



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-058

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

### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, Esq., of counsel

Regina Skyer & Associates, LLP, attorneys for respondent, Jesse Cole Cutler, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Mary McDowell Friends School (Mary McDowell) for the 2012-13 school year. The parent cross-appeals from that portion of the IHO's decision which reduced the parent's tuition reimbursement award by 25 percent. For the reasons set forth below, the matter must be remanded to the IHO for further administrative proceedings.

### **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**

With regard to the student's educational history in this case, the student attended a district public school for kindergarten and first grade and had attended Mary McDowell since the 2009-10 school year (second grade) (see Tr. pp. 157-60; Dist. Ex. 9 at p. 2).

On February 13, 2012, the parent executed an enrollment contract with Mary McDowell for the student's attendance during the 2012-13 school year (Parent Ex. H at pp. 1-2).

On March 20, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 3 at pp. 1, 13). Finding that the student remained eligible for special education and related services as a student with an other health-impairment, the March 2012 CSE recommended a 12:1+1 special class placement in a community school for 35 periods per week (*id.* at pp. 1, 8, 12).<sup>1</sup> The March 2012 CSE also recommended the following related services to be provided in a group: two 30-minute sessions per week of speech-language therapy and two 30-minute sessions per week of occupational therapy (OT) (*id.* at p. 8). In addition, the March 2012 CSE recommended strategies to address the student's management needs (multisensory approach to learning, structure routines with clear expectations, repetition and review of previously presented information, breaks as needed, graphic organizers when writing, and checklists to self-monitor work production), nine annual goals, and testing accommodations (extended time; location with minimal distractions; revised test formats in the form of questions and directions read and re-read aloud; and use of an FM unit) (*id.* at pp. 3, 4-7, 10).

In a final notice of recommendation (FNR) dated August 14, 2012, the district summarized the 12:1+1 special class and related services recommended in the March 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (*see* Dist. Ex. 6).

In a letter dated August 20, 2012, the parent advised the district that she could not "accept or reject" the assigned public school site because she could not visit the school site until September (Parent Ex. D at p. 2).<sup>2</sup> The parent additionally requested that the district provide her with "any information regarding the class or school" identified in the August 2012 FNR (*id.*).

In a letter to the district dated August 22, 2012, the parent provided the district with written notice that she "reject[ed]" the March 2012 IEP and would place the student at Mary McDowell and seek tuition reimbursement if the district failed to "cure the procedural and substantive errors" in the student's IEP and "offer him an appropriate school placement" (Parent Ex. B at pp. 1-2). The parent argued that the March 2012 CSE "changed" the student's placement recommendation from a State-approved nonpublic school to a 12:1+1 special class in a community school "without any evaluations or documentation" (*id.* at p. 2). The parent further argued that the only evaluation considered by the March 2012 CSE was used in a prior CSE meeting to support placement in a State-approved nonpublic school (*id.*). The parent also argued that a 12:1+1 special class would be inappropriate because, as the parent explained to the March 2012 CSE, the student previously attended a 12:1+1 special class where he was attacked by "physically aggressive" students (*id.*). Additionally, the parent indicated that a 12:1+1 classroom would be "too loud and distracting" and would not provide the student with an adequate level of

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<sup>1</sup> The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (*see* 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>2</sup> A copy of the August 2012 FNR was attached to the parent's letter including the handwritten notation: "please see attached letter" (*see* Parent Ex. D at pp. 1-2).

"individualized instruction" (id.). The parent also averred that the student required "very small math and reading groups in order to learn" (id.). The parent further asserted that: (1) the March 2012 CSE improperly relied upon teacher estimates; (2) the annual goals in the March 2012 IEP could not be implemented or met in the "recommended program"; (3) the March 2012 CSE inappropriately recommended "full participation in the general education curriculum"; and (4) the annual goals and management needs included in the March 2012 IEP did not address all of the student's deficits (id.). The parent indicated that she was "unable to visit th[e] recommended placement until school re-open[ed] in September" but nevertheless rejected the placement based on her belief that "a 12:1+1 class" would not be able to meet the student's "complex academic and social-emotional needs" (id.).

In a letter to the district dated September 26, 2012, the parent indicated that she visited a classroom within the assigned public school site (Parent. Ex. I). Based on her visit, the parent argued that the students in the observed classroom were "far too low functioning" and that the student would be the only fifth grader as well as "the oldest (and largest) child" in the classroom (id.).

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

In a due process complaint notice dated July 19, 2013, the parent alleged that the district failed to offer the student a FAPE for the 2012-13 school year (Parent Ex. A at pp. 1-4). The parent argued that the March 2012 CSE was improperly constituted because the regular education teacher "ha[d] not been a . . . classroom teacher for a number of years" (id. at p. 2). Thus, argued the parent, the regular education teacher would not have been responsible for implementing the student's IEP had the student attended a public school (id. at pp. 2-3). Regarding the March 2010 IEP's annual goals, the parent asserted that they were "generic and vague," did not provide a "grade level baseline," and did not address all of the student's deficits (id. at p. 3). Moreover, the parent alleged that the March 2012 CSE failed to: (1) "specify objectives" regarding the student's modified criteria in mathematics and English language arts (ELA); (2) develop annual goals "tailored" to the student's "modified reading, writing[,] or math curriculum"; and (3) "correlate . . . modified promotional standards with the proposed academic goals" (id.). The parent further objected to the indication in the March 2012 IEP that the student "should fully participate in the general education curriculum" (id.). Next, the parent argued that the March 2012 CSE's recommendation of a 12:1+1 special class placement, instead of the prior year's recommendation of a State-approved nonpublic school placement, absent any documentation to support such a change, resulted in a denial of a FAPE (id. at p. 2). The parent further averred that a 12:1+1 special class placement was inappropriate for the student because he required "additional supports" in "a smaller . . . educational environment" (id.). Specifically, the parent alleged that it was "brought to the [March 2012] CSE's attention" that the student currently attended small class sizes in reading (six students) and math (five students) and that, even in those environments, the student demonstrated "a great deal of distractibility" and required "constant reminders" (id.).

With regard to the assigned public school site, the parent alleged that she visited a classroom and found it inappropriate to meet the student's needs (Parent Ex. A at pp. 3-4).

Specifically, she asserted that: (1) the classroom did not provide "a suitable and functional peer group"; (2) the students "appeared to be far lower functioning" than the student; (3) the classroom was "a distracting setting"; and (4) no "FM unit[s]" were available (id.). Additionally, the parent alleged that the assigned public school site "could not implement [the student's] IEP" (id.).

The parent indicated that Mary McDowell was an appropriate unilateral placement that addressed the student's "academic and social/emotional needs" (Parent Ex. A at p. 4). Further, the parent contended that she "cooperated in the CSE review and placement process at all relevant times" (id.). As relief, the parent requested reimbursement of the costs of the student's tuition at Mary McDowell for the 2012-13 school year (id. at pp. 1, 4).

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

On November 13, 2013, the parties proceeded to an impartial hearing, which concluded on January 14, 2014 after two days of proceedings (Tr. pp. 1-208). In a decision dated March 25, 2014, the IHO "recognize[d]" that the district failed to offer the student a FAPE for the 2012-13 school year (IHO Decision at p. 17). The IHO next found that Mary McDowell was an appropriate unilateral placement because it addressed the student's "emotional and educational difficulties" and provided "a flexible learning environment designed to meet [the student's] immediate educational needs" (id.). The IHO proceeded to find that the parent "fail[ed] to contact the [district] about her specific concerns relating to placement and the IEP process" (id.). According to the IHO, this warranted a 25 percent reduction of in the parent's tuition reimbursement award (id.). Accordingly, the IHO ordered that the district reimburse the parent for 75 percent of the student's tuition costs at Mary McDowell (id.).

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

The district appeals, arguing that the IHO's decision was "inadequate as a matter of law", that the district offered the student a FAPE for the 2012-13 school year, and that equitable considerations do not support the parent's request for tuition reimbursement. The district argues that the March 2012 CSE relied upon current and sufficient evaluative material, including a progress report from Mary McDowell.<sup>3</sup>

Initially, the district asserts that, "although the IHO offered a summary of the evidence" and "a broad overview of the applicable law," the IHO improperly determined that the district failed to offer the student a FAPE in a single sentence without citation to the hearing record or the applicable law or identification of the allegations in the parent's due process complaint notice underlying such a finding. The district further contends that the IHO's determinations with respect to the appropriateness of the unilateral placement and equitable considerations were "similarly cursory."

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<sup>3</sup> The district mentions the appropriateness of Mary McDowell in its petition only briefly, observing that the private school did not offer any mainstreaming opportunities for the student.

Turning to the merits, the district argues that, although the regular education teacher who participated in the March 2012 CSE was not teaching in a classroom at the time of the meeting, she was otherwise qualified to participate as a member of the CSE. The district additionally argues that the parent identified no harm stemming from the fact that the regular education teacher did not teach in a classroom at the time of the March 2012 CSE meeting. The district further avers that the March 2012 IEP's annual goals sufficiently targeted the student's areas of need. The district additionally contends that the criterion and method of each annual goal included information specific to student and, further, that the student's present levels of performance identified his "baseline" level of skills. The district also contends that no specific annual goals were necessary with respect to the student's modified promotional criteria. The district argues that the parent's claim that the student's change in placement required new evaluations is based upon Section 504 of the Rehabilitation Act, which is not within the SRO's jurisdiction. Furthermore, the district argues that the recommended 12:1+1 special class placement would have addressed the student's needs in the least restrictive environment (LRE). The district also contends that the parent's challenges to the assigned public school site were speculative as a matter of law because the student did not attend the assigned public school site. Finally, as to equitable considerations, the district contends that the parent did not seriously consider a public placement and failed to timely inform the district of her concerns with the March 2012 IEP.

In an answer, the parent denies the district's material assertions and argues that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school. The parent contends that the IHO's decision was legally sufficient, although she also submits that the IHO's failure to address the specific allegations in her due process complaint notice was "improper." The parent further alleges that the March 2012 CSE's failed to appropriately consider recommendations contained within a privately obtained evaluation, as well as a progress report from Mary McDowell. With respect to the March 2012 IEP, the parent alleges that it was inappropriate because it did not contain any annual goals targeted to the student's comprehension needs and failed to recommend an FM unit for the student. Further, argues the parent, the recommended 12:1+1 special class placement would be too large for the student. The parent additionally contends that considerations regarding the assigned public school site were relevant to an assessment of whether the district offered the student a FAPE and that the assigned public school site could not have implemented the March 2012 IEP.

The parent also interposes a cross-appeal asserting that the IHO erred by reducing the parent's award of tuition reimbursement award by 25 percent. The parent argues that she received the student's March 2012 IEP on August 14, 2012, responded promptly to the district in a letter dated August 20, 2012, and communicated her concerns with the March 2012 IEP in a letter dated August 22, 2012. Thus, argues the parent, she timely communicated her disagreement with the March 2012 IEP to the district and any delay was attributable to the district. Accordingly, the parent argues that she is entitled to a full award of tuition reimbursement.

In an answer to the parent's cross-appeal, the district asserts that the parent never seriously considered a public school placement and, further, that a partial or complete reduction in the parent's award of tuition reimbursement is supported by the hearing record.

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides

everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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

After considering the parties' respective arguments, I agree with the district that the IHO's decision precludes meaningful review of the findings, conclusions, and orders of the IHO. Therefore, a remand to the IHO is warranted.

The IHO began her decision by conducting a thorough summary of the testimony presented at the impartial hearing (see IHO Decision at pp. 5-17). Following this recitation, the IHO "recognize[d]" that the district did not "offer a FAPE to [the student] for the 2012-2013 school year" (id. at p. 17). This sentence is the only analysis the IHO provided as to the claims raised by the parent in her due process complaint notice, which remained live at the time of the IHO's decision (see IHO Decision at p. 17; Parent Ex. A at pp. 1-4; see also, IHO Exs. AA [parent's closing brief]; BB [district's closing brief]).<sup>4</sup> Next, regarding the appropriateness of the parent's unilateral placement, the IHO observed in a similarly laconic fashion that the student "presented as a student with emotional and educational difficulties" who needed "a flexible learning environment designed to meet his immediate educational needs" (id.). Based upon "a complete and thorough review of the testimony" as well as the parent's "post-hearing position", the IHO concluded that Mary McDowell satisfied those needs (id.). The IHO then found that the parent did not "contact" the district regarding her "specific concerns relating to placement and the IEP process" (id.). However, in making this determination, the IHO did not discuss the parent's August 22, 2012 letter outlining the parent's concerns with the March 2012 IEP (see Parent Ex. B at pp. 1-2).

An IHO is required to issue detailed findings on the discrete issues identified in a party's due process complaint notice, a process that entails detailed factual and legal analysis (34 CFR 300.511[c][1][iv] [an IHO "[m]ust possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice"]; see generally 20 U.S.C. § 1415[f][3][E]; 8 NYCRR 200.5[j][4]). The IHO's disposition of the parties' claims in this case fell short of this standard. Specifically, the IHO's failure to connect her summary of the evidence in the hearing record with her ultimate conclusions prevents a meaningful review of her decision (see IHO Decision at pp. 5-17). Additionally, and more problematically, the IHO's decision fails to address any of the allegations raised in the parent's due process complaint notice (compare Parent Ex. A at pp. 1-4, with IHO Decision at p. 17).

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<sup>4</sup> Although a handwritten notation indicates that the district's closing brief consists of 10 pages, the 10-page exhibit submitted as part of the hearing record is clearly incomplete (see IHO Ex. BB). Therefore, should this matter be appealed to the Office of State Review a second time, the district should ensure that the full exhibit is submitted at that time.

Accordingly, this matter must be remanded to the IHO for a determination on the merits of the specific issues set forth in the parent's July 2013 due process complaint notice or as agreed upon by the parties (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*9 n.4 [S.D.N.Y. Nov. 27, 2012], reconsideration denied, 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at \*3 [S.D.N.Y. Jan. 22, 2013]).<sup>5</sup> In order to clarify the points the IHO must address on remand, as to the appropriateness of Mary McDowell, the district does not explicitly appeal the IHO's decision and, consistent with its position during the impartial hearing, asserts only that Mary McDowell does not constitute the LRE for the student (see Tr. pp. 12, 44-45, 117; Pet. ¶ 25). Given the Second Circuit's recent decision in C.L. v. Scarsdale Union Free Sch. Dist., with regard to the standard applicable to a question of the restrictiveness of a unilateral placement, the IHO need not further address the appropriateness of Mary McDowell (744 F.3d 826, 837 [2d Cir. 2014]). However, after the IHO addresses the parent's distinct allegations, the IHO should reconsider or explain her determination regarding the equitable factors in the matter, in light of the parent's August 22, 2014 letter to the district (see Parent Ex. B at pp. 1-2).

Based on the foregoing, I decline to review the merits of IHO's decision at this time. However, if either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf., D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

## **VII. Conclusion**

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the claims set forth in the parent's July 19, 2013 due process complaint notice and identified herein, which have yet to be addressed. At this time, it is therefore unnecessary to address the parties' remaining contentions in light of the determinations above.

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<sup>5</sup> The following observation may serve to clarify the parties' dispute on remand. With respect to the parent's allegation relating to the March 2012 CSE's decision to change the student's placement recommendation to a 12:1+1 special class in a community school from a State-approved nonpublic school, as recommended the year prior, it has been held that "if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school." (W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148-49 [S.D.N.Y. 2006]; see R.H. v. Plano Independent Sch. Dist., 607 F.3d 1003, 1014-1015 [5th Cir. 2010]; see also Connors v. Mills, 34 F. Supp. 2d 795, 798 [N.D.N.Y.1998]). Thus when determining an appropriate placement on the educational continuum, a CSE should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*15 [S.D.N.Y. Aug. 19, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013]).

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the March 25, 2014 decision is vacated and the matter is remanded to the same IHO who issued the March 25, 2014 decision to determine the merits of the unaddressed issues set forth in the parent's July 19, 2013 due process complaint notice; and

**IT IS FURTHER ORDERED** that, if the IHO who issued the March 25, 2014 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

**Dated:**           **Albany, New York**  
                      **June 27, 2014**

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