



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-081

**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, Ilana A. Eck, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, Gregory Cangiano, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at Bay Ridge Preparatory School (Bay Ridge) for the 2013-14 school year. 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**

In this case, the student began attending Bay Ridge beginning in September 2009 for sixth grade, and he has continuously attended Bay Ridge through the 2012-13 school year for ninth grade (see Dist. Ex. 5; see also Tr. pp. 51-52, 66, 161, 184-85).

On May 8, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (10th grade) (see Dist. Ex. 1 at pp. 1, 12-13). Finding the student remained eligible for special education and related services as a student with a speech or language impairment, the May 2013 CSE recommended a 15:1 special class placement in a community school with the following related services: one 30-minute session per week of individual counseling and two 30-minute sessions per week of speech-language therapy in a small group (id. at pp. 8, 12-13). In addition, the May 2013 CSE recommended the use of assistive technology devices—including a computer and an "FM" unit—throughout the school day and testing accommodations (extended time; revised test formats and directions, such as reading questions and directions aloud; use of a calculator; use of aids or assistive technology devices, such as enlarged print, an FM unit, and a computer; and the use of a scribe to record answers) (id. at pp. 8-10). The May 2013 IEP also included a coordinated set of transition activities and measureable postsecondary goals (id. at pp. 3-4, 10-11).

In a final notice of deferred placement dated June 6, 2013, the district advised the parents that although the student had a "right to an immediate placement" in the program recommended in the May 2013 IEP, the student could remain in his current program at Bay Ridge through the conclusion of the school year (Parent Ex. D). In addition, the district indicated that it would be in the student's "best interest" to defer placement in the recommended program until September 2013 (id.).

In a final notice of recommendation (FNR) dated June 8, 2013, the district summarized the special education and related services recommended in the May 2013 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex. 2).

On July 24, 2013, the parents consented to the district's recommendation to defer the student's placement in the recommended program until September 2013, and further indicated in a handwritten notation on the original notice that they were "extremely concerned" about the "recommended placement" (Parent Ex. D). The parents further noted that the student required a "small, structured school environment" that the "recommended program" could not provide, and requested information about the functional levels of the other students in the program, as well as information about the supports the student would receive (id.).

In a letter dated August 9, 2013, the parents advised the district that since receiving the FNR, they repeatedly contacted the assigned public school site to arrange a visit and to obtain additional information without success (see Parent Ex. E). The parents asked the district to provide a "profile of the proposed program" and expressed concern about the district's "recommendation" (id.).

By letter dated August 23, 2013, the parents notified the district of their intentions to unilaterally place the student at Bay Ridge for the 2013-14 school year, to seek reimbursement for the costs of the student's tuition from the district, and to seek the provision of transportation services for the student (see Parent Ex. C at pp. 1-2). In addition, the parents alleged that the district failed to offer the student a FAPE, the parents rejected the May 2013 IEP, and upon information and belief—and without visiting the assigned public school site—the parents

indicated that the "recommended school" could not implement the student's IEP (id. at pp. 1, 4). With respect to the May 2013 IEP, the parents indicated that the "recommended program" was not appropriate because the student required "additional supports within the framework of a smaller and more supportive educational environment" in order to address his "educational, speech/language, and social/emotional needs" (id. at p. 2). The parents also indicated that the student's needs could not be met in a 15:1 special class placement (id.). The parents also asserted that the May 2013 CSE impermissible predetermined the "program recommendation," as it was based upon programs available in the district and not based upon the student's needs (id.). Next, the parents indicated that although the May 2013 CSE recognized the student's need for a "small environment" by recommending a "separate location" as a testing accommodation with no more than 12 students in the room, the May 2013 CSE's recommendation for a 15:1 special class placement was not consistent with the limited number of students related to the testing accommodation (id.). In addition, the parents noted that the May 2013 IEP included "inconsistent" information about the student's instructional levels and functional levels (id.). Turning to the annual goals, the parents indicated that the May 2013 CSE did not create the annual goals at the meeting, which deprived the parents of the opportunity to participate in the development of the IEP (id. at pp. 2-3). In addition, the parents described the annual goals as "generic," and indicated that the annual goals in the May 2013 IEP failed to include baselines, methods to measure progress, and could not be implemented in the "recommended program" (id. at p. 2). The parents further noted that the May 2013 IEP failed to provide any "meaningful academic or social/emotional management needs," which would prevent an educator or service provider from providing "appropriately modified instruction" or in "restructuring the classroom environment" to meet the student's needs (id. at p. 3).

Next, the parents indicated that the May 2013 CSE did not provide materials or documents relied upon at the meeting to those CSE members who attended the meeting via telephone (see Parent Ex. C at p. 3). In addition, the parents noted that the May 2013 CSE ignored their expressed concerns about the student's need for a "small, individualized grouping" to benefit educationally and thus, failed to provide them with an opportunity to meaningfully participate at the meeting (id.). The parents also indicated that the May 2013 CSE failed to consider "all the programs available" on the continuum of services within the district ranging from the least restrictive to the most restrictive, and failed to adequately explain the reasons for rejecting "certain programs" (id.). In addition, the parents noted that the "proposed program" did not provide the student with a "suitable and functional peer group" for instructional and social/emotional purposes in violation of State regulations (id.). With respect to the assigned public school site, the parents indicated that they requested a "tour of the program," as well as "additional information"—including the reasons why the May 2013 CSE recommended a 15:1 special class placement and how the "program" could provide the supports the student needed—and had not received any response (id. at p. 4).

On September 9, 2013, the parents executed an enrollment contract with Bay Ridge for the student's attendance during the 2013-14 school year beginning September 2013 (see Parent Ex. F at p. 1).

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

By due process complaint notice dated September 9, 2013, the parents alleged that the district failed to offer the student a FAPE for the 2013-14 school year (see Parent Ex. A at pp. 1, 3-5). Essentially, the parents resubmitted the August 23, 2013 notice of unilateral placement letter as the due process complaint notice, with some modifications, such as requesting a determination that Bay Ridge constituted the student's pendency (stay-put) placement during the instant proceedings based upon an unappealed IHO's decision in the parents' favor, dated May 7, 2013 (compare Parent Ex. A at pp. 1-5, and Parent Ex. B at pp. 1-13, with Parent Ex. C at pp. 1-4). In addition, the parents alleged in the due process complaint notice that the "recommended program" was not appropriate for the student because he required "additional, individualized supports in a smaller and more supportive educational environment" in order to address his "educational, attentional, behavioral, speech/language, and social/emotional needs" (compare Parent Ex. A at p. 3, with Parent Ex. C at p. 2). The parents also alleged in the due process complaint notice that the May 2013 IEP noted the student's need for a "'great deal of redirection,' 'he [could] be easily distracted,' and 'require[d] 1:1 attention'" (id.). As relief, the parents requested reimbursement of the costs of the student's tuition at Bay Ridge for the 2013-14 school year (id. at pp. 5-6).

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

On October 4, 2013, the IHO conducted a prehearing conference, and on October 28, 2013, the parties proceeded to an impartial hearing, which concluded on April 8, 2014 after four nonconsecutive days of proceedings (see Tr. pp. 1-217). By decision dated May 6, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year, Bay Ridge was an appropriate unilateral placement, and equitable considerations weighed in favor of the parents' requested relief; consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Bay Ridge for the 2013-14 school year (see IHO Decision at pp. 7-9).

After "carefully scrutinize[ing] the IEP," the IHO found that although it adequately described the student's "cognitive abilities, his academic delays in reading and math, his significant difficulties in writing and note taking and his need for a lot of redirection due to his distractibility as well as other management needs," the May 2013 IEP failed to include "any discussion" about the student's anxiety and how his anxiety affected his educational needs (IHO Decision at p. 7). As a result, the IHO concluded that the May 2013 CSE "completely and fatally ignored this emotional overlay" when making its "program recommendation" (id. at p. 8). The IHO noted that while a 15:1 special class placement may have been appropriate if the student was not an "anxious young man," the May 2013 IEP failed to include supports to assist the student's transition to a "larger class in a larger school" and to an "unfamiliar location" (id.). As a result, the IHO found that the May 2013 IEP failed to offer the student a FAPE (id.). The IHO also noted that while the parents believed they did not have a "fair opportunity to be heard" at the May 2013 CSE meeting, the evidence in the hearing record did not "clearly establish" the parents' subjective belief, and therefore, the IHO declined to render a determination regarding the alleged procedural defects in the "IEP process" (id.).

With respect to the unilateral placement, the IHO found that the student received instruction in his core academic courses in "extremely small classes" (IHO Decision at p. 8). In addition, the student received "[s]pecial afternoon support sessions" to "compensate" for the absence of a paraprofessional (id. at pp. 8-9). At Bay Ridge, the student also received a modified curriculum to allow for a "slower pace with repetition and review," as well as strategies to address his management needs, such as the use of graphic organizers, outlines, worksheets, and breaking down assignments (id. at p. 9). The IHO also noted that the student did "well" both academically and emotionally at Bay Ridge during the 2013-14 school year (id.). Finally, the IHO found that equitable considerations weighed in favor of the parents' requested relief because the parents cooperated with the district, promptly notified the district of their "concerns," and attempted to visit the assigned public school site (id.).

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

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2013-14 school year. Initially, the district argues that the IHO's decision must be annulled because the IHO sua sponte raised the student's anxiety—and the May 2013 IEP's alleged failure to provide sufficient supports to address the student's emotional deficits—as a basis upon which to conclude that the district failed to offer the student a FAPE when the parents did not raise such issues in the due process complaint notice. Similarly, the district contends that the IHO improperly found that the May 2013 IEP was not substantively appropriate because it failed to address the student's anxiety, noting that the parents also did not raise this as an issue to resolve in the due process complaint notice. Alternatively, if properly addressed by the IHO, the district asserts that the May 2013 IEP adequately addressed the student's anxiety.

Next, the district argues that while not addressed in the IHO's decision, the parents' remaining claims raised in the due process complaint notice concerning the sufficiency of the May 2013 IEP and the assigned public school site would not support a finding that the district failed to offer the student a FAPE for the 2013-14 school year. More specifically, the district argues that the evidence in the hearing record revealed that the parents meaningfully participated in the development of the student's IEP and the May 2013 CSE did not ignore the parents' expressed concerns; the parents abandoned the issue raised regarding telephonic participation of certain CSE members, or alternatively, such violation would not rise to the level of a denial of a FAPE; the May 2013 CSE's recommendation of a 15:1 special class placement in a community school was appropriate; the May 2013 CSE considered, and rejected, other placement options; the present levels of performance in the May 2013 IEP were sufficient to guide instruction, regardless of the typographical errors or confusion about the student's academic levels and actual grade level; the annual goals in the May 2013 IEP were appropriate; the management needs in the May 2013 IEP were appropriate; and any issues related to the assigned public school site—such as the implementation of the May 2013 IEP or the functional grouping—were speculative. Finally, the district argues that the IHO erred in finding that Bay Ridge was an appropriate unilateral placement.

In an answer, the parents respond to the district's allegations with admissions and denials, and assert that the IHO properly concluded that the district failed to offer the student a FAPE for

the 2013-14 school year, that Bay Ridge was an appropriate unilateral placement, and that equitable considerations did not preclude an award of tuition reimbursement. In addition, the parents counter each of the district's arguments pertaining to the issues not addressed by the IHO's decision and affirmatively allege arguments in support of findings contrary to those sought in the district's petition. Overall, the parents seek to uphold the IHO's decision in its entirety.

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 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—Scope of the Impartial Hearing and Unaddressed Issues**

As noted above, the district asserts that particular issues alleged by the parents in the due process complaint notice but not addressed by the IHO would not alternatively result in a finding that the district failed to offer the student a FAPE for the 2013-14 school year. The district also contends that the IHO sua sponte raised and decided issues not included in the parents' due process complaint notice as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2013-14 school year. In the answer, the parents deny the particular assertions and/or assert that different conclusions should be drawn from them. A review of the hearing record reveals that the IHO failed to address numerous issues alleged by the parents in the September 9, 2013 due process complaint notice and that the resolution of these particular issues could alternatively result in a finding that the district failed to offer the student a FAPE for the 2013-14 school year if, in fact, the IHO sua sponte raised and relied upon issues not alleged in the parents' due process complaint notice—or under M.H. at the impartial hearing—as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2013-14 school year (compare IHO Decision at pp. 7-9, with Parent Ex. A at pp. 1-6).

Accordingly, the matter should be remanded to the IHO for a determination on the merits of the claims set forth in the parents' September 9, 2013 due process complaint notice (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]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at \*3 [S.D.N.Y. Jan. 22, 2013]. In addition to the points the IHO must address on remand, the IHO should clarify and/or determine whether the parents' due process complaint notice properly included issues such as the student's anxiety—as well as the May 2013 IEP's alleged failure to address the student's emotional deficits—as a basis upon which to conclude the district failed to offer the student a FAPE for the 2013-14 school year in the first instance (C.F. v. New York City Dep't of Educ., 2014 WL 814884, at \*8 [Mar. 4, 2014]).<sup>1</sup>

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<sup>1</sup> If the IHO determines such claim was not raised in the due process complaint, the parties should explain—and the IHO should determine—whether the issues nevertheless should be heard because this is a case in which 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 217, 250-51 [2d Cir. 2012]; see D.B. v. New York City Dep't of Educ., 2013

It is left to the sound discretion of the IHO to determine whether additional evidence or briefing is required in order to make the necessary findings of fact and conclusions of law relative to each of these issues. Furthermore, the IHO may find it appropriate to schedule another prehearing conference with the parties to, among other things, simplify and clarify the remaining issues (see 8 NYCRR 200.5[j][3][xi][a]). If either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal should be addressed together 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 parents' September 9, 2013 due process complaint notice and identified herein, which have yet to be addressed. Although I have considered the parties remaining contentions, it is unnecessary to address these contentions at this time in light of the determinations above.

**IT IS ORDERED** that the IHO's decision dated May 6, 2014 is vacated and the matter is remanded to the same IHO who issued the May 6, 2014 decision to determine the merits of the unaddressed issues set forth in the parents' September 9, 2013 due process complaint notice; and

**IT IS FURTHER ORDERED** that, if the IHO who issued the May 6, 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**

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WL 4437247, at \*6-\*7 [S.D.N.Y. Aug. 19, 2013]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*5-\*7 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*9-\*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*5-\*6 [S.D.N.Y. May 14, 2013]).