The University of the State of New York

The State Education Department
State Review Officer
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No. 11-161

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Andrew K. Cuddy, attorneys for petitioners, Michael J. Cuddy, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request for compensatory or additional education services as relief for respondent's (the district's) failure to offer the student a free appropriate public education (FAPE) for the 2010-11 school year. The district cross-appeals from that portion of the impartial hearing officer's decision which found that the district failed to offer the student a FAPE. The appeal must be dismissed. The cross-appeal must be sustained in part.

Background

On December 14, 2010, the Committee on Special Education (CSE) conducted the student's annual review and developed his individualized education program (IEP) for eighth grade for the 2010-11 school year (Parent Ex. B at pp. 1-2).[1] On the IEP, the CSE described the student's recommended placement as a "[g]eneral [e]ducation [t]eacher" with a total of 15 hours per week of special education teacher support services (SETSS) in a specialized school with an 8:1 staffing

[1] At all times relevant to the administrative due process proceedings, the student attended a district public school. The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

ratio, and further noted that the 15 hours per week of SETSS services would be provided to the student in the following manner: direct support in the his general education classroom for 5 periods per week (3 periods per week in his English language arts class and 2 periods per week in his mathematics class); direct support in a separate location for 7 periods per week; and indirect support for 3 periods per week (id. at pp. 1, 11).[2, 3] As noted in the IEP, the CSE considered and rejected several alternative programs and services in making the student's placement recommendation, such as a general education setting with no supplementary aids and services, a general education setting in a community school with no related services, and a 12:1+1 special class in a specialized school (id. at p. 12).

In addition to recommending academic and social/emotional management needs to address the student's deficits, the CSE also recommended related services of two 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of counseling in a small group; two 30-minute sessions per week of occupational therapy (OT) in a small group; the services of a crisis management paraprofessional "all" day ("40 periods per week"); and the services of a special transportation paraprofessional (Parent Ex. B at pp. 1-2, 13).[4] According to the IEP, the student participated in alternative assessment and modified promotion criteria (id. at p. 13). The CSE developed annual goals and short-term objectives to address the student's identified needs in the following areas: OT (cursive writing skills, attention skills, and ability to work with peers), writing, reading comprehension, counseling (peer/staff interactions and problem-solving skills), speech-language (pragmatic conversational skills and critical thinking skills), mathematics, and attention/organization (id. at pp. 6-10). In addition, the IEP included a behavior intervention plan (BIP) that targeted the student's inability to remain focused in class,

[2] For seventh grade (2009-10 school year), the student attended the same special education program and received nearly identical related services as recommended by the December 2010 CSE (compare Parent Ex. C at pp. 1-2, 11, with Parent Ex. B at pp. 1-2, 11). In addition, the student received his SETSS services in seventh grade from the same individual who provided SETSS services to the student under the December 2010 IEP in eighth grade (2010-11 school year) (see Tr. pp. 62-64, 91-92, 96-97).

[3] Although referred to in testimony at times as a "SETSS program," "CTT class" or an "inclusion model," testimony further clarified that the student's recommended placement appeared to function as an integrated co-teaching (ICT) classroom, as defined in State regulations: the classrooms consisted of both regular education students and special education students—with no more than eight special education students—and were staffed with both a regular education teacher and a special education teacher (Tr. pp. 11-13, 24-27, 63-65, 68-69, 98-101, 158-63, 171-72; see 8 NYCRR 200.6[g]). Testimony also revealed that the student's recommended SETSS services—which he received within the above-described model—were provided to him in a manner consistent with direct and indirect consultant teacher services, as defined in State regulations (Tr. pp. 63-65, 68-69, 98-102; see 8 NYCRR 200.6[d]; see also 8 NYCRR 200.1[m][1] [defining direct consultant teacher services as "specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability to aid such student to benefit from the student's regular education classes"], 200.1[m][2] [defining indirect consultant teacher services as "consultation provided by a certified special education teacher . . . to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes"], 200.1[yy] [defining "special education teacher"]).

[4] Evidence revealed that the student received all of the related services during the 2010-11 school year mandated on his IEP (see Tr. pp. 27, 142-44; Parent Ex. B at p. 13).

picking up small objects from the floor to play with them, and remaining quiet when he did not "understand something" or was "confused about directions" (id. at p. 14).

Due Process Complaint Notice

By due process complaint notice dated May 17, 2011, the parents alleged that the district failed to offer the student a FAPE for the 2010-11 school year (Parent Ex. A at pp. 1-3). The parents indicated that they disagreed with the student's "current program and placement" set forth in "current IEP," dated "December 14, 2010" (id. at pp. 1-2; see Parent Ex. B at pp. 1-14). Generally, the parents asserted that the recommended program did not "challenge" the student "academically;" the paraprofessional did not work with the student "constructively," and at times, the paraprofessional did not remain within close proximity to the student; and the "mainstream teachers" were not trained to work with "students on the autism spectrum" and did not interact with the student (Parent Ex. A at p. 2). In addition, the parents alleged that the IEP included inaccurate present levels of educational performance because the grade levels reported to describe the student's instructional levels were not based upon "specific data or standardized testing" (id.). Next, the parents asserted that the annual goals in the IEP were not "specific enough" to address the student's needs in the areas of "socialization, pragmatic language, semantics, presupposition and daily living skills" (id.). The parents also contended that the failure to provide progress reports about the student's related service—and the failure to provide related services in accordance with the IEP—denied the parents an opportunity to meaningfully participate in the decision-making progress in developing the student's IEP (id.). In addition, the parents alleged that the IEP did not include recommendations for parent counseling and training or for transition services pursuant to State regulations, the December 2010 CSE was not validly composed, the district failed to conduct a functional behavior assessment (FBA) and failed to develop an appropriate BIP, and the district failed to properly evaluate the student (id. at p. 3).

As relief, the parents sought to annul the current IEP; the provision of an appropriate program and placement with "adequately trained staff" or alternatively, the issuance of a Nickerson letter allowing the parents to place the student in an appropriate nonpublic school; the provision of training to the "para[professional] and teaching staff" specifically related to the student's disability and needs; the development of an appropriate IEP with the parents' participation; to conduct a comprehensive triennial evaluation of the student "in all areas;" the development of accurate and current present levels of educational performance, measurable annual goals and short-term objectives, and the identification of "appropriate methodologies" to address the student's needs; the provision of "quarterly [p]rogress [r]eports" regarding the student's IEP annual goals; the provision of "parent counseling and training" and "[t]ransitional [s]upport [s]ervices" pursuant to State regulations; the provision of "corrective services for those not provided;" that a properly composed CSE be convened; that a comprehensive FBA be conducted and an appropriate BIP be developed; payment of the parents' attorneys fees and expenses; and any further relief deemed "just and proper" (id. at pp. 3-4).

Resolution Session

On May 31, 2011, the parties met for a resolution session, which resulted in a resolution agreement (Dist. Ex. 2 at pp. 1-3; see Tr. pp. 178-200).[5] According to the resolution agreement, the parties agreed that the district would conduct a "triennial evaluation" of the student, including a psychoeducational evaluation; a social history update; and evaluations in the areas of speech-language, counseling, and OT (Dist. Ex. 2 at p. 1). The district agreed to provide "updated progress reports" from the SETSS provider, the general education teacher, and the related services providers (id.). In addition, the district agreed to conduct an FBA and develop a BIP with the "full participation of the student's teachers, related service providers, the school psychologist, school administration and the parent[s]" (id.). The district also agreed to discuss all "instructional methodologies" used with the student and to consider and to explore "new methodologies that might benefit the student" (id.).

According to the resolution agreement, the district agreed to convene a "duly constituted" CSE meeting with all the required members—including a "Transition Linkage Coordinator" to discuss "transition services and assist in the development of a comprehensive transition plan"—no later than June 22, 2011 (Dist. Ex. 2 at p. 1). The district further agreed to invite an "adult service provider" to attend the CSE meeting (id.). Next, the district agreed to mail the parents all of the student's evaluations within five days prior to the scheduled CSE meeting (id.). At the scheduled CSE meeting, the district agreed to discuss parent counseling and training and to add it as a related service on the student's IEP; moreover, the district—through the attendance of a "parent coordinator" at the scheduled CSE meeting—agreed to inform the parents about any parent counseling and training opportunities remaining in the 2010-11 school year, as well as any parent counseling and training opportunities scheduled for the 2011-12 school year, and "how these c[ould] provide carryover to the parent" (id.). Next, the district agreed to provide the parents with "updated quarterly progress reports" within one week prior to the scheduled CSE meeting, which would include "both current and past reports for the 2010-2011 school year in all related service areas" (id.). In addition, the district agreed to review the FBA, the BIP, progress reports, and all evaluations at the scheduled CSE meeting, and further, that "[a]ll" of the student's annual goals for "speech-language [therapy], OT, counseling, SETSS, and transition" would be "addressed, developed and or modified with full participation of the parent[s]" (id. at pp. 1-2). The district also agreed to discuss "[a]ll professional development and staff development including all

[5] The parents participated in the resolution session with the assistance of a paralegal from their attorneys' law office (compare Tr. pp. 180-81, with Dist. Ex. 1 at pp. 1, 5). At the impartial hearing, the district presented a witness who participated in the resolution session on behalf of the district (see Tr. pp. 178-200). The witness testified that at the resolution session, the participants "went over the hearing request" and "looked at the items with regard to the actual relief," and "together [they] worked on providing the relief to the parents" (Tr. pp. 180-81). She also testified that the parties generated a resolution agreement that "would provide the relief that the parents were seeking at the time" (Tr. p. 181). The parties did not, however, resolve the parents' request for relief in the form of "corrective services for those not provided" as had been set forth in the due process complaint notice (see Tr. pp. 182, 184-86, 188-99; see also Dist. Exs. 1 at p. 4; 2 at pp. 1-3). The district's witness explained in testimony that although the district sought "clarification" and further specificity from the parents and their representative at the resolution session regarding the request for "corrective services," no further information was articulated (see Tr. pp. 187-88, 190-99).

workshops and training's [sic] given to [the student's] teachers and paraprofessionals for the 2010-2011 school year as well as planned trainings for the 2011-2012 school year" (id. at p. 2).

Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing, which occurred over the course of two nonconsecutive days: July 5 and August 22, 2011 (Tr. pp. 1, 204). On July 5, 2011, prior to the presentation of witness testimony, the impartial hearing officer stated that the parties had discussed the "extent of the issues to be presented in this hearing" at a June 16, 2011 prehearing conference and in an off-the-record discussion previously held that day (Tr. pp. 8, 10-11).[6] The impartial hearing officer then noted that as of July 5, 2011, the district had conducted evaluations of the student, and a CSE meeting had been scheduled for July 12, 2011 (see Tr. p. 11). Next, she indicated that the "issue for this hearing" would be the parents' request for "correct[ive] services as a result of their claim that [the student] was denied a free appropriate public education for the 2010/2011 school year" (id.). As neither party objected to, or further clarified, the impartial hearing officer's summary of the prehearing events or the issues presented for the impartial hearing, the hearing continued and the district's representative presented an opening statement, the parties entered evidence into the hearing record, and the district presented its case in chief (see Tr. pp. 11-23).[7] At the conclusion of the impartial hearing on August 22, 2011, the parties agreed to submit closing memoranda to the impartial hearing officer no later than September 19, 2011, and that at that time, the parties would "be entertaining [m]otions to extend the compliance date" in order for the impartial hearing officer to render a decision (see Tr. pp. 309-10).[8]

In their closing brief and relevant to the instant appeal, the parents argued, among other things, that the district failed to offer the student a FAPE because the student's SETSS provider for the 2009-10 and 2010-11 school years was not a certified special education teacher, which they alleged constituted a "failure to implement the IEP as written" (see Answer Ex. A at pp. 2-4).[9] As relief, the parents requested an award of compensatory or additional education services as a remedy

[6] As a reminder, State regulations require that a "transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer" (8 NYCRR 200.5[j][3][xi]).

[7] It appears that the parents' attorney reserved the right at the beginning of the impartial hearing to present an opening statement at the start of the parents' case in chief; however, without explanation, the parents' attorney did not do so (see Tr. p. 10; see generally Tr. pp. 1-311).

[8] The impartial hearing officer failed to enter into the hearing record the parties' post-hearing briefs submitted prior to the record close date in order to complete the hearing record (see 8 NYCRR 200.5[j][5][v]). In this case and as discussed more fully below, the parents submitted their closing brief—which had been submitted to the impartial hearing officer—for consideration as additional documentary evidence in this appeal (Answer Ex. A). The district did not object to the consideration of the parents' closing brief (Reply ¶ 4).

[9] In addition, the parents asserted in their closing brief that the district failed to offer the student a FAPE based upon its failure to conduct an FBA and develop an appropriate BIP, its failure to provide parent counseling and training and transitional support services pursuant to State regulations, its failure to include a certified special education teacher at both the December 2009 and December 2010 CSE meetings to develop the student's IEPs, the recommended program for the 2010-11 school year was not appropriate, and the student was not appropriately designated as an alternate assessment student (see Answer Ex. A at pp. 4-7).

for the district's "[p]ast [d]enial of FAPE," indicating that such an award would "compensate" the student for the "losses he suffered due to the absence of a certified special education teacher" (id. at pp. 7-8). Specifically, the parents calculated that based upon the mandate of 15 hours per week of "combined direct and indirect special education support for both the 2009/10 and 2010/11" school years, the student was entitled to an award of compensatory or additional education services in the form of 960 hours of "direct special education tutoring services, to be provided at the parent's discretion, and available for the remainder of [the student's] eligibility for services" from the district (id. at p. 8).

In a decision dated November 1, 2011, the impartial hearing officer recited the facts of the case, and concluded that although the evidence demonstrated that the student received all of the services reflected on the December 2010 IEP, the evidence also demonstrated that the SETSS services provided to the student were "not actually provided by a certified special education teacher" (IHO Decision at pp. 1-13). Consequently, she indicated that the only remaining question was whether the district's failure to "provide properly trained staff warrant[ed] corrective services for the 2010/11 school year when all other substantive issues raised by the parents ha[d] previously been resolved," noting that the parties had "agreed" at the prehearing conference that the "substantive issues raised in the parents' due process complaint notice had been substantially resolved" and that "[a]ny deficiency . . . in the challenged IEP or its implementation during the 2010/11 school year [had been] corrected during the resolution period" (id. at p. 13).

In addressing this issue, the impartial hearing officer found that although she would be "hard pressed to find that the program and services provided" to the student during the 2010-11 school year were appropriate, the evidence revealed that the student made "progress" academically in both reading and mathematics in the district's program (IHO Decision at pp. 14-15). She further indicated that the program recommendations set forth in a privately obtained evaluation report—such as placement in an "inclusive classroom with accommodations . . . with typically developing children who model appropriate semantic and pragmatic language skills as well as social skills,'"—"substantially model[ed] the program provided" by the district during the 2010-11 school year (id. at p. 15).[10] The impartial hearing officer determined that based upon the evidence, the student had also developed a "group of friends," he was "well liked in the school community," and when given the opportunity to transfer to a different school in November 2010, the parents and student declined the offer in order for the student to remain near his friends (see id.).

Next, the impartial hearing officer noted that the "program which was implemented may have been deemed appropriate if it had been properly staffed by people knowledgeable" in the area of the student's disability (IHO Decision at p. 15). Ultimately, the impartial hearing officer concluded that she was "constrained to find that the program implemented" for the student during the 2010-11 school year was "inappropriate" because the student's SETSS provider was not a certified special education teacher and the guidance counselor responsible for the student's counseling services was "ill prepared to meet [his] needs" (id. at pp. 15-16). Notwithstanding this

[10] The evidence indicated that although the parents had privately obtained evaluations of the student in 2008 and 2009 resulting in the generation of evaluation reports, the parents did not provide these evaluation reports to the CSE (see Tr. pp. 222, 227, 275-90, 300-301; Parent Exs. E-H; see also IHO Decision at p. 15).

conclusion, however, the impartial hearing officer declined to award compensatory or additional education services as a remedy because the "deficiencies . . . were satisfactorily resolved in the resolution period," the evidence in the hearing record did not support or warrant such an award, and further, because the "resolution [agreement] properly resolved the concerns raised by the parents in the due process complaint notice" (id. at pp. 16-18).

Appeal for State-Level Review

The parents appeal, and assert that the impartial hearing officer erred in denying their request for compensatory or additional education services. In particular, the parents argue that it was error for the impartial hearing officer to not "compensate for services not provided—i.e., the special education services that [the student's] IEP offered in the form of SETSS services" because the student's SETSS provider was not a certified special education teacher (Pet. ¶ 21; see Pet. ¶¶ 22-23, 28, 37, 53). The parents also argue that the impartial hearing officer erred in denying "any compensation for [the student] having attended an inappropriate program" during the 2010-11 school year based upon "erroneous conclusions of fact and law," noting that the parents' failure to articulate a "settlement proposal" to the district at the resolution session regarding their demand in the due process complaint notice for "corrective services" does not preclude such an award, and further, that the law does not require parents to "expand upon the demands in the hearing request prior to hearing in order to remain eligible to receive meaningful relief for a denial of FAPE" (Pet. ¶¶ 24-29).[11] Next, the parents contend that the impartial hearing officer "incorrectly stated" that the district "'properly resolved the concerns raised by the parents' in the due process complaint'" by its agreement to "perform (long overdue) evaluations and to hold a CSE meeting to develop an [sic] new IEP going forward," asserting that it was "simply ludicrous" for the impartial hearing officer to claim that the district's "promise to fulfill its legal duties going forward provide[d] an adequate remedy for a past deprivation" (Pet. ¶¶ 36-37). As such, the parents renew their request for the student to receive an award of "960 hours of direct special education tutoring services, to be provided at the parent's discretion, and available for the remainder of [the student's] eligibility for services" from the district.[12]

In its answer, the district responds to the parents' allegations in the petition, and affirmatively asserts as a defense that the parents did not exhaust their administrative remedies with respect to the claim for 960 hours of special education tutoring. The district argues that the parents' due process complaint notice did not request 960 hours of special education tutoring, and further, that the hearing record does not reflect that the parents raised the request for 960 hours of special education tutoring "at any time prior to initiating their appeal" as relief for the failure to offer the student a FAPE for the 2010-11 school year (Answer ¶ 41). In addition, the district contends that based upon their own admission in the petition, the parents' unspecified claim for

[11] The parents do admit in the petition, however, that it was not "until the hearing itself" that the "parents were unaware that [the student's SETSS provider] was not certified in special education" (Pet. ¶ 28).

[12] The parents' memorandum of law submitted in support of the petition reasserts, nearly verbatim, the allegations and arguments asserted in the parents' closing brief submitted to the impartial hearing officer (compare Parent Mem. of Law at pp. 1-10, with Answer Ex. A at pp. 1-9).

"corrective services" in the due process complaint notice could not have been based upon the district's alleged failure to provide the student's SETSS services by a certified special education teacher because the parents did not learn about the SETSS provider's qualifications until the first date of the impartial hearing on July 5, 2011. Next, the district asserts that to the extent that the parents' petition now raises, or attempts to raise, a claim for relief upon a purported failure to offer the student a FAPE for the 2009-10 school year, such claim was not exhausted administratively, and must be denied.

The district also asserts as a defense that the parents are not entitled to an award of 960 hours of special education tutoring because they did not sustain their burden of production and persuasion to warrant such relief. The district argues that the student's academic and social progress during the 2010-11 school year, together with the relief provided by the resolution agreement, provided an adequate remedy for any alleged failure to offer the student a FAPE for the 2010-11 school year. In addition, the district contends that the hearing record does not contain sufficient evidence to support either the quantity of the parents' requested relief—960 hours—or the substantive appropriateness of the parents' requested relief—special education tutoring.

In a cross-appeal, the district asserts that the impartial hearing officer erred in concluding that the district failed to offer the student a FAPE for the 2010-11 school year because the student's SETSS provider was not certified in special education and the guidance counselor responsible for providing the student's counseling services was "'ill prepared'" to meet his needs. The district argues that the impartial hearing officer's decision exceeded her jurisdiction as the parents' due process complaint notice did not raise either the SETSS provider's or the guidance counselor's qualifications as an issue upon which to predicate a finding that the district failed to offer the student a FAPE. In addition, the district contends that the impartial hearing officer's conclusions with respect to the guidance counselor are unsupported by the evidence. Next, the district argues after the parents learned about the SETSS provider's lack of certification as a special education teacher on the first date of the impartial hearing, the parents did not attempt to amend their due process complaint notice to include this issue. The district also argues that even if the qualifications of the student's SETSS provider and guidance counselor are properly raised in the appeal, the parents have no individual right of action under the Individuals with Disabilities Education Act (IDEA) and must, instead, pursue such claim under State law and regulations. To the extent that the impartial hearing officer relied upon the SETSS provider's lack of certification in special education and the guidance counselor's qualifications as a basis to conclude that the district failed to offer the student a FAPE, the district argues that the impartial hearing officer exceeded her jurisdiction and her conclusion must be annulled as a matter of law. As relief, the district seeks to annul the impartial hearing officer's finding that the district failed to offer the student a FAPE for the 2010-11 school year, or alternatively, seeks to uphold the impartial hearing officer's denial of the parents' request for 960 hours of special education tutoring as compensatory or additional education services.

In their answer to the district's cross-appeal, the parents respond to the district's allegations with general admissions and denials. In their accompanying memorandum of law in opposition to the district's cross-appeal, the parents assert arguments that both the impartial hearing officer and a State Review Officer have jurisdiction to conclude that the district failed to offer the student a

FAPE for the 2010-11 school year because the parents raised the issue of "teacher training" in the due process complaint notice. The parents also argue in the accompanying memorandum of law that the district "misrepresents that the parent[s] did not request 960 hours of special education tutoring prior to initiating the appeal," and specifically note that their closing brief submitted to the impartial hearing officer contained the requested relief. In addition, the parents attach an attorney affirmation and their closing brief submitted to the impartial hearing officer as additional documentary evidence for consideration on appeal.

Finally, in a reply, the district responds to the allegations in the parents' answer to the cross-appeal. In addition, the district specifically indicates it does not object to the consideration of the parents' closing brief as additional documentary evidence, but does object to the consideration of the attorney affirmation since the information is extraneous to the impartial hearing and the district had no opportunity to cross-examine the attorney regarding the statements set forth in the affirmation (Reply ¶ 4).[13]

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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)

[13] Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only 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 (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; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, since the district does not object to the consideration of the parents' closing brief, I will accept the document as additional evidence. However, a review of the attorney affirmation indicates that the information presented could have been offered at the time of the impartial hearing, and moreover, since the information is not necessary in order to render a decision in this matter, I decline to accept the attorney affirmation offered as additional evidence.

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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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; 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 accurately reflects the results of evaluations to identify the student's needs (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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).

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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

In this case, I agree with the district's assertion in its cross-appeal that the parents did not raise claims regarding the qualifications of the SETSS provider or the guidance counselor as a basis for finding that the district failed to offer the student a FAPE for the 2010-11 school year in their May 2011 due process complaint notice, or during the course of the impartial hearing, and as such, the impartial hearing officer erred and exceeded her jurisdiction in predicating her conclusion that the district failed to offer the student a FAPE for the 2010-11 school year upon these grounds (see Dist. Ex. 1 at pp. 1-5; R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *6 [S.D.N.Y. Mar. 15, 2011]).

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see C.F. v. New York City Dept. of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140).

Upon review of the due process complaint notice, I find that while the parents sought "corrective services for those not provided" as a form of relief, the due process complaint notice cannot be reasonably read to include claims—such as the district's failure to provide SETSS services by a certified special education teacher denied the student a FAPE or that the district's failure to provide counseling services by a provider specifically trained to work with students with autism denied the student a FAPE—upon which to predicate such relief (see Dist. Ex. 1 at pp. 1-5). In addition, the parents' due process complaint notice cannot be so broadly read as to construe the parents' claim that the "mainstream teachers" did not have "training to work with students on the autism spectrum" as providing either an impartial hearing officer or a State Review Officer with jurisdiction to reach claims regarding the qualifications of either the SETSS provider or the guidance counselor (see Dist. Ex. 1 at pp. 1-5; Parent Mem. of Law in Opp. at pp. 1-2). Further, the hearing record does not reflect that the parents requested to amend the May 2011 due process complaint notice, that the impartial hearing officer otherwise authorized an amendment to the May 2011 due process complaint notice, or that the district consented to expand the scope of the impartial hearing to include issues about the qualifications of the SETSS provider or the guidance counselor as a basis for the request for "corrective services" (see Tr. pp. 1-311). Moreover, both the SETSS provider and the guidance counselor testified about their respective qualifications on the July 5, 2011—the first day of the impartial hearing—which allowed the parents sufficient time

before the final day of the impartial hearing on August 22, 2011 to seek an amendment of the due process complaint notice.

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review the issues. To hold otherwise inhibits the development of the hearing record for the impartial hearing officer's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dept. of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D. and R.D v. Bedford Cent. Sch. Dist., 2011 U.S. Dist. LEXIS 107381, at *33 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, I further find that the impartial hearing officer exceeded her jurisdiction by basing her decision on issues that she raised sua sponte in her decision that were not identified in the parents' May 2011 due process complaint notice (IHO Decision at pp. 13-16). The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at an impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Thus, the impartial hearing officer should have confined her determination to issues raised in the parents' May 2011 due process complaint notice (see 20 U.S.C. § 1415[c][2], [f][3][B]; 34 C.F.R. §§ 300.508[b], [d][3], 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7], [j][1][ii]; R.B., 2011 WL 4375694, at *6-*7; M.P.G., 2010 WL 3398256, at *8; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

In sum, I find that the impartial hearing officer reached an issue sua sponte over which she lacked jurisdiction and, therefore, I will annul that portion of her decision that determined that the

district failed to offer the student a FAPE for the 2010-11 school year because the district failed to provide SETSS services to the student by a teacher certified in special education and the district failed to provide counseling services to the student by a guidance counselor familiar with autism (Application of the Dep't of Educ., Appeal No. 11-105; Application of a Child with a Disability, Appeal No. 07-130).

Procedural Violation

Notwithstanding the above determination, however, I note that even if the parents had properly raised the claims regarding the qualifications of the SETSS provider and the guidance counselor in their due process complaint notice, the evidence in the hearing record would not support a finding that the district failed to offer the student a FAPE during the 2010-11 school year based upon this procedural violation.

In arriving at the conclusion regarding the SETSS provider, the impartial hearing officer appears to have treated any lack of credentials as a per se denial of a FAPE. I decline to adopt such a broad rule.[14] As noted above, a procedural violation rises to the level of a denial of 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, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H, 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

In this case, the impartial hearing officer concluded that based upon the evidence, the student received all of the services mandated in the December 2010 IEP, and the parents do not challenge this finding (IHO Decision at pp. 1-13; see Petition; Parent Memorandum of Law). To

[14] A State has broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have also recognized that the proper inquiry when challenging the district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8 2011]; see L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]), and that the purposes of the IDEA may nevertheless be achieved for a particular student and his or her needs met even when the provision of specially designed instruction is provided by personnel who are not certified (see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *6 [S.D.N.Y. Sept. 6, 2011]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [noting that in a tuition reimbursement case, the lack of services by state-certified teachers at the parents' unilateral placement did not compel a finding that the services were inappropriate]). Thus, the provision of services by personnel who lack the required certifications does not constitute an automatic denial of a FAPE, but rather the issue is a fact-specific inquiry. I also note, however, that the precise extent to which each distinct state requirement is adopted for purposes of offering the student a FAPE under the IDEA is not always entirely clear (see, e.g., Poway Unified Sch. Dist. v. Cheng, 2011 WL 4479033, at *4 n.3 [S.D.Cal. Sept. 26, 2011] [collecting cases and citing Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730 [2d Cir.2007]]). Notwithstanding this point, the district and its personnel in this case are subject to State standards and should nevertheless ensure that the student's services are provided in conformity with State regulations regarding provider qualifications, and the parents would be well within their rights to demand that the district do so.

the extent that the SETSS services provided to the student during the 2010-11 school year were not delivered by a certified special education teacher, the evidence demonstrates that the SETSS provider was a properly certified regular education teacher (see Tr. pp. 61-63, 95-96), that the SETSS provider completed coursework in "child psychology" and "differentiating instruction," (Tr. pp. 63-64, 119), that the SETSS provider completed student teaching in an "inclusion class . . . with children with autism" (Tr. pp. 63, 119), that the SETSS provider participated in a "six- part workshop" in the "SETSS training program" provided by the district (Tr. pp. 63-64), and that during the school year, the SETSS provider received "SETSS coaching" provided by the district, which included monthly meetings (Tr. p. 64).

Additionally, the SETSS provider pushed-in to the student's classes to deliver "in-class support," and he provided "tutorial work" to the student during the "beginning of the day and at the end of the day" (Tr. p. 64; see Tr. pp. 100-02). Moreover, the SETSS provider testified about the student's academic skills, his behavior, and his peer relations; the student's areas of need; and that he addressed the student's areas of need by modifying the curriculum and/or assignments and by using instructional methodologies, such as "scaffolding," "graphic organizers" for writing assignments, "manipulatives" for mathematics and science, and "technology" with the student (laptop, iPad, PowerPoint) (see Tr. pp. 68-72, 74-78, 81-82, 108). The SETSS provider also testified that he developed the annual goals in the student's December 2010 IEP, as well as the student's BIP, and he described how the BIP was implemented (see Tr. pp. 83-91). In addition, the SETSS provider testified about the student's progress he has observed since he began working with him during the 2009-10 school year (see Tr. pp. 91-93). Moreover, the hearing record contains unrebutted, objective evidence of the student's progress in the form of a student report card from the 2010-11 school year, as well as testimony regarding the student's grades in his most recent report card at the time of the impartial hearing, both of which indicate that the student received passing grades in all of his core academic classes during the 2010-11 school year (see Tr. p. 82; Parent Ex. M). With regard to the implementation of the student's IEP, the evidence does not support the conclusion that the district deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see DD-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

Therefore, based upon the evidence in the hearing record as discussed, even if the district's failure to provide the student's SETSS services by a certified special education teacher during the 2010-11 school year constituted a procedural violation, the hearing record does not support a finding that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits such that it rose to the level of a denial of a FAPE.

Conclusion

I have considered the parties' remaining contentions and find that based upon the determinations made herein, I need not reach them.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision, dated November 2, 2011, finding that the district failed to offer the student a FAPE for the 2010-11 school year is hereby annulled.

Dated: **Albany, New York**
February 10, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER