



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-204

**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 XXXXXXXXX**

### **Appearances:**

Educational Advocacy Services, attorneys for petitioners, Jennifer A. Tazzi, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at Sinai Elementary School (Sinai) for the 2011-12 school year. 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], [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**

The CSE convened on March 31, 2011 to develop the student's IEP for the 2011-12 school year (Dist. Ex. 1).<sup>1</sup> Finding that the student remained eligible for special education and

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<sup>1</sup> I note that the hearing record contains multiple copies of the March 2011 IEP (Dist. Ex. 1; Parent Ex. N). Additionally, at the time the parents submitted the exhibit into evidence, the IHO indicated that the exhibit contained two pages, whereas the version received by the Office of State Review consists of 19 pages (Tr. p. 176). However, because the exhibit submitted by the parents was not referenced during the impartial hearing, counsel for the parents does not cite to this exhibit in the parents' petition, and the version submitted into evidence by the district is more legible, for purposes of this decision, citations to the IEP are made only to the district exhibit.

related services as a student with a speech or language impairment,<sup>2</sup> the CSE recommended placement in a 12:1+1 special class in a community school; related services of two thirty-minute sessions per week of individual occupational therapy (OT), two thirty-minute sessions per week of individual physical therapy (PT), three thirty-minute sessions per week of individual speech-language therapy, one thirty-minute session per week of speech-language therapy in a dyad; and the services of a full-time crisis management paraprofessional in a 1:1 ratio (*id.* at pp. 1, 15, 17). The CSE also recommended that the student receive adapted physical education and special education transportation (*id.* at pp. 1, 5). In addition, the CSE noted that the student's behavior seriously interfered with instruction, recommended a number of environmental modifications and provision of human or material resources to meet the student's management needs, and developed a behavioral intervention plan (BIP) (*id.* at pp. 3-5, 18).

In a final notice of recommendation (FNR) dated July 1, 2011, the district summarized the special education and related services recommended by the March 2011 CSE and identified the particular public school site to which the district assigned the student for the 2011-12 school year (Dist. Ex. 2).

By letter dated August 22, 2011, the parents notified the district of their intention to enroll the student in Sinai for the 2011-12 school year and seek public funding for this placement (Parent Ex. C).<sup>3</sup>

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

The parents requested an impartial hearing by due process complaint notice dated May 15, 2012 (Parent Ex. A).<sup>4</sup> The parents generally asserted that the district denied the student a FAPE for the 2011-12 school year based on procedural and substantive grounds (*id.* at p. 1). The parents also raised specific arguments relating to the annual goals contained in the student's March 2011 IEP and relating to the implementation of the March 2011 IEP at the district's assigned public school site (*id.* at p. 2). Regarding the annual goals, the parents asserted that they did not reflect the discussion that took place at the March 2011 CSE meeting regarding the student's needs and that the goals developed for the crisis management paraprofessional were insufficiently specific to provide guidance regarding the paraprofessional's responsibilities (*id.*). The parents also asserted that, rather than paraprofessional assistance, the student required instruction and monitoring by a special education teacher experienced in modifying behavior (*id.*). Regarding the assigned public school site, the parents asserted that the classroom in which

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<sup>2</sup> The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

<sup>3</sup> Sinai is an out-of-state nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7). The hearing record indicates that Sinai is colocated with a general education nonpublic school (Tr. p. 128).

<sup>4</sup> It appears from the hearing record that the parents withdrew their May 2012 due process complaint notice in contemplation of settlement and later sent a letter to the district in December 2012 requesting that the district reinstate their complaint (Parent Exs. A; B; *see* Tr. p. 228). The IHO noted that while he was appointed as a result of the December 2012 letter, the issues to be determined in the hearing were those set forth in the May 2012 due process complaint notice (IHO Decision at p. 2).

the student would have been placed was overbooked and that the student would not have been grouped appropriately (*id.*). As relief, the parents requested that the district directly fund the cost of the student's tuition at Sinai for the 2011-12 school year, provide the student with the related services included in the March 2011 IEP at Sinai, and provide transportation to and from Sinai (*id.* at pp. 2-3).<sup>5</sup>

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

An impartial hearing was convened on June 20, 2013 and concluded on August 21, 2013 after three non-consecutive hearing dates (Tr. pp. 1-240).<sup>6</sup> In a decision dated September 17, 2013, the IHO determined that the district offered the student a FAPE for the 2011-12 school year (IHO Decision). As an initial matter, the IHO determined that the district did not commit any procedural violations in the development of the March 2011 IEP (*id.* at p. 9). The IHO then determined that the parents' assertions regarding the annual goals in the March 2011 IEP were not sufficiently pleaded in their due process complaint notice to raise an argument that the annual goals were not appropriate to meet the student's needs (*id.*). As an alternative, the IHO also found that the annual goals contained in the March 2011 IEP were appropriate and accurately reflected the student's deficits as discussed during the CSE meeting (*id.*). Regarding the annual goals developed for the student's paraprofessional, the IHO found that the CSE was not required to include goals for the paraprofessional and that the goals were sufficiently specific to provide guidance (*id.*). The IHO then rejected the parents' claims regarding implementation of the IEP at the assigned public school site because the parents had advised the district they were enrolling the student at Sinai prior to the start of the 2011-12 school year, the district had no obligation to maintain a seat for the student thereafter, and the parents lost standing to challenge the appropriateness of the public school site after they notified the district of their unilateral placement of the student at Sinai (*id.* at pp. 9-10). Having found that the district offered the student a FAPE, the IHO declined to address the appropriateness of Sinai or equitable considerations (*id.* at p. 10).

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

The parents appeal, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year. As a basis for a denial of FAPE, the parents assert that the district failed to establish that it offered a program that could manage the student's behavioral and social/emotional needs. The parents assert that the IHO erred in finding that a crisis management paraprofessional would have adequately addressed the student's behavioral needs and in finding that the goals for the crisis management paraprofessional were sufficient to address the student's behaviors. The parents further assert that the district denied the student a FAPE because it failed to conduct a functional behavioral assessment (FBA), the BIP included in the March 2011 IEP did not meet New York State regulatory requirements, and the March 2011

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<sup>5</sup> The parents also purported to reserve the right to challenge the appropriateness of the annual goals and the recommended placement, and to amend the due process complaint notice upon receipt of the student's file (Parent Ex. A at p. 3).

<sup>6</sup> The hearing record does not indicate any reason why the impartial hearing was delayed for six months after the parents requested that one be held.

IEP did not include counseling as a related service. Regarding implementation of the student's IEP, the parents assert that the IHO erred in finding that the district did not have an obligation to maintain a seat in the public school site for the student and that the parents lost standing to challenge the appropriateness of the specific public school site.

In addition, the parents assert that Sinai was an appropriate placement for the student for the 2011-12 school year and that equitable considerations weigh in favor of their requested relief. The parents request direct funding for the cost of the student's tuition at Sinai or, in the alternative, that the matter be remanded to the IHO to determine whether the assigned public school could have met the student's needs and implemented the related services recommended in the March 2011 IEP.

The district answers, asserting that the IHO correctly found the district offered the student a FAPE. The district notes that the parents did not appeal the IHO's finding that there were no procedural violations in the development of the IEP and asserts that the IHO was correct in finding the annual goals sufficient and in dismissing the parents' claims regarding implementation of the IEP at the assigned public school site. The district also asserts that the parents' claims relating to the lack of an FBA, the adequacy of the BIP, and the omission of counseling as a related service are both outside the scope of the hearing and without merit. In the event that it is found the district did not offer a FAPE, the district asserts that the parents' unilateral placement of the student at Sinai was not appropriate and that equitable considerations weigh against granting the parents' requested relief.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA

(M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals

designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Finality of Unappealed Determinations**

Initially, neither party has appealed the IHO's determinations that the district did not violate any procedural requirements in the development of the IEP and that the March 2011 IEP accurately reflected the student's deficits as discussed during the CSE meeting (IHO Decision at p. 9). Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

#### **2. Scope of Impartial Hearing and Review**

Before addressing the merits of the parents' appeal, I must next address what issues are properly before me for review. While the parents raise the lack of an FBA, the inadequacy of the

BIP, and the failure to include counseling as a related service in their petition as bases upon which to conclude that the district failed to offer the student a FAPE for the 2011-12 school year, the district argues that those claims were not properly raised in the parents' due process complaint notice.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing and may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. §1415[f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5 [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*5-\*7 [S.D.N.Y. Aug. 13, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8).

Upon review, I find that the parents' due process complaint notice cannot reasonably be read to include any of the issues now challenged by the district as raised for the first time on appeal in the parents' petition as a new basis upon which to now conclude that the district failed to offer the student a FAPE for the 2011-12 school year. The hearing record demonstrates that the issues presented for resolution before the IHO included challenges to the annual goals included in the March 2011 IEP, the role of the crisis management paraprofessional, and the implementation of the March 2011 IEP at the assigned public school site (see Parent Ex. A at pp. 1-3).<sup>7</sup>

Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parents attempt to amend their due process complaint notice. 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 D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at \*6-\*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at \*5-\*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*9-\*11 [S.D.N.Y. Aug. 9, 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), the additional issues raised in this appeal were not initially elicited by the district in testimony other than as routine questioning regarding the development of the IEP and were not raised by the district to obtain a strategic advantage (Tr. pp. 35-36, 41-42, 54, 58,

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<sup>7</sup> Although the parents' due process complaint notice contains a general allegation asserting that the district denied the student a FAPE based on "procedural as well as substantive grounds," such a general assertion is insufficient to preserve the arguments raised in the parents' petition (see B.P., 841 F. Supp. 2d at 611).

61-62). The district did not elicit testimony as to how the BIP addressed the student's needs, as the only testimony regarding the BIP on direct examination was in response to questions directed at the manner in which the BIP was developed during the CSE meeting (Tr. 35-36, 41-42).<sup>8</sup> In addition, testimony regarding the lack of an FBA and counseling first occurred in response to questions posed to the district witness by the parents' attorney during cross-examination (Tr. pp. 54, 61-62). Therefore, I find that the district did not "open the door" to these issues under the holding of M.H. (see A.M., 2013 WL 4056216, at \*9-\*11; B.M., 2013 WL 1972144, at \*6; compare P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at \*14 [S.D.N.Y. July 22, 2013]).

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 seek to include these issues in an amended due process complaint notice, I decline to review them. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration and would render the IDEA's statutory and regulatory provisions meaningless (see 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]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]); M.R., 2011 WL 6307563, at \*13). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at \*6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at \*13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).<sup>9</sup>

Consequently, the allegations in the parents' petition raised for the first time on appeal are outside the scope of my review and, therefore, these allegations will not be considered (see N.K., 2013 WL 4436528, at \*5-\*7; B.M., 2013 WL 1972144, at \*6; C.H., 2013 WL 1285387, at \*9; B.P., 841 F. Supp. 2d at 611).

## **B. Behavioral Needs**

### **1. Annual Goals and Management Needs**

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<sup>8</sup> It should be noted that the parents' challenge to the BIP is solely based on whether it complied with State requirements. In the event that I were to find that the BIP was procedurally defective, the parents do not identify how the failure to comply with State procedures would have impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, 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]; see D.B., 2013 WL 4437247, at \*11).

<sup>9</sup> As the Second Circuit has explained, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parent] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M., 2013 WL 1972144, at \*6 n.2 [noting that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]).

The parents assert that the two annual goals included in the March 2011 IEP to address the student's behavioral needs were insufficient.<sup>10</sup> 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 (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]).

A review of the March 2011 IEP shows that it contained information regarding the student's academic performance and learning characteristics, social/emotional performance, and physical development (Dist. Ex. 1 at pp. 3-5).<sup>11</sup> The March 2011 IEP described the student as easily distracted and as having difficulty staying on task, sitting still, and controlling his impulses (id. at p. 3). Socially, the IEP indicated that the student was unfocused, and although he responded to redirection, he usually did not sustain attention for prolonged periods (id. at p. 4). The IEP also reflected that the student exhibited difficulty being flexible, interpreting social cues and maintaining eye contact (id.). The IEP indicated that the student was interested in socializing with others but also engaged in power struggles and was competitive (id.). The CSE determined that the student's behaviors seriously interfered with instruction and required additional adult support (id.). The IEP identified the student's special education teacher and crisis management paraprofessional as the personnel responsible for providing the student with behavioral support (id.).<sup>12</sup>

According to the district special education teacher who participated in the March 2011 CSE meeting, the CSE discussed the student's present levels of performance, determined his management needs and need for a behavior management plan (BIP), and developed the annual goals from that discussion (Tr. pp. 30, 34-36, 43-44, 91-93). She further testified that the Sinai representatives and the parents provided the CSE with information about the student's behavior management needs, based on which the CSE developed the social/emotional goals (Tr. pp. 35-37).

With regard to the disputed issue, to address the student's social/emotional needs, the March 2011 IEP contained three annual goals directed towards improving the student's social/emotional and behavior skills (Dist. Ex. 1 at pp. 9-10). One of the IEP annual goals

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<sup>10</sup> While the parents object to the two annual goals relating to the student's behavioral needs, they do not raise any objections on appeal regarding the remaining goals contained in the March 2011 IEP.

<sup>11</sup> As noted above, the parents do not appeal the IHO's determination that the March 2011 IEP accurately reflected the student's deficits as discussed during the CSE meeting.

<sup>12</sup> Although the IEP also indicates that a counselor is one of the personnel responsible for providing behavioral support, and counseling is recommended to address the student's social/emotional management needs, counseling was not recommended as a related service for the student in the March 2011 IEP (Dist. Ex. 1 at pp. 4, 17).

addressed the student's need to participate in school related activities with the assistance of a crisis management paraprofessional, demonstrated by his ability to follow teacher instruction and comply with the school's rules and regulations (*id.* at p. 9). The second annual goal was designed to improve the student's ability to cope with stress by "tak[ing] breaks from classroom activities" with the assistance of a crisis management paraprofessional (*id.*). The third, which did not specifically reference the student's paraprofessional, targeted the student's ability to maintain attention, remain focused, and stay on task to complete classroom tasks (*id.* at p. 10). A review of the annual goals from the March 2011 IEP reveals that they were consistent and sufficiently aligned with the student's social/emotional and behavior needs as set forth in the present levels of performance (see Dist. Ex. 1 at pp. 3-4, 9-10).<sup>13</sup>

In addition to the annual goals, the March 2011 IEP included management strategies and a BIP to address the student's behavioral needs (Dist. Ex. 1 at pp. 3-4, 18). The CSE recommended modifications and supports to address the student's academic management needs including preferential seating, breaking assignments into short sequential steps, repetition, rephrasing, redirection, refocusing, and positive reinforcement (*id.* at p. 3). The IEP also incorporated modifications and supports to address the student's social/emotional management needs including praise and encouragement; counseling; a calm, small, structured setting; preparation prior to transitions; and predictable routines; as well as reiterating the student's need for "consistent and frequent" positive reinforcement, refocusing, and redirection (*id.* at p. 4). According to the district special education teacher, the CSE developed the BIP at the meeting based on oral information provided by the parents and Sinai representatives (Tr. pp. 41-42, 54-55). The BIP described the student's behaviors that interfered with learning, behavioral changes that were expected, strategies to be attempted to change the behavior, and supports to be employed to assist the student (Dist. Ex. 1 at p. 18). The behaviors described in the BIP as interfering with the student's learning and the strategies to change the behaviors are consistent with those included in the social/emotional and academic present levels of performance sections of the IEP (compare Dist. Ex. 1 at pp. 3-4, with Dist. Ex. 1 at p. 18).

## **2. Recommendation for a Crisis Management Paraprofessional**

According to the district special education teacher, the CSE took into account all of the information provided during the meeting about the student's progress, current levels, and need for attention and focusing, in recommending a 12:1+1 special class in a community school (Tr. p. 29; Dist. Ex. 1 at pp. 1, 15, 17).<sup>14</sup> The special education teacher explained that a 12:1+1 special class could address the needs of students who had behavioral difficulties and needed extra

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<sup>13</sup> As discussed further below, although the annual goals may not have themselves indicated the manner in which they were to be implemented, the evidence shows that a paraprofessional services were identified on the written IEP; as further described below was indicated that recommended paraprofessional would have received guidance from a special education teacher in how to address the needs targeted by each goal. Certainly the goals could have been drafted with greater clarity on this point, but any deficiency did not result in denial of a FAPE.

<sup>14</sup> The parents did not raise an objection to the sufficiency of the 12:1+1 special class placement recommendation in the due process complaint notice (Parent Ex. A).

attention (Tr. pp. 80-81).<sup>15</sup> The IEP indicates that the CSE also considered and rejected placement in an integrated co-teaching program as being insufficient to address the student's social-emotional needs, and considered and rejected placement in a special class in a specialized school as being too restrictive (Dist. Ex. 1 at p. 16). The district special education teacher testified that the CSE included the supplemental service of a 1:1 crisis management paraprofessional in the student's March 2011 IEP due to his distractibility, difficulty with transitions and social situations, and to help the student stay focused on lessons (Tr. pp. 35, 37, 105-06).

Regarding the role of the crisis management paraprofessional, the IHO determined that the provision of a 1:1 crisis management paraprofessional would provide support for the student in staying on task and remaining available for instruction.<sup>16</sup> The district special education teacher testified that the CSE determined the student required a 1:1 crisis management paraprofessional because he was distractible, sometimes unfocused, and needed attention to transition to the class and stay on task (Tr. pp. 105-106). She further stated that the CSE recommended the supplementary service of a paraprofessional to target the student's needs relating to behaviors under the direction of the classroom teacher (Tr. p. 62). Specifically, the district special education teacher identified the role of the crisis management paraprofessional for the student to include keeping him on task, re-focusing the student, and assisting the student's teacher in implementing the teacher's directions and lessons (Tr. p. 63). The special education teacher testified that the classroom teacher would provide the paraprofessional with information including what skills to focus on with the student and suggest alternative strategies and modifications to the activities (Tr. pp. 47-48). Additionally, she defined the role of the paraprofessional as implementing the classroom teacher's directions to address the student's needs, not "to decide what to do" or provide the student with instruction (Tr. pp. 37, 63-64). Further, the special education teacher testified that the goals were created for the crisis management paraprofessional, to be carried out under the supervision of the student's special education teacher, in order to meet the student's behavioral management and social/emotional needs (Tr. pp. 40, 46-47). Contrary to the parents' argument that the student needed to be "instructed and monitored by a trained special education teacher," the hearing record indicates that the student would have received instruction from the special education teacher in the

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<sup>15</sup> According to State regulations, a 12:1+1 special class is designed for "students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]).

<sup>16</sup> While I understand how the parents might interpret the IHO's decision as mistaking the role of the 1:1 crisis management paraprofessional as providing instruction, the IHO's determination is also reasonably interpreted as meaning that the 1:1 crisis management paraprofessional will, by keeping the student on task, ensure that the student is available for instruction by his classroom teacher (IHO Decision at p. 10). Considering the testimony, the hearing record supports the conclusion that the role of the 1:1 crisis management paraprofessional was not to provide instruction but to keep the student available for instruction by attending to his interfering behaviors (Tr. pp. 62-64). This is consistent with State guidance documentation indicating a paraprofessional "may assist in the implementation of a behavioral intervention plan, but may not provide instructional services to a student" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Mem. [Jan. 2012], at p. 1, available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>).

recommended 12:1+1 classroom and the 1:1 crisis management paraprofessional would have addressed the student's behavior management and social/emotional needs (Tr. pp. 46-48, 62-64).

Overall, the hearing record provides no reason to depart from the IHO's conclusion that the CSE developed annual goals designed to address the student's behavioral needs, as set forth in the present levels of performance, and provided information sufficient to guide the student's special education service providers, particularly when considered in conjunction with the management needs included in the March 2011 IEP and the role of the crisis management paraprofessional (see T.G. v New York City Dep't of Educ., 2013 WL 5178300, at \*18 [S.D.N.Y. Sept. 16, 2013]; S.H. v Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*9 [S.D.N.Y. Dec. 8, 2011]; C.T. v Croton-Harmon Union Free Sch. Dist., 812 F. Supp. 2d 420, 432 [S.D.N.Y. 2011]).

### **C. Assigned Public School Site**

The parents challenge the IHO's rejection of their implementation claims regarding both the size of the proposed classroom at the public school and the grouping of the students. The IHO determined that the district was not obligated to maintain a place for the student at the assigned public school location after the parents rejected the March 2011 IEP. Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*14-\*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at \*19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at \*11-\*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is

required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed.Appx. 135, 141, 2013 WL 2158587, at \*4 [2d Cir. May 21, 2013]), and, even more clearly that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed.Appx. at 87, 2013 WL 3814669 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective (see, e.g., C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]). Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 2013 WL 4056216, at \*13; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K., 2013 WL 4436528, at \*9 [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In this instance the parents cannot prevail on their claims that the district would have failed to implement the March 2011 IEP at the public school site because a retrospective analysis of how the district would have executed the student's March 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87, 2013 WL 3814669; R.E., 694 F3d at 186, 195; A.M., 2013 WL 4056216, at \*13; R.C., 906 F. Supp. 2d at 273). The parents rejected the district's program by letter to the district dated August 22, 2011, in which the parents asserted that the CSE had not offered the student a placement and notified the district of their intention to enroll the student at Sinai for the 2011-12 school year (Parent Ex. C at p. 1). In addition, on August 16, 2011, the parents entered into a

contract to enroll the student at Sinai for the 2011-12 school year (Parent Ex. E). Although the student's father testified that he had not rejected the district's recommended program and placement at the time he visited the public school, his testimony also indicates that he visited the public school in September 2011, after the parents sent the August 22, 2011 letter (Tr. pp. 206, 213-16; Parent Ex. C at p. 1). Moreover, the contract between Sinai and the parents indicates that the parents could not have removed the student from Sinai after September 1, 2011 without incurring the full cost of the student's tuition at Sinai for the 2011-12 school year (Parent Ex. E). Considering that the parents rejected the offered placement prior to the time the district would have been obligated to implement the student's IEP and prior to the father's visit to the assigned public school site, it is not surprising that at the time of the student's father's visit to the assigned public school site, he was informed that the district did not currently have a seat available for the student (Tr. pp. 200, 214-15). Under these circumstances, the IHO's determination that the district was not obligated to establish that the assigned public school site would have been able to implement the student's March 2011 IEP must be upheld (see K.L., 530 Fed. App'x 81, 87, 2013 WL 3814669, at \*6; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273).

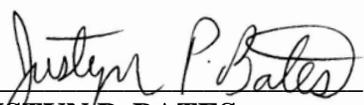
## VII. Conclusion

In summary, the district established that the March 2011 IEP appropriately addressed the student's behavioral needs as set forth in the present levels of performance and provided sufficient information to guide the student's providers in instructing the student (see T.G., 2013 WL 5178300, at \*18; S.H., 2011 WL 6108523, at \*9; C.T., 812 F. Supp. 2d at 432). The necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Sinai was an appropriate placement or whether equitable considerations support the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at \*12). However, although not raised by the parents, I remind the district that while it may permissibly rely on privately obtained evaluations or information provided by private school personnel to develop a student's IEP and offer the student a FAPE (G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*23-\*24 [S.D.N.Y. Mar. 29, 2013]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011]; M.H. v. New York City Dep't of Educ., 2011 WL 609880, at \*9-\*10 [S.D.N.Y. Feb. 16, 2011]), the district does so at its own risk because the district—not the private school—remains obligated under the Act to ensure that the student is appropriately evaluated in all areas related to his disabilities (20 U.S.C. § 1414[b][2], [3]; 34 CFR 300.304[b], [c]; 8 NYCRR 200.4[b][3]-[6]).

I have considered the parties' remaining contentions; however, in light of the above determinations, it is unnecessary to address them.

## THE APPEAL IS DISMISSED

**Dated:** Albany, New York  
January 9, 2014

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