B at pp. 1-7; E at pp. 1-8). 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 included these issues in the amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders 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, [quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoefl v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]]; see C.D., 2011 WL 4914722, at \*13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Accordingly, the IHO exceeded his jurisdiction in finding that the district denied the student a FAPE for the 2012-13 school year based, in part, upon the issues sua sponte raised, addressed, and relied upon in the decision, and those determinations must therefore be annulled.

## **B. November 2011 IEP**

### **1. Annual Goals**

Although not addressed by the IHO, the district asserts on appeal that the annual goals in the November 2011 IEP were appropriate to meet the student's needs and that the parents participated in the development of the annual goals, thus precluding a finding of predetermination. Again the parents' own position is conflicted and they cannot be heard to concede in their answer that the IHO did not address the annual goals in the November 2011 IEP because the 2011-12 school year was not at issue and, at the same time, assert that that the annual goals were not appropriate to meet the student's needs.

Even assuming for the sake of argument that the parents had not made the concession, their claim regarding the annual goals would nevertheless fail. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next

scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In this case, a review of the hearing record indicates that the November 2011 CSE developed approximately 11 annual goals and 33 corresponding short-term objectives to specifically address the student's individual needs as reflected in the present levels of performance in the November 2011 IEP. According to the present levels of academic performance, the student independently used the bathroom but required a time schedule; he required redirection to focus and to attend when working on academic tasks; he could follow along during learning experiences with prompting to attend; and he worked well during independent work times with prompting to stay on task (Dist. Ex. 4 at p. 1). As indicated in the November 2011 IEP, the CSE described the student's instructional level in both mathematics and reading as prekindergarten (*id.* at p. 16). To address the student's academic needs, the November 2011 IEP included annual goals designed to improve the student's ability to identify numbers; to label uppercase letters; to identify the main character after listening to a story; to follow two-step directives; to identify body parts; and to sequence a four-step recipe or experiment using pictures with modeling and visual supports (*id.* at pp. 3-7). According to the student's then-current special education teacher at the public school, the November 2011 CSE created the student's academic annual goals based upon the results of a September 2011 administration of the ABLLS-R to the student, as well as from teacher observations (Tr. p. 177; Dist. Ex. 2 at pp. 1-3).

With respect to the student's abilities to communicate and social development, the November 2011 IEP indicated that the student adjusted well to his current school setting; he transitioned well to the next activity and used a picture schedule; he worked well with staff, but exhibited some difficulty interacting with peers and with sharing; he demonstrated increased participation and focus when given a reinforcer; he inconsistently requested desired items with verbalizations and gestures; and he labeled some common objects with cues (Dist. Ex. 4 at p. 1). To address the student's identified social and communication needs, the November 2011 IEP included annual goals targeting the student's ability to verbally request or reject items or objects using three word phrases, to label body parts, and to label classroom objects (*id.* at pp. 10-12). The November 2011 IEP also contained an annual goal targeting the student's ability to sing five words of a song (*id.* at p. 8). The student's speech-language pathologist testified that the speech-language annual goals had been developed based upon observations, assessments, and a parent survey, as well as the results of a September 2011 administration of the ABLLS-R to the student (Tr. pp. 273, 275; Dist. Ex. 2 at pp. 1-3). To further improve and support the student's communication needs, the student's speech-language pathologist testified that she provided additional communication supports, such as "visual picture symbols," to support the student's verbalizations, as well as collaborated in the classroom to help the student "initiate communication" (Tr. p. 269).

With respect to the student's present levels of physical development, the November 2011 IEP indicated that the student used an immature pencil grasp; he needed assistance to trace letters; he benefited from a quiet environment; and he required cues to attend to a table top activity, but could sit for tracing, fine motor, and language activities with minimal prompting

(Dist. Ex. 4 at p. 1). To address the student's fine motor needs, the November 2011 IEP included an annual goal designed to improve his ability to trace the letters of his name (*id.* at p. 9).

Based upon a review of the hearing record, the evidence supports a conclusion that the student's November 2011 IEP included the required academic and functional annual goals designed to meet the student's identified needs resulting from his disability and that would allow the student to be involved in and make progress in the general education curriculum. Therefore, the annual goals, as written, would not support a determination that the district failed to offer the student a FAPE for the 2012-13 school year had the student continued to be educated under the November 2011 IEP.

Next, although not addressed by the IHO, the district contends that the parents participated in the development of the annual goals, precluding a finding that the annual goals were predetermined. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [indicating that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] [noting that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]).

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], *aff'd*, 2013 WL 3868594 [2d Cir. July 29, 2013]; D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*10-11 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at \*7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at \*6-\*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008] W.S., 454 F. Supp. 2d at 147-48; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D. D-S., 2011 WL 3919040, at \*10-\*11; R.R. v. Scarsdale

Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

Here, although the hearing record reflects that the student's then-current special education teacher and speech-language pathologist drafted the annual goals prior to the November 2011 CSE meeting, the hearing record also reflects that the parent had the opportunity to participate in the development of the annual goals (Tr. pp. 179, 273, 336).<sup>12</sup> According to the hearing record, the student's then-current special education teacher read the annual goals to the parent at the November 2011 CSE meeting, and specifically asked the parent whether she agreed or disagreed with the annual goals or if she thought the annual goals needed adjustments (Tr. pp. 179-80). The student's then-current speech-language pathologist also provided the parent and the other CSE members with a draft of the annual goals related to the student's speech-language needs at the November 2011 CSE meeting (Tr. p. 273). The speech-language pathologist testified that she read the draft to the parent at the November 2011 CSE meeting, and the parent agreed with the speech-language annual goals because the goals would be "targeting him, labeling, verbalizing his wants and needs, which [was] something that [the parents] wanted [the student] to work on" (Tr. pp. 273-74, 336). Therefore, although the annual goals were prepared prior to the November 2011 CSE meeting, the hearing record indicates that the parent had the opportunity to review and revise the annual goals at the November 2011 CSE, as well as add her thoughts or input into the development of the annual goals, which supports a conclusion that the parent had the opportunity to participate in the development of the annual goals and that the annual goals were not predetermined (see M.W., 869 F. Supp. 2d at 333-34 [holding that the fact that the district participants were prepared for the discussion does not mean that the IEP developed for the student was predetermined but rather "was a sign of the seriousness with which they viewed their task"])). Therefore even if the parents had not waived this claim with their concession regarding the November 2011 IEP, they would not have succeeded in this argument had the IHO reached the issue.

## **2. November 2011 IEP Placement Recommendations**

The district asserts that the IHO erred in finding that the student "ceased making progress" under the special education and related services recommended in the November 2011 IEP, which contributed to the IHO's conclusion that the district failed to offer the student a FAPE for the 2012-13 school year. The parents assert in the answer that IHO properly concluded that the student's failure to make progress under the November 2011 IEP resulted in a failure to offer the student a FAPE for the 2012-13 school year.

According to the hearing record, at the time of the November 2011 CSE meeting the student exhibited significant deficits in attending, receptive and expressive language, fine motor skills, cooperative play, and communicative interactions (Dist. Exs. 2; 4 at pp. 1-2; 5; 7; 9). State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with the

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<sup>12</sup> The student's mother attended the November 2011 CSE meeting (see Dist. Ex. 4 at p. 19).

student's needs as identified by the November 2011 CSE, and in conformity with State regulations, the November 2011 CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school with related services of speech-language therapy and OT (Dist. Ex. 4 at pp. 13-14, 17). At the impartial hearing, a district witness testified that from September 2011 through August 2012, the student attended a 6:1+1 special class, which generally served either "multiply disabled" students or students with "severe autism" at that particular public school (Tr. pp. 78-83). In addition, the witness testified that the 6:1+1 special class at that particular public school continued to be an appropriate placement for the student during the 2012-13 school year because he was grouped with students with similar learning needs and behavior needs (see Tr. pp. 81-85). Furthermore, the student's then-current special education teacher testified that the 6:1+1 special class placement was appropriate for the student because the "small setting" allowed the student to receive "more individualized attention" (Tr. p. 200).

In addition to the 6:1+1 special class recommendation, the November 2011 CSE developed annual goals to address the student's needs in the areas of reading, mathematics, and science; fine motor skills; receptive, expressive, and pragmatic language skills; and provided a variety of strategies and accommodations to support the student's management needs (Tr. pp. 189, 236; Dist. Ex. 4 at pp. 1-14). More specifically, November 2011 IEP included a recommendations for a small class size and for classroom staff to work on improving the student's ability to attend functionally so he could "get the most out of learning" in order to support the student's academic, developmental, and functional needs (Dist. Ex. 4 at p. 1). To support the student's social development, the November 2011 IEP included recommendations for the staff to work on engaging the student in cooperative play, as well as using expressive language when interacting with peers and adults (id. at p. 1). Additionally, to support and address the student's management needs, the November 2011 IEP included the following recommendations: a small, highly structured setting with an emphasis on routines; verbal and visual prompts; praise and positive reinforcement; extra time for transition to changes in schedules; use of manipulatives; consistent and repetitive reinforcement; and adult modeling (id. at pp. 1-2). Furthermore, according to the student's report card, other academic, social, and behavioral skills were targeted in addition to those addressed in the November 2011 IEP (see Dist. Ex. 5).

Based on the foregoing, the hearing record demonstrates that the student exhibited significant academic and management needs that required a high degree of individualized attention and intervention, such that the November 2011 CSE's recommendation to place the student in a 6:1+1 special class in a specialized school with related services was designed to address the student's academic, social, and behavioral needs, and accordingly, was reasonably calculated to enable him to receive educational benefits.

### **3. November 2011 IEP and Progress**

Similar to the argument regarding the November 2011 IEP program recommendations noted above, the district asserts that IHO erred in finding that the student made little to no progress by the end of 2011-12 school year, and in particular, that the student's failure to make

progress on the annual goals in the November 2011 IEP indicated that the district failed to offer the student a FAPE for the 2012-13 school year. The parents disagree, and assert that the IHO correctly determined that the student made little to no progress by the end of the 2011-12 school year. Contrary to the IHO's determination, a review of the hearing record supports a conclusion that the student made progress while being educated under the November 2011 IEP and with respect to the annual goals and short-term objectives set forth in the November 2011 IEP.

Based upon the criteria for scoring on the ABLLS-R, the student's improved skills demonstrated acceptable progress in many areas with several skills improving to the maximum criteria level for that task (see Tr. pp. 130-73; Dist. Ex. 2 at pp. 1-3). Specifically, the student's then-current special education teacher testified that the student demonstrated improved skills on the May 2012 administration of the ABLLS-R in the areas of visual performance, receptive language, motor imitation, requests, labeling, social interactions, spontaneous vocalizations, play and leisure skills, reading, mathematics, and writing (Tr. pp. 137-73; see Dist. Ex. 2 at pp. 1-3). Furthermore, she testified that the student exhibited new and emerging skills on the May 2012 administration of ABLLS-R in the areas of visual performance, receptive language, motor imitation, vocal imitation, requests, labeling, intraverbals, social interactions, spontaneous vocalizations, group instruction, classroom routines, generalized responding, reading, mathematics, writing, dressing, grooming, toileting, and fine and gross motor skills (id.).

The student's then-current speech-language pathologist also testified that the student made progress in his communication skills, and in spring 2012, he demonstrated increased independence and initiated communication through pointing, verbalizing, or handing an adult a picture (Tr. p. 285). She further testified that in fall 2011, the student could not distinguish between pictures, but in spring 2012, he could distinguish between three to four symbols, and he could express what he wanted when given a choice (Tr. pp. 281, 316). Additionally, she testified that by spring 2012, the student progressed to the beginning of phase III of the picture exchange communication system (PECS), and he began to initiate the skill by "going up to an adult or whoever had an item that he wanted" (Tr. pp. 316, 320). The speech-language pathologist also indicated that by spring 2012, the student began to use the phrase "I want" to request an item and that he followed directives more consistently (Tr. p. 287). Finally, the speech-language pathologist testified that she felt the student had made "some gains" in his speech-language abilities during the 2011-12 school year (id.).

With regard to the student's behaviors during the 2011-12 school year, the speech-language pathologist testified that although she noted an increase in swatting, scratching, and hitting when he became frustrated, these behaviors had not been consistent over the course of the school year (Tr. pp. 303-06, 320-22; see Dist. Ex. 9 at p. 2). She also noted that the student's tantrum behaviors due to the removal of desired items also remained inconsistent over the course of the 2011-12 school year (Tr. pp. 321-22). However, the student's special education teacher testified that behaviors—which she considered to be due to frustration resulting from his communication deficits—had decreased throughout the year, and as the student's use of the communication book improved, he became "much less physical" by the end of summer 2012 (Tr. pp. 194-96).

Turning to the student's progress related to his annual goals, the weight of the evidence in the hearing record does not support the IHO's conclusion that the district failed to offer the student a FAPE because the student did not make progress on his annual goals and short-term objectives (see IHO Decision pp. 10-11). Initially, the IHO erred in determining whether the student made progress based on the number of IEP goals the student "achieved," during the 2011-12 school year, rather than focusing on the extent to which the student had progressed (see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*31, \*36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]; IHO Decision at pp. 10-11). According to the student's progress reports, as well as the student's then-current special education teacher, the student achieved two annual goals set forth in the November 2011 IEP, and made some progress toward achieving the remaining annual goals (Tr. pp. 184-91; Dist. Ex. 4 at pp. 3-13). In addition, the student's report card for the 2011-12 school year indicated that the student had made some progress towards improving additional skills, other than those addressed in the November 2011 IEP annual goals (see Parent Ex. 5). Furthermore, as discussed in detail above, the hearing record, along with testimony from student's then-current special education teacher and speech-language pathologist, indicated that the student made progress academically, socially, and behaviorally throughout the 2011-12 school year until the parents removed him from the district's program (Tr. pp. 137-73, 184-91, 193-96, 281, 285, 287, 316, 320; Dist. Exs. 2; 4-5; 9).

Based upon the weight of the evidence, the hearing record establishes that the student made meaningful progress academically, socially, and behaviorally during the 2011-12 school year and that the student's progress on his annual goals was commensurate with his ability.

Aside from the weak support in the hearing record regarding lack of progress, the other fundamental error in the IHO's analysis is that, in essence, a retrospective analysis of the student's educational program for the 2011-12 school year was conducted to reach that conclusion. Such a retrospective analysis—judging the adequacy IEP through the student's subsequent performance under the plan—has now been foreclosed in this Circuit (see R.E., 694 F3d at 186 [holding that "[w]e now adopt the majority view that the IEP must be evaluated prospectively as of the time of its drafting"]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at \*9 [S.D.N.Y. Jan. 22, 2013] [noting that the fact finder "must not engage in 'Monday-morning quarterbacking' influenced by [the] knowledge of [a student's] subsequent progress"]). Accordingly, for all of the foregoing reasons, the IHO's determinations must be reversed.

#### **4. Notice of Assigned School**

The district asserts on appeal that IHO erred in finding that the failure to provide the parents with an FNR contributed to the conclusion that the district failed to offer the student a FAPE for the 2012-13 school year. The parents disagree with the district's interpretation of the IHO's finding regarding the lack of an FNR, and assert that the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year because the student's needs had not been met, and the student's continued placement in the same program and placement where

he "clearly regressed" was not reasonably calculated to confer benefits to the student. Regardless of the interpretation of the IHO's finding on this issue, the failure to provide the parents with an FNR in this case is inconsequential because it is undisputed that the student continued to attend the same public school he had been attending since September 2011 during July and August 2012—the start of the 2012-13 academic school year (see Tr. pp. 79, 82-85, 119-22, 126-33, 173-75, 179-81, 183-84, 191-93, 195-96; see Dist. Exs. 2-4; Parent Exs. B; E). In addition, "[b]ecause the parents' right to participate in the development of their child's IEP does not extend to the DOE's decision regarding the particular school site that their child would attend, the defective notice did not impede this right" (A.S. v. New York City Dep't of Educ., No. 10-cv-00009, slip op. at 18–19 [E.D.N.Y. May 25, 2011]; see also K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*16 [S.D.N.Y. Aug. 23, 2012]; S.H. v. New York City Dep't of Educ., 2011 WL 666098, at \*5 [S.D.N.Y. Feb. 15, 2011] [finding that a notice's misidentification of the specific school in a multi-school building was "inconsequential"]). Accordingly, the IHO's decision on this issue must be reversed.

### **C. Equitable Considerations**

Having found that the district failed to offer the student a FAPE for the 2012-13 school year from November 28, 2012 through June 30, 2013, and that the parents' unilateral placement of the student at the Rebecca School was appropriate, I must now address whether equitable considerations otherwise preclude an award of tuition reimbursement under the facts of this case.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic-Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the

student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

### **1. Sufficiency of 10-Day Notice**

The district argues that, contrary to the IHO's finding, equitable considerations do not weigh in favor of the parents' request for tuition reimbursement. The district argues that the parents' 10-day notice, dated August 13, 2012, did not meet statutory requirements because it did not identify specific issues or concerns related to the student's IEP.

In this case, the hearing record establishes that the student continued to attend a public school and receive services pursuant to his November 2011 IEP through August 2012 (see Tr. pp. 79, 82-85, 119-22, 126-33, 173-75, 179-81, 183-84, 191-93, 195-96; see Dist. Exs. 2-4; Parent Exs. B; E). In a letter dated August 13, 2012, the parents indicated that they "carefully considered" the recommended 6:1+1 special class with continued placement at the student's current public school; however, the parents asserted that the student's "current program and placement" did not meet his "educational, emotional and social needs" and therefore, they intended to unilaterally place the student at the Rebecca School for the 2012-13 school year (Parent Ex. A). The student began attending the Rebecca School in September 2012, and the parents initially requested an impartial hearing by due process complaint notice, dated September 25, 2012 (see Parent Exs. B at p. 1; E at pp. 1-8).

Based on the foregoing, I find that while the parents timely provided the district with the required 10-day notice prior to removing the student from the district, I agree with the district's argument that the 10-day notice was insufficient as a matter of law because it did not set forth any concerns about the special education programs and related services recommended in the student's 2011-12 IEP (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). As noted above, without this information the district has no opportunity—before the student is removed from the public school—to assemble a team, devise an appropriate program, or otherwise remedy concerns expressed by the parents with respect to the recommended special education programs and related services in the student's IEP in order to offer the student a FAPE.

A review of the hearing record also reveals that although the parents may have expressed concerns about the student's lack of progress to the student's special education teacher during the implementation of the November 2011 IEP, this is not sufficient to put the district on notice—consistent with provisions governing 10-day notices—of the parents' concerns specifically related to the special education programs and related services recommended in the student's November 2011 IEP. As noted previously, one parent attended and participated in the November 2011 CSE meeting to develop the student's IEP and was provided opportunities throughout the CSE meeting and throughout the school year to express concerns, ask questions, or discuss the information presented at that time.

Consequently, the parents' failure to comply with the 10-day notice requirements weighs against them with respect to equitable considerations; however, in light of the discussion below regarding the level of appropriate relief, I decline to exercise my discretion to further reduce any award of the parents' requested relief on this basis.

#### **D. Relief**

Having determined that the district failed to offer the student a FAPE for a portion of the 2012-13 school year, I find that equitable considerations favor reimbursing the parents for the period from November 28, 2012 through June 30, 2013 due to the failure of the district to conduct the student's annual review and to develop his November 2012 IEP (see G.G. v. Dist. of Columbia, 2013 WL 620379, at \* 8 [D.D.C. Feb. 20, 2013] [holding that because the district failed to make a timely eligibility determination for the student, the district must reimburse the parents for tuition costs for the period from the date that the eligibility determination should have been made until the student's IEP is completed]; W.M. v. Lakeland Cent. Sch. Dist., 783 F.Supp.2d 497, 506 [S.D.N.Y. 2011] [concluding that the equities favor reimbursing the parents for tuition costs for the period after the completed social history and psychoeducational report was sent to the district, which the Court determined was March 1, 2008, through the end of the school year]; Application of the Bd. of Educ., Appeal No. 11-142 [finding that the parents are entitled to reimbursement for the student's tuition costs for approximately three of the eight months that the student attended the unilateral placement because the parents indicated that they were no longer interested in having the district provide the student a FAPE by their August 2010 letter].

#### **VII. Conclusion**

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

**IT IS ORDERED** that that the IHO's decision, dated July 1, 2013, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2011-12 school year; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated July 1, 2013, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2012-13 school year from July 2012 through November 2012; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated July 1, 2013, is modified by reversing that portion which directed the district to reimburse the parents for the costs of the student's tuition at the Rebecca School for the 2012-13 school year from September 2012 through November 2012; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for the costs of the student's tuition at the Rebecca School for the student's attendance from November 28, 2012 through June 30, 2013, upon proper proof of payment.

**Dated:** Albany, New York  
September 13, 2013



**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**