



# The University of the State of New York

The State Education Department  
State Review Officer  
[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 13-238

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

## **Appearances:**

Cuddy Law Firm, PC, attorneys for petitioner, Jason H. Sterne, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that her claims were moot because respondent (the district) conceded that it had not offered the student a free appropriate public education (FAPE) and the appropriateness of all of the requested relief sought. 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**

Because of the procedural posture of this case, a detailed factual recitation is unnecessary. By way of background, on January 24, 2012, the CSE convened to develop the student's IEP (Dist Ex. 1).<sup>1</sup> Finding the student eligible for special education services as a student with autism, the CSE recommended program consisting of placement in a 6:1+3 special class in a State-approved nonpublic day school and related services in the form of two 30-minute sessions per week of individual speech-language therapy at home; two 30-minute sessions per week of individual speech-language therapy at school; two 30-minute sessions per week of individual occupational therapy (OT) after school; and one 60-minute session per week of counseling at school, with all services to be provided on a 12-month basis (id. at pp. 1, 8-9).

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<sup>1</sup> The projected implementation date for the January 2012 IEP was February 1, 2012 (Dist. Ex. 1 at p. 1).

Following the parent's filing of a due process complaint notice dated June 22, 2012,<sup>2</sup> the district and parent entered into a resolution agreement dated July 18, 2012, whereby the district agreed to provide the student with eight hours per week of home-based "SETSS"<sup>3</sup> for the 2012-13 10-month school year (Parent Ex. B).<sup>4</sup>

On January 17, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (Dist. Ex. 2 at p. 13). The January 2013 CSE determined that the student continued to be eligible for special education and related services as a student with autism, and recommended placement in a 6:1+3 special class in a State-approved nonpublic day school, that the student receive adapted physical education three periods per weeks, and related services consisting of four 30-minute sessions per week of individual speech-language therapy, all on a 12-month basis (*id.* at pp. 1, 9-10).<sup>5</sup> The CSE did not recommend the eight hours per week of ABA services that the student received during the 2012-13 school year pursuant to the July 2012 resolution agreement (*id.* at pp. 9-10; *see also* Parent Ex. B).

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

By amended due process complaint notice dated July 3, 2013, the parent requested an impartial hearing (Parent Ex. A at p. 2).<sup>6</sup> In her complaint, the parent indicated that the January

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<sup>2</sup> The June 2012 due process complaint notice was not included in the hearing record.

<sup>3</sup> The hearing record does not define SETSS; for purposes of this decision it is presumed that the parties are referring to special education teacher support services. As the hearing record receives that these services were provided to the student using an "ABA" (also not defined; presumably applied behavior analysis) methodology, for ease of reference they are hereafter referred to as "ABA services."

<sup>4</sup> The impartial hearing record submitted on appeal included two exhibits labeled Parent Exhibit B; only one—the July 2012 resolution agreement—was received into evidence at the impartial hearing (Tr. p. 3). The other—the student's January 2013 IEP—is duplicative of District Exhibit 2, which is cited alone for reference to that document. Furthermore, although the hearing record included a parent exhibit list and 17 additional parent exhibits beyond the two entered into the hearing record on the first day of the impartial hearing (Tr. p. 3), the IHO initially declined to enter any additional exhibits into the hearing record and the transcript of the impartial hearing does not indicate that they were admitted into evidence (Tr. pp. 28-29; *see* Tr. pp. 2, 21). However, the IHO later directed counsel for the parent to "[p]ut all your exhibits in, and I will look at them" (Tr. pp. 75-77; *see* IHO Decision at p. 9 [listing as having been entered into the hearing record parent exhibits D, E, F, H, K, L, M, N, O, P, Q, R, S, T, U]). Although it is unclear whether these exhibits were entered into the hearing record, in the interests of having an adequate record upon which to render a decision each has been reviewed and considered in order to ensure that a meaningful review is conducted. I encourage the IHO to more clearly identify those items he has entered into the hearing record and considered in issuing his decision in the future (8 NYCRR 200.5[j][5][v]). The hearing record failed to include the district's proposed resolution agreement dated October 18, 2013, which was clearly received into evidence by the IHO as District Exhibit 6 (IHO Decision at p. 9; Tr. pp. 21, 35, 37). However, the district's proposed resolution agreement is not necessary to reach a determination in this case.

<sup>5</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>6</sup> The parent initially filed a due process complaint notice dated June 26, 2013 (Parent Ex. A at p. 1), which was superseded by the amended due process complaint notice (Parent Ex. A at p. 2). The IHO accepted both the single-page original and single-page amended due process complaint notices into evidence as one exhibit (*see* Tr. p. 3; Parent Ex. A). Although the exhibit submitted to the Office of State Review with this appeal totals two pages, the hearing record indicates that Parent Exhibit A consisted of four pages (Tr. p. 2; IHO Decision at p. 9).

2013 CSE failed to recommend (1) home-based ABA services for July to August 2013; and (2) ABA services and counseling for September 2013 through August 2014 (*id.*). As to relief for the alleged deprivations, the parent requested that the district "[g]rant [an] RSA<sup>7</sup> for both services" (*id.*).<sup>8</sup>

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

An impartial hearing was conducted on September 19, 2013 and October 21, 2013 (Tr. pp. 1-122). By interim decision dated September 24, 2013, the IHO ordered that effective September 2013, the student's pendency placement included the related services of "eight hours of weekly ABA (1:1) home services " and "one hour of counseling (1:1) at home or outside school" (Interim IHO Decision at p. 2; see generally Tr. pp. 1-19).<sup>9</sup> The IHO stated that although the July 2012 resolution agreement provided that the student would receive eight hours of home-based 1:1 ABA services through the end of the 2012-13 school year, "no provision or agreement was made or evident" for the provision of ABA services to the student during summer 2013, indicating that further proceedings would be necessary to determine whether the district was responsible for provision of the ABA services during summer 2013 (Interim IHO Decision at p. 2; see also Parent Ex. B).<sup>10</sup>

Following the conclusion of the impartial hearing, the IHO issued a decision dated November 21, 2013 (IHO Decision). The IHO found that the request for relief had become moot because the district conceded that it failed to provide the student with a FAPE and "had agreed to the [parent's] request to restore the home services and counseling the [student] had received during the 2012-13 school year on a 12-month basis" (*id.* at pp. 7-8). Initially, relative to the counseling and home-based ABA services that the student received during July and August 2013, the IHO noted that the student had "suffered no interruption in services" and that any form of relief that he could have granted pursuant to the parent's amended due process complaint notice was "moot" because the district conceded that the student should receive one hour per week of counseling and eight hours per week of home-based 1:1 ABA services on a 12-month basis from June 2013 through August 2014 (*id.* at pp. 3-4, 7-8).

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<sup>7</sup> The hearing record reflects that "RSA" stands for related service authorization (IHO Decision at p. 2; Tr. p. 112), which is a district-generated form entitling parents to obtain related services from private providers at district expense (IHO Exs. 1-2). The State Education Department has issued guidance indicating that it is permissible for districts to contract with private entities to provide related services to students with disabilities ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2, 2010], available at <http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html>).

<sup>8</sup> Neither the original nor amended due process complaint notices specified the number of hours per week of ABA and counseling services the parent was seeking (see Parent Ex. A at pp. 1-2). However, the original due process complaint notice requested "continuation" of the services (*id.* at p. 1).

<sup>9</sup> Neither party challenges the IHO's pendency determination on appeal.

<sup>10</sup> Because the parent did not request counseling services for July and August 2013 in her amended due process complaint notice, the IHO made no findings relative to whether the counseling service provider was paid for the one hour per week of counseling services provided to the student during July and August 2013. During the impartial hearing, however, the parent affirmed that she received an RSA from the district for the student's home-based counseling services for July and August 2013 and the hearing record contains an RSA authorizing payment for counseling services received by the student during summer 2013 (see Tr. p. 98; IHO Ex. 2; see also Tr. p. 5).

With regard to whether the district paid the provider of the ABA services provided to the student during July and August 2013—an issue raised for the first time at the impartial hearing by counsel for the parent—the IHO found that, even were the issue raised in the due process complaint notice and thus properly before him, because the service provider continued to supply the student with eight hours per week of home-based 1:1 ABA services during summer 2013 "without the issuance of the RSAs or payment, as is its apparent practice, [the provider] ha[d] its own recourse to pursue payment" (IHO Decision at pp. 4-5, 7).

Finally, with regard to the statement made by counsel for the parent during the impartial hearing that the parent's case was not moot because the parent sought 10 hours per week of home-based 1:1 ABA services (as opposed to 8), the IHO rejected counsel's argument, finding that the parent had neglected to specify in her amended due process complaint the number of hours sought, that "even after the parent retained counsel, counsel made no request to amend the request a second time to reflect ten hours," and that the "last agreed[-]upon hours of services were 8 hours based on a signed and binding resolution agreement" (*id.* at pp. 5-6).

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

The parent appeals, arguing that although the district conceded that it failed to offer the student a FAPE, conceded that the relief sought by the parent for the July and August 2013 was appropriate, and despite that the student actually received both ABA and counseling services during summer 2013, the IHO nonetheless erred in finding the case moot and dismissing the parent's case. Specifically, the parent argues that the case is not moot because the district failed to issue to the parent or produce at the impartial hearing an RSA authorizing payment for the ABA services received by the student in July and August 2013 and, therefore, the parent is financially responsible for payment of the ABA services received by the student during summer 2013 unless the district is ordered to "retroactively issue" an RSA, or directly pay the service provider, for the ABA services provided to the student during July and August 2013.<sup>11</sup> Alternatively, the parent argues that the IHO erred in finding moot the relief sought by the parent because although the parent did not specify the number of hours of ABA services sought in her amended due process complaint notice, the parent was seeking 10 hours of home-based ABA services for July 2013 through August 2014.

Next, the parent argues that the IHO should be referred for discipline. The parent advances two bases in support of her claim. First, the parent argues that the IHO scheduled the first hearing date 48 days after the end of the resolution period. Second, the parent argues that although on or around September 17, 2013 she requested an adjournment of the September 19, 2013 hearing date because she was attempting to secure representation of counsel, the IHO denied her request and required her to proceed without counsel on September 19, 2013 while engaging in substantive determinations on the record (*see* Tr. pp. 1-19). Finally, the parents have attached documents to their petition that were not entered into evidence at the impartial hearing, which I construe as a request for consideration of additional evidence on appeal (Pet. Exs. A; B).

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<sup>11</sup> At the impartial hearing, the parent stated that she had received an invoice from the ABA service provider for the home-based ABA services provided to the student during July and August 2013 (Tr. p. 98).

As to relief, the parent requests that the district be ordered to issue an RSA for the eight hours of home-based ABA services provided to the student during July and August 2013. In addition, the parent requests that the district be ordered to issue RSAs for the 2013-14 school year in the amount of ten hours per week of home-based ABA/SETSS, one hour per week for counseling (music therapy), and one hour per week for OT.

The district answers, denying the parent's material assertions and requesting that the IHO's decision be upheld for the reasons stated by the IHO. The district also raises four additional arguments. First, the district objects to the submission of additional evidence attached to the parent's petition for review and requests that the additional evidence not be considered in this appeal. Second, the district argues that the IHO correctly found that the case was moot because the district conceded the appropriateness of the relief sought by the parent. In addition, the district argues that there is no relief that can be awarded to the parent because the student received eight hours per week of home-based ABA services and one hour per week of counseling without any interruption of service since at least July 2013. Third, the district contends that the issue of whether the student is entitled to one hour per week of OT services for the 2013-14 school year is not properly raised on appeal because the parent neither requested such relief in her amended due process complaint notice nor secured the district's consent to an expansion of the scope of the impartial hearing to include the issue of whether the student should receive OT services. Fourth, the district argues that there is no merit to the parent's allegation that the student is entitled to receive 10 hours per week of home-based 1:1 ABA services. In support of this argument, the district notes that the parent's amended due process complaint notice failed to specify the number of weekly hours sought. Alternatively, the district argues that the hearing record reflects that eight hours per week of home-based ABA services were appropriate and that the parent conceded in her amended due process complaint notice that the eight hours per week of ABA services that the student had been receiving pursuant to the July 2012 resolution agreement constituted a program that provided the student with educational benefit.

## **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. Scope of Review**

Initially, as neither party appeals from the IHO's determination on pendency, that decision is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Next, the hearing record indicates that the district issued an RSA for two 30-minute sessions per week of individual OT services for July and August 2013 (IHO Ex. 1). To the extent that the parent now also requests—for the first time on appeal—an order directing the district to issue an RSA for OT services for the remainder of the 2013-14 school year, the parent made no request in her amended due process complaint notice for any relief due to allegedly insufficient OT services, nor did she request permission to amend her complaint a second time and, therefore, such a request is not properly reviewed in this appeal (20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; see R.E., 694 F.3d at 187-88 n.4 [noting the requirement that parents "state all of the alleged deficiencies in the IEP

in their . . . due process complaint"]; see also B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*6 n.2 [S.D.N.Y. May 14, 2013] [noting that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]. In addition, an independent review of the hearing record does not provide any indication that the district "opened the door" regarding the issue of OT services so as to expand the scope of the impartial hearing (M.H., 685 F.3d at 250-51). Accordingly, the issue of whether the parent is entitled to additional relief in the form of an RSA as the result of inadequate OT services is not properly before me.

## 2. Additional Evidence

On appeal, the district objects to the parent's submission of additional evidence in the form of two supplemental exhibits—each of which includes numerous documents—attached to her petition for review and that the supplemental exhibits should be rejected (Pet. Exs. A; B). The proffered exhibits submitted by the parent were not received into evidence at the impartial hearing (see IHO Decision at p. 9; Interim IHO Decision at p. 4; Tr. pp. 2, 21). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

As noted above, the parent attaches to her petition two supplemental exhibits containing additional evidence that the parent wishes to be considered in support of her appeal. The first supplemental exhibit contains various letters regarding scheduling of a resolution meeting and the impartial hearing and other prehearing procedures (Pet. Ex. A at pp. 1-19). The second supplemental exhibit submitted by the parent with her petition includes five invoices sent from the ABA service provider to the district for the July and August 2013 home-based ABA services (Pet. Ex. B at pp. 1-6).

First, the IHO's interim decision is already included in the hearing record and its further submission with the parent's petition is not necessary. Second, with regard to the remaining documentary evidence submitted with the parent's petition for review, the parent has proffered no reason explaining why the supplemental exhibits either could not have been submitted at the time of the impartial hearing or explaining why the evidence is necessary in order for an SRO to render a decision in this appeal. Moreover, the parent was represented by counsel on the second hearing date, at which time counsel for the parent could have attempted to introduce the evidence into the record and present testimony relative to the contents of the supplemental exhibits.

With specific regard to the second supplemental exhibit, which contains five separate invoices sent from the ABA service provider to the district, the hearing record contains testimony from the ABA service provider's representative—whose name appears on the "provider name" line of the invoices submitted to the district—discussing the issue of payment and amounts owed to the service provider for services provided to the student during July and August 2013 (see Tr. pp. 107-15; Pet. Ex. B at pp. 4-6). Thus, additional evidence on this matter

would be cumulative and is not necessary to render a decision in this appeal. Moreover, it is unnecessary to determine any amounts owed to the ABA service provider in this appeal. Further, it would be improper and inconsistent with sound principles of due process to accept into evidence information about the amount owed to the service provider without affording the district an opportunity to challenge the evidence. Accordingly, where the parents have not provided an adequate basis for why these exhibits are necessary for rendering a decision in this matter, I decline to consider the additional evidence submitted by the parent on appeal.<sup>12</sup>

### **3. IHO Bias/Incompetence**

On appeal, the parent contends that an SRO should refer the IHO for discipline because the IHO failed to timely convene the hearing but denied the then-pro se parent's prehearing request for an adjournment for the purpose of securing counsel and then required her to proceed without counsel on the first hearing date while engaging in substantive determinations on the record (see Tr. pp. 1-19). As to the parent's claim that the IHO failed to timely schedule any hearing dates after the end of the resolution session (see 8 NYCRR 200.5[j][3][iii][b][3] [providing that an IHO shall commence a prehearing conference or impartial hearing within the first 14 days after the expiration of the 30-day resolution period]), the parent does not point to any evidence in the hearing record of a denial of a FAPE or other harm to the student that resulting from the delay in convening the hearing. To the contrary, the parent additionally argues that the IHO should have granted her request for an adjournment and further delayed the first day of the hearing so that the parent could formally retain and secure the presence of counsel, with whom the parent had already been in contact. However, there is no basis for relief here as the parent has failed to show any prejudice to the parent or student resulting from counsel's absence on the first day of hearing. Indeed, following the first day of the impartial hearing, the parent received a favorable order from the IHO determining the student's pendency placement to consist of the greater part of the relief now requested by the parent (see Interim IHO Decision at p. 2).

In this case, after accounting for applicable extensions, it appears that the IHO issued a final decision within the 45-day timeline (34 CFR 300.510[b][2], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), and contrary to the contentions of the parent, the hearing record does not establish that the IHO must be "referred for discipline" on the basis that he acted with bias, engaged in misconduct, demonstrated incompetence, or abused his discretion in the conduct of the hearing. An independent review of the hearing record demonstrates that the parent was provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]).

### **B. Mootness**

The principal question presented by the parties in this appeal is whether, having found that the district conceded the appropriateness of the relief sought by the parent for the 12-month 2013-14 school year; that no relief could be awarded to the parent for July and August 2013 because the student received the services that the parent requested for those months; and that the student has received all of the services requested without interruption since at least July 2013, the

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<sup>12</sup> Nevertheless, the additional evidence submitted by the parent in this appeal has been reviewed and consideration thereof would not affect my determination in this matter.

IHO erred in dismissing the matter as moot. For the reasons that follow, the IHO erred in finding the parent's case moot and that no further meaningful relief could be awarded to the parent on the facts of this case.

As other SROs have long held in administrative reviews of IHO decisions, the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at \*3-\*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993] [noting that the challenged order was moot because there were "no indications that either party [was] still being affected in some way" by the subject of the appeal]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980] [concluding "that the rights of the parties cannot be affected by the determination of this appeal and it is therefore moot"]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

In this case, the parent requested in her amended due process complaint notice: (1) ABA services for July and August 2013 and (2) ABA services and counseling for September 2013 through August 2014 (Parent Ex. A at p. 2).<sup>13</sup> Because the student received eight hours per week of ABA services during July and August 2013 and because the district conceded the appropriateness of the relief that the parent requested for June 2013 through August 2014, the IHO found that "there is nothing left to resolve" and that the case was moot because the parent had received all of the relief requested in her amended due process complaint notice (IHO Decision at p. 8).<sup>14</sup>

In support of the IHO's finding that the case is moot, the district asserts that since the time of the IHO's decision, it "authorized" payment to the ABA service provider for services that were provided to the student for July and August 2013 (see Answer ¶ 15).<sup>15</sup> The district, however, neither includes a citation to the record nor submits any additional evidence in support

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<sup>13</sup> There is no indication in the hearing record that the student has not received the requested ABA services and counseling pursuant to the IHO's pendency order (Interim IHO Decision at p. 2).

<sup>14</sup> Although not at issue in this appeal, as noted above the parent affirmed in her testimony that she received an RSA from the district for one hour per week of counseling services for July and August 2013 (Tr. p. 5; see also Tr. p. 98; IHO Ex. 2).

<sup>15</sup> The district also represented that "it will provide payment for the eight hours of weekly ABA [h]ome [s]ervices and the one hour of weekly [c]ounseling [s]ervices through the end of August 2014" (Answer ¶ 23).

of its statement, which by itself does not provide a sufficient basis for affirming the IHO's decision without evidentiary support in the hearing record for its assertion that it "authorized" payment to the ABA service provider.

While the ABA service provider is not a party to this case, and the parent may not assert a claim for payment on behalf of a third party, the district is a party to this appeal, and it is the district that is responsible for offering the student a FAPE. To this end, the district has conceded that it did not offer the student a FAPE and that the student was entitled to ABA services for July and August 2013, thereby conceding its obligation under the IDEA to fund those services (IHO Decision at p. 8; Tr. pp. 23-25, 28-30, 73). Yet, the district has not provided support for its assertion that it already issued an RSA to the parent or paid the ABA service provider directly, potentially leaving the parent and student responsible, along with the district, for the settlement of payment for the July and August 2013 ABA services provided to the student (Tr. pp. 98-99, 110-17). A student is entitled by the IDEA to a "free appropriate public education" (20 U.S.C. § 1400[c][3]). Because it was raised as an issue and there is no evidence in the hearing record confirming that an RSA has been issued or, alternatively, that the district has otherwise made payment arrangements with the ABA service provider directly, for the eight hours per week of ABA services received by the student for July and August 2013, the student would potentially be subject to the loss of services for nonpayment.<sup>16</sup>

Although I disagree with the IHO that the relief sought by the parent was moot, it is certainly understandable how the IHO concluded the matter was moot because the student had received the requested July and August 2013 ABA services at issue in this case. The matter is very close to becoming moot and should have been easily rectified by the parties themselves without resorting to a due process hearing. Be that as it may, at the time of the impartial hearing the district had not yet issued an RSA or otherwise shown that it had arranged for payment for the ABA services provided to the student for July and August 2013 (Tr. pp. 98-99). Thus, because the parent was receiving invoices and the student was subject to injury for nonpayment of the ABA service provider for the services that it provided during July and August 2013, issuance of an RSA to the parent, or an order directing the district to pay for the ABA services provided to the student during July and August 2013, constitutes meaningful relief that can still be awarded to the parent in this case, and therefore the case is not moot (see Lillbask, 397 F.3d at 84). In view of the foregoing, to the extent that the district has not yet issued an RSA, or paid the ABA service provider directly, for the ABA services provided to the student during July and August 2013 for which the district has conceded liability, the IHO erred in finding the parent's case moot and should have issued a directive to the district to arrange for payment for the ABA services.

Finally, to the extent that the parent argues on appeal that the IHO should have granted the parent's request for 10 hours of home-based ABA services for the 2013-14 school year starting in September 2013, the IHO's decision is affirmed. Here, where counsel for the parent raised the issue for the first time on the second day of the impartial hearing; the request for 10 hours per week of ABA services was not raised in the parent's amended due process complaint notice; was raised at the impartial hearing after the expiration of the resolution period; was raised after the district had conceded that it had failed to offer the student a FAPE; and was raised at the

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<sup>16</sup> I note that the hearing record indicates that the parent received an invoice from the ABA service provider for the July and August 2013 services (Tr. pp. 98-99).

impartial hearing only after the IHO suggested that there was nothing further to adjudicate and that the case was moot (Tr. pp. 30, 57; Parent Ex. A at p. 2). Moreover, even if the parent had raised the issue, I note that the hearing record in this case demonstrates that eight hours per week of home-based ABA services was sufficient and appropriate for this student. Specifically, the student's July 2013 annual progress report expressly recommended that the student "continue to receive 8 hours per week of ABA services in order to benefit from a fully comprehensive program that targets all areas of need" (Parent Ex. P at p. 4). There is no evidence in the hearing record that suggests the student required an increase in ABA services.

## VII. Conclusion

For the reasons stated above, the student was entitled to receive—at district expense—eight hours per week of home-based ABA services, in addition to one hour per week of home-based counseling during July and August 2013. In addition, the district has conceded that the student should receive eight hours per week of home-based ABA services and one hour per week of home-based counseling from September 2013 through August 2014 without interruption. In light of the foregoing, I need not address the parties' remaining contentions.<sup>17</sup> To the extent that payment to the ABA service provider has not already been made, payment by the district to the ABA service provider for the July and August 2013 ABA services provided to the student will afford to the parent all of the relief she requested in this case.

### **THE APPEAL IS SUSTAINED IN PART.**

**IT IS ORDERED** that the IHO's decision, dated October 21, 2013, is modified, by reversing those portions that found the parent's request for relief moot and that there was no relief that could be awarded in this case; and

**IT IS FURTHER ORDERED** that to the extent that the district has not yet issued payment to the ABA service provider for the ABA services provided to the student during July and August 2013, the district is hereby ordered to do so within 60 days of the date of this decision.

**Dated:** Albany, New York  
February 21, 2014

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

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<sup>17</sup> I note that the State Education Department has issued guidance regarding the provision of related services in circumstances similar to those present here, where a student is recommended for placement in a State-approved nonpublic school at public expense ("Provision of Related Services to Students with Disabilities Placed in Approved Private Schools in New York City," Office of Special Educ. [Sept. 2012], available at <http://www.p12.nysed.gov/specialed/duprocess/NYC-IHO-RSA-912.pdf>).