The University of the State of New York

The State Education Department
State Review Officer
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No. 12-017

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Baldwin Union Free School District

Appearances:
Ingerman Smith, LLP, attorneys for respondent, Susan M. Gibson, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request for respondent (the district) to place the student at the Camphill Special School (Camphill) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has received diagnoses of an autistic disorder and pervasive developmental disorder (PDD) (Dist. Ex. 26 at p. 7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On April 6, 2011, the CSE met for the student's annual review and to develop an IEP for the 2011-12 school year (Dist. Ex. 14). For the 2011-12 school year, the CSE recommended the student's placement in an 8:1+1 special class with related services of individual speech-language therapy for five thirty minute sessions per week (id. at p. 9). The CSE also recommended that the student receive direct consultant teacher services four times per week for one hour in his home (id.).

In a letter dated May 27, 2011, the parent requested that the district send an application to Camphill on behalf of the student (Dist. Ex. 22).[1] The parent expressed concern regarding the student's lack of progress and the characterization by the student's teachers and therapists that the student had no motivation and his performance was inconsistent (id. at p. 1). The parent suggested that Camphill provided a different environment and approach that might motivate the student (id.).

In a subsequent letter dated June 3, 2011, the parent explained that the reason he was requesting Camphill was not because he wanted to secure a residential placement, but because he believed that Camphill might provide the student with a more appropriate environment because of its unique approach of educating students in a "natural" way (Dist. Ex. 23). The parent also noted that Camphill was too far away for the student to be reasonably transported by bus or a private driver (id. at p. 2). Therefore, he requested that the director of pupil services inform him whether there was a special school similar to Camphill that existed in New York State (id.). In response to the parent's letter, the district scheduled a CSE meeting to discuss his concerns (Tr. pp. 145-46).

The CSE convened on July 13, 2011 (Dist. Ex. 21).[2] According to meeting minutes, the CSE discussed the parent's concerns as expressed in the May 27, 2011 letter, specifically that the student was not making progress and that his teachers described him as being unmotivated and inconsistent (id. at p. 1). CSE members agreed that the student had made small gains in some programs, but that his overall functioning did not reflect significant changes in academics, communication, activities of daily living (ADLs), or social skills (id.). The parent requested that the student be placed in a school with a different environment and a methodology other than applied behavior analysis (ABA) (id.). The parent further clarified that he was not necessarily seeking a residential placement (id.). The CSE agreed to explore in-State placements for the student including approved day schools and residential programs, and identified potential programs to which the district would send applications (id. at p. 2; see Dist. Ex. 29; Parent Ex. 3). However, the CSE determined that the district would not send an application to Camphill because the district was required to apply to State-approved schools and intended to apply to in-State schools first, and because Camphill was not an approved out-of-State residential program (Dist. Ex. 21 at p. 2). Despite the CSE's willingness to explore other placements, its recommendation for placement in a district 8:1+1 special class along with consultant teacher services delivered in the home as set forth in the April 2011 IEP did not change (see Tr. pp. 150, 198).

In a letter dated July 13, 2011, the district provided the parent with prior written notice of its intent to send applications to State-approved day schools and in-State residential programs in order to identify other in-State programs that might be available to meet the student's needs (Dist. Ex. 27). The prior written notice included a list of schools to which the district intended to apply and stated that the parent would indicate his agreement/disagreement in writing (id. at p. 2).

[1] Camphill is a nonpublic, residential school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] This meeting did not result in a new IEP for the student (Tr. p. 150; see Dist. Ex. 21).

A. Due Process Complaint Notice

In a due process complaint notice dated July 18, 2011, the parent asserted that at the July 2011 CSE meeting, the district did not distribute "documented information" provided by the parent; the CSE did not assert that Camphill was an inappropriate placement for the student; the parent's assertion that the student needed an alternative to ABA and a "particular environment" was not contradicted by the CSE; the CSE "maliciously" proposed to place the student in residential schools in New York State; the director of pupil services was not qualified to recommend a program for the student; the student's teacher and parents were the most qualified persons to recommend a program for the student and they never expressed that he needed a residential school; the proposed residential schools were not disclosed at the CSE meeting or afterwards; and documentary evidence was not provided for the CSE to consider whether the proposed schools would meet the student's educational needs (Dist. Ex. 1 at pp. 5-7). In addition, the parent asserted that the July 2011 CSE did not have a valid evaluation that assessed the student's educational needs because the 2009 psychoeducational evaluation that was considered by the CSE was inappropriate (id. at p. 7). As relief, the parent sought an order enjoining the district from sending applications to schools and an order for the district to pay for a placement and expenses at Camphill (id. at p. 10).

B. IHO Decision

The impartial hearing convened on October 4, 2011 and concluded on October 11, 2011, after three days of testimony (Tr. pp. 1-777). In a decision dated December 27, 2011, the IHO found that the April 2011 IEP and placement recommendation were appropriate (IHO Decision at p. 14). The IHO specifically found that the April 2011 IEP accurately described the student's needs from the evaluations and reports considered by the CSE, as well as input provided by the CSE participants (id. at p. 17). In addition, the IHO found that the CSE was properly composed, the goals were appropriate, and the program recommendations were reasonably calculated to result in progress and provide the student with a free appropriate public education (FAPE) (id. at pp. 17-18). Although noting that the student's progress was minimal and inconsistent, the IHO found that meaningful educational progress must be measured in relation to the individual potential of a student and that given the student's substantial cognitive and language impairments, the student made meaningful educational progress (id. at p. 18).

The IHO further found that the doctrine of collateral estoppel barred the parent's claim that the April 2011 CSE relied on a 2009 psychoeducational evaluation that was inappropriate because the appropriateness of the 2009 psychoeducational evaluation had been litigated at a prior impartial hearing completed in January 2010 and an SRO affirmed the prior impartial hearing officer's finding that the 2009 psychoeducational evaluation was appropriate and accurately described the student's educational needs (IHO Decision at pp. 14-15; see Application of a Student with a Disability, Appeal No. 09-121). In addition, the IHO found that the district did not have an obligation to send an application to the parent's preferred school (Camphill) and that that the district cannot ignore the continuum of placements in making recommendations for the student (IHO Decision at pp. 19-20). The IHO also found that the parent was not denied an opportunity to meaningfully participate in developing the student's IEP and recommending a placement for the student for the 2011-12 school year (id. at pp. 20-21). As to whether the student's special education needs continued to be met in the 8:1+1 special class program in the district's public school, the

IHO found that because the student's progress had been inconsistent and minimal, it was necessary to perform additional testing "to better understand the student's needs" (id. at pp. 21-22). Therefore, the IHO ordered the district to fund an independent neurological evaluation, provided that the parents consent to the evaluation, and further ordered that the CSE convene to consider the results of the evaluation and any other current information regarding the student's needs (id. at pp. 22, 24).[3]

Regarding Camphill, the IHO found that "virtually" no information was provided to the April 2011 CSE regarding the methodology of instruction used at the school and the needs of the students who attended; therefore, the information was insufficient for the CSE to consider the program appropriate, especially before less restrictive in-State placements were considered (IHO Decision at p. 20). The IHO further found that the parent failed to satisfy his burden of showing that Camphill was an appropriate placement for the student for the 2011-12 school year; that the parent never placed the student at Camphill and incurred no obligation for the payment of tuition at Camphill; and that there was no basis to deny or limit reimbursement on equitable grounds (id. at pp. 22-24).

IV. Appeal for State-Level Review

The parent appeals, asserting that the district failed to provide the student with a FAPE. The parent specifically asserts that the district's recommended placement for the 2011-12 school year was not appropriate; the student has not achieved meaningful progress in the district placement; the 2009 evaluation report did not determine and assess the student's educational needs and therefore the district has no evidence to show that the 2011-12 placement meets the student's needs; and the issue of whether the student's educational placement offered the student a FAPE was never previously litigated and therefore the doctrine of collateral estoppel or res judicata does not apply. In addition, the parent asserts that the district failed to prove that Camphill was inappropriate and that the district had no basis to deny the student a placement at Camphill. In addition, the parent asserts that the IHO erred in applying the burden of proof; that the parent does not assert a tuition reimbursement claim; that the dispute is about a CSE placement not a parental placement; and that equitable considerations are not an issue. As to the impartial hearing process, the parent asserts that the IHO's granting of extensions was improper. The parent also apparently asserts that the IHO was not impartial and lacked competence.

The district answers, asserting that the IHO correctly determined that the district's April 2011 IEP and placement recommendation for the student were appropriate. In addition, the district asserts that the IHO properly determined that the student made meaningful educational progress in the district's program; that absent parental placement of the student at Camphill and incurring a legal obligation for the costs of that placement, the parent's claim for relief lacks a legal basis; that the district was not obligated to send an application to the parent's preferred placement at Camphill; that the parent had the burden of demonstrating that Camphill is an appropriate placement for the student and the parent failed to satisfy that burden; and that the equities favor the district. In addition, the district asserts that the IHO correctly determined that Application of a Student with a Disability, Appeal No. 09-121, was binding on the instant proceeding and that any alleged

[3] Neither party has appealed the IHO's decision to order an independent neurological evaluation; thus, that part of the decision is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][[v]).

procedural inadequacies did not result in the loss of educational opportunity for the student or seriously infringe on the parent's participation in the formulation of the IEP.

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 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) 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 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 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 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. Dep't 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 enabling 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 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]).]

VI. Discussion

A. Res Judicata/Collateral Estoppel

First, I will address the parent's assertion that the IHO erred in finding that the parent's claim regarding the appropriateness of the 2009 psychoeducational evaluation was barred by the doctrine of collateral estoppel.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 (N.D.N.Y. Dec. 19. 2006)].

The doctrine of res judicata "precludes parties from litigating issues 'that were or could have been raised' in a prior proceeding" (Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6; Application of a Child with a Disability, Appeal No. 07-093; Application of a Child with a

Disability, Appeal No. 06-100; Application of a Child with a Disability, Appeal No. 05-072; Application of a Child with a Disability, Appeal No. 04-099).

> The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again.

(In re Hunter, 4 N.Y.3d 260, 269 [2005]).

"[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (Chen v. Fischer, 6 N.Y.3d 94, 100 [2005] [quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]]; In re Hunter, 4 N.Y.3d at 269). Res judicata applies when (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same plaintiff or someone in privity with the plaintiff; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (Grenon, 2006 WL 3751450, at *6).

The related doctrine of collateral estoppel precludes parties from litigating "a legal or factual issue already decided in an earlier proceeding" (Perez, 347 F.3d at 426; Grenon, 2006 WL 3751450, at *6). To prove collateral estoppel, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was 'actually litigated and decided' in the previous proceeding; (3) the party had a 'full and fair opportunity' to litigate the issue; and (4) the resolution of the issue was 'necessary to support a valid and final judgment on the merits.'

(Grenon, 2006 WL 3751450, at *6 [quoting Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]]).

Upon review of the hearing record, I concur with the IHO that the doctrine of collateral estoppel bars relitigating the issue of whether or not the 2009 psychoeducational evaluation was appropriate. Although the parent had not previously asserted the claim that the student was denied a FAPE for the 2011-12 school year, he is basing his claim in part on the assertion that the 2009 psychoeducational evaluation was inappropriate and did not accurately assess the student's educational needs (Dist. Ex. 1 at p. 7). These issues regarding the appropriateness of the 2009 psychoeducational evaluation were already litigated and decided in a prior impartial hearing, which was subsequently affirmed by an SRO (Application of a Student with a Disability, Appeal No. 09-121). The parties had a full and fair opportunity to litigate the issue, the parent was a party to the prior matter, and resolution of the issue was necessary to support the final judgment on the merits. Moreover, although the parent has appealed the SRO finding in Application of a Student with a Disability, Appeal No. 09-121 to a District Court, the pendency of an appeal does not divest a decision on the merits of the requisite finality for res judicata or collateral estoppel purposes (DiSorbo v. Hoy, 343 F.3d 172, 183 [2d Cir. 2003]; Depasquale v. Allstate Ins. Co., 2002 WL

31520500, at *1 [2d Cir. Oct. 31, 2002]; Rosen v. Paul, Hastings, Janofsky & Walker LLP, 2005 WL 1774126, at *2 [S.D.N.Y. Jul. 28, 2005]; NM IQ LLC. v. McVeigh, 2004 WL 2827618, at *7 n.1 [S.D.N.Y. Dec. 9, 2004]; In re Capoccia, 272 A.D.2d 838, 847 [3d Dep't 2000]; Beard v. Town of Newburgh, 259 A.D.2d 613, 614 [2d Dep't 1999]). Accordingly, the parent is precluded from relitigating the issue of whether or not the 2009 psychoeducational evaluation was appropriate.

B. IHO Bias

The parent appears to contend in his petition that the IHO in this case was not impartial. Upon careful review of the record, I find no basis in the record that supports the parent's general allegation that the IHO displayed bias or prejudice against the parent because he made rulings in favor of the district. Although the parent disagrees with the conclusions reached by the IHO, that disagreement does not provide a basis for finding actual or apparent bias by the IHO (Application of a Student with a Disability, Appeal No. 10-004; Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75). Moreover I have reviewed the hearing record in this matter and find that the parent was provided an opportunity to be heard at the impartial hearing, which I also find was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]).[4] The hearing record reveals that the impartial hearing officer remained courteous during the impartial hearing, treated the parent with respect, and explained his rationale for rulings and decisions (see, e.g., Tr. pp. 12-13, 19-20, 27, 29-30, 34-37, 38-39, 51-59, 67-68, 335-40, 341-42, 433-34, 631-37, 744).

I also must note that the parent's petition includes 68 instances of profanity as well as other improper comments directed toward the IHO, the impartial hearing process, and the district's attorney at the impartial hearing (see Petition at pp. 1-18). I find that the use of profanity, name calling, and inappropriate comments made by the parent in his petition and accompanying memorandum of law is contradictory to the intent of the IDEA, which is to ensure that students with disabilities have available to them a FAPE and to ensure that the rights of students with

[4] Regarding the parent's assertion that the IHO's granting of extensions was improper and the IHO "automatically granted an extension of time" for the impartial hearing at the August 17, 2011 prehearing conference (see Petition at p. 3), I note that the hearing record does not include an explanation of why the impartial hearing was scheduled for October 4, 2011, but rather indicates that "[p]ursuant to a preliminary conference" the impartial hearing was scheduled for four dates in October, with the first date indicated as October 4, 2011 (Parent Ex. 17). I further note that the IHO indicates in his decision that case extensions were issued pursuant to 8 NYCRR 200.5(j)(5)(i), which requires that extensions may only be granted consistent with regulatory constraints and that an IHO ensure that the hearing record includes documentation setting forth the reason for each extension (see IHO Decision at p. 2). In addition, the hearing record does reflect that on the first date of proceedings, October 4, 2011, the district indicated that the next witness would not be able to complete testimony and asked if the witness could appear the next morning, that the matter was scheduled for October 5, 2011, and that the impartial hearing officer also indicated that he believed another date would be needed and if needed, such would be scheduled the next day, and that thereafter the hearing was scheduled for a third date , October 11, 2011, and that the hearing concluded on the third date (Tr. pp. 170-171; see Tr. 564). Although the IHO is reminded to comply with 8 NYCRR 200.5(j)(5)(i) regarding the granting of extensions, I decline to reverse his decision on this basis alone.

disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove, 129 S. Ct. at 2491; Rowley, 458 U.S. at 206-07).

C. April 2011 IEP

1. Sufficiency of Evaluative Data and Present Levels of Performance

Next, I turn to the parent's assertion that the CSE lacked sufficient evaluative data to determine the student's educational needs and therefore, the district could not show that the recommended 8:1+1 placement for the 2011-12 school year meets the student's needs.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Meeting attendees at the April 2011 CSE meeting included the CSE chairperson, a psychologist, a regular education teacher, the student's special education teacher, his speech-language therapist, an occupational therapist, and the student's father (Dist. Ex. 14 at pp. 13, 15). A speech-language pathologist from the Board of Cooperative Educational Services (BOCES) who conducted an Augmentative and Alternative Communication (AAC) evaluation of the student also participated in the meeting via telephone (Dist. Exs. 14 at p. 13; 19).[5] In developing the student's 2011-12 IEP, the CSE considered parent observations, annual review recommendations from the student's LSH teacher, progress summaries from the student's classroom teacher and consultant teacher, an independent speech-language evaluation, and the BOCES AAC evaluation (Dist. Ex.

[5] The parent waived the participation of an additional parent member (Dist. Ex. 14 at p.13).

14 at pp.1, 14; see Dist. Exs. 10; 14-19).[6] The resultant IEP also included the results of standardized testing conducted as part of the November 2010 speech-language evaluation and the February 2009 psychoeducational evaluation (Dist. Ex. 14 at p. 1).

The progress reports completed by the student's classroom and consultant teachers provided narrative updates of the student's progress toward his IEP goals that covered the student's performance as it related to reading, mathematics, speech-language skills, motor development, basic cognitive and daily living skills, behavior, and functional classroom skills (Dist. Exs. 16; 17). In addition, the independent speech-language evaluation provided information regarding the student's communicative abilities including his receptive and expressive language, joint attention, play skills, oral motor abilities, and social relatedness (Dist. Ex. 10). The BOCES AAC evaluation report provided information regarding the student's speech-language abilities, communication needs, and sensory functioning (Dist. Ex. 19). Minutes from the April 2011 CSE meeting indicated that the CSE reviewed the AAC evaluation report and the student's communication needs, a list of questions presented by the parent, use of the Edmark program to develop the student's sight word acquisition and functional language, and the manner in which OT services would be provided to the student (Dist. Ex. 14 at pp. 13-14). Based on the above, I find that the evaluative data considered by the April 2011 CSE and the input from the CSE participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). Here, the student's present levels of performance in the areas of academic achievement, functional performance, and learning characteristics indicated that he was able to follow some simple classroom routines, but that he required intensive instruction to acquire new skills (Dist. Ex. 14 at p. 2). In math, the student was able to match the correct number of counters (up to eight) when given a flashcard with a numeral with embedded prompts, and in reading the student was learning to match picture/word combinations as a reading pre-readiness skill (id. at pp. 2-3). The IEP indicated that the student's receptive and expressive language skills were very limited and with respect to academics noted that he did not receptively or expressively identify numbers 1 to 10 and inconsistently identified word/picture combinations (id.). The IEP further reflected that the student was able to imitate several line strokes, but did not write letters or numbers using the correct formations (id. at p. 3). The IEP identified as a strength of the student the ability to request preferred items from multiple instructors across a variety of settings (id.). With respect to the student's academic, developmental, and functional needs, the IEP indicated that the student exhibited behaviors that produced their

[6] An "LSH" teacher is presumed to mean a "language, speech and hearing" teacher (see Tr. p. 472; Dist. Ex. 25 at p. 9). The individual designated as the student's LSH teacher on the April 4, 2011 annual review recommendations form is identified as a speech-language therapist in the April 6, 2011 CSE meeting minutes (Dist. Exs. 14 at p. 13; 18).

own reinforcement thereby conflicting with the presentation of instructional demands (id.). The IEP further noted that the student needed to improve his spontaneous communication and receptive and expressive language skills, and increase his responsivity to multiple cues in his environment (id.). The IEP reflected the parent's concern that the use of PECS would decrease the student's use of verbal communication, and explained that verbal communication would be paired with the introduction of pictures (id.).

The IEP described the student's social and emotional abilities as being well below age expectations (Dist. Ex. 14 at p. 3). The student displayed severe problems relating appropriately to adults or peers, although when prompted would greet them (id.). According to the IEP, the student demonstrated limited use of toys in an appropriate manner during pretend play and did not interact with peers during play-based activities (id.). The IEP identified as one of the student's strengths his ability to request preferred reinforcers from several adults in different environments (id.). Areas of social need included the student's ability to reciprocate greetings, engage in activities appropriately, engage in social interactions, and demonstrate play skills (id.).

According to the IEP, the student's physical levels and abilities were within age expectations with the exception of fine motor and gross motor skills (Dist. Ex. 14 at p. 3). The IEP indicated that the student had limited strength, vitality, and alertness and that his self-help skills were delayed (id.). The IEP further indicated that the student had difficulty with motor planning and needed to improve his ability to imitate motor movements using objects (id.). The student's ability to independently bounce a ball was cited as a strength in the IEP, while his ADL skills, including self-care, were designated as areas of need (id. at p. 4). The April 2011 IEP also described the student's management needs, noting that he engaged in challenging behaviors including self-stimulatory behaviors (id.). Overall, the description of the student's abilities and needs in the April 2011 IEP were consistent with information reviewed by the CSE (compare Dist. Ex. 14, with Dist. Exs. 10; 15-19).

Based on the foregoing, I find that the April 2011 CSE had sufficient information relative to the student's present levels of academic achievement and functional performance at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

2. Appropriateness of the District's Recommended Program

The IHO determined that the April 2011 CSE's program recommendation for the student was appropriate (see IHO Decision at pp. 17-19). The parent asserts that the recommended program was not appropriate because the student has not achieved meaningful progress in the district placement and ABA methodology was not appropriate for the student.

A review of the hearing record reflects that the IEP developed by the April 2011 CSE included programs and services designed to address the student's identified academic, social/emotional, behavioral, and physical needs. To address the student's intensive management needs and need for individualized attention, the CSE recommended that he be placed in an 8:1+1 special class with related services of individual speech-language therapy for five 30-minute

sessions per week (Dist. Ex. 14 at p. 9). The CSE also recommended that the student receive direct consultant teacher services four times per week for one hour in his home (id.). The April 2011 IEP reflected that the student would be provided with consistent structure, the use of visual aids and cues, and the support of a 1:1 aide as supplementary aids and services (id.). The IEP stated that the student required an alternative mode of communication and indicated that he would be provided with assistive technology in the form of a picture communication system (id.). In addition, the IEP indicated that an occupational therapy consult would be provided to school personnel on behalf of the student and that consultation with the speech-language therapist would also be provided within the classroom (id. at pp. 9, 10). The IEP described the environmental and human or material resources needed to address the student's management needs including individualized behavior management strategies, intensive direct instruction in a highly structured environment with 1:1 support, high levels of repetition and reinforcement, and visual cues to assist with understanding (id. at p. 4). The IEP also indicated that the student required a behavioral intervention plan to address his self-stimulatory behaviors (id.). Annual goals and short-term objectives recommended by the CSE targeted the student's deficits in study skills, reading, mathematics, speech-language abilities, social/emotional development, behavior, motor development, cognition, and daily living skills, and indicated that the student would participate in alternative assessment (id. at pp. 5-8, 11). The IEP stated that the student required special transportation accommodations and services including a bus with an attendant, door-to-door transportation, and a minibus (id. at p. 11). Lastly, the CSE found the student eligible for a 12-month special education program and recommended that he receive a similar program during the summer months (id. at p. 10).

As a result of the parent's concerns, the CSE reconvened on July 13, 2011 and reviewed the student's 2010-11 progress report for IEP goals, among other documents (Tr. pp. 150-51; Dist. Exs. 21 at p. 1; 27). District staff confirmed during testimony that the student's progress since entering the district's 8:1+1 program had been minimal, slow, and inconsistent (Tr. pp. 136-37, 140, 153, 155, 377-78, 399, 405, 460-77, 518; see Dist. Ex. 21). With respect to the 2010-11 school year, the student's classroom teacher testified that the student achieved IEP goals related to reducing stereotypical behaviors, extending a sequential design, matching clothing to body parts, filling in the words of familiar phrases, and requesting preferred objects (Tr. pp. 504, 507, 508, 510-11; see Dist. Ex. 24). In addition, she reported that the student made some progress in identifying signs found in the community, imitating motor movements using an object, returning greetings, pouring liquid into a cup without spilling, matching numerals to their physical representations, writing the first letter of his name, and identifying colors (Tr. pp. 495-96, 503-04, 505, 507-09). However, the classroom teacher also testified that the student's progress on many goals was inconsistent (Tr. pp. 491-514). The student's speech-language therapist reported that the student made minimal progress toward his 2010-11 IEP goals, but noted that he was able to label several presented pictures (Tr. pp. 491-514; Dist. Ex. 18). Overall, district staff opined that the student's progress was consistent with his cognitive and adaptive abilities (Tr. pp. 110, 137, 141, 378, 399-400; see Tr. p. 471).

At the beginning of the 2011-12 school year, the student was attending the 8:1+1 special class recommended by the CSE (Tr. pp. 574-75). According to the special education teacher, the goal of the 8:1+1 program was to increase the students' independence, communication, and adaptive skills (Tr. p. 582). She reported that she worked on teaching "functionally" and "within context" (id.). The special education teacher reported that classroom instruction was

individualized based on students' needs (Tr. p. 583). She observed that the student learned best during 1:1 instruction or in a dyad where the other student served as a model (id.). She further stated that the student did best when provided with modeling and prompting (id.). According to the special education teacher, the student was easily distracted and therefore a partition was used during instruction (Tr. p. 584). The special education teacher reported that an occupational therapist came into the classroom three times per week and in addition to working individually with the student, provided the teacher with strategies specific to the student (id.). The special education teacher estimated that she spoke to the speech-language provider once per day regarding the student and had worked with her to determine the student's ability to discriminate when using line drawings as opposed to pictures (Tr. p. 587). The special education teacher also reported that she worked with the district's behavior consultant regarding administration of the Assessment of Basic Language and Learning Skills-Revised (ABLLS-R) and how to implement the student's IEP goals in a functional manner (Tr. pp. 590-91). She further indicated that she had spoken with the behavior consultant regarding data collection for a new behavior exhibited by the student (Tr. p. 591). The special education teacher reported that the student demonstrated continuous vocal stereotypes that were internally motivating and that staff was trying to identify competing motivators (Tr. pp. 596-97).

Addressing the parent's assertion that the student does not benefit from ABA methodology, initially, I note that the director of pupil services testified that the district's 8:1+1 classes used ABA, which she described as a combination of many teaching modalities such as discrete trial teaching (Tr. p. 101). She noted, however, that ABA as employed by the district also included the use of video modeling, picture schedules, and chaining (Tr. pp. 101-03). According to the director of pupil services, staff looked at a particular goal that they wanted to teach a student, decided on a teaching methodology or instructional technique to teach the skill, and then measured to see if the instruction resulted in the desired outcome (Tr. pp. 102-03). If not, staff would look to modify how materials were presented, the materials that were used, or the teaching strategies that were employed (Tr. p. 103). She opined that the student required ABA (Tr. p. 270). The district's behavior consultant testified that the district's 8:1+1 program included several strategies that were "advised" by ABA including discrete trial training, applied verbal behavior, use of visual cues, modeling, shaping, and reinforcement (Tr. pp. 357-59). He indicated that the ABLLS-R was used as both an assessment tool and a curriculum and assisted staff with goal selection (Tr. p. 370). The behavior consultant also testified that the student required ABA, noting that there were a number of strategies advised by ABA, not just 1:1 instruction (Tr. p. 412) The student's special education teacher for the 2009-10 and 2010-11 school years defined ABA as "outcome-based educational strategies" (Tr. p. 454). She testified that the district program was "data driven" and included many instructional techniques such as incidental teaching and visual schedules (id.). The special education teacher testified that the student had made slow, gradual progress with ABA and opined that ABA had been effective for the student because "there were things we could consider achieved" (Tr. pp. 518-19). She further opined that the student required ABA (Tr. p. 519).

I concur with the IHO's findings that given the student's substantial cognitive and language impairments, as well as interfering behaviors, the student made meaningful educational progress in the district's 8:1+1 special class during the 2010-11 school year (see IHO Decision at p. 18). The behavior consultant who evaluated the student testified that based on the results of standardized testing, the student presented with a significant degree of cognitive impairment that suggested to him that the student's academic potential was limited (Tr. p. 352). He opined that it

would take "quite a bit of repetition" for the student to acquire and maintain new skills (id.). He further noted, based on his assessment, that the student exhibited significant impairment in adaptive behavior (Tr. p. 353). In addition, district staff familiar with the student reported that he was "profoundly" delayed and had very limited abilities in all areas (Tr. pp. 100, 351-52, 441-42, 581).

The behavior consultant testified that although he believed that the recommended 8:1+1 program was appropriate for the student, he was in agreement with the CSE's decision to look at other programs based upon the parent's dissatisfaction and concern for his son and the student's rate of progress (Tr. p. 419). The student's classroom teacher for the 2009-10 and 2010-11 school years testified that she also believed that the 8:1+1 special class recommendation was appropriate for the student, but agreed with the CSE's decision to explore other possibilities for the student because the parent had concerns and it was "always good to see if there was something that might work" (Tr. p. 520). The director of pupil services testified that although she believed that the CSE's recommended placement was appropriate for the student, the CSE was willing to explore residential programs as the district was looking to work with the parent and understand his perspective of having a child functioning at a "severe" level (Tr. p. 200). She testified that she also thought that there was a possibility that with consistency throughout the day and evening, there would be a chance for the student to make additional progress (id.). Accordingly, I find that the hearing record does not support the parent's assertion that the student had not achieved meaningful progress in the district placement and ABA methodology was not appropriate for the student.[7]

VII. Conclusion

After reviewing the hearing record, I agree with the IHO's determination that the district offered the student a FAPE for the 2011-12 school year. I find that the evidence contained in the hearing record supports a finding that the April 2011 CSE appropriately identified the student's areas of need and that the special education programs and services recommended in the April 2011 IEP, including placement in a 8:1+1 special class with home-based consultant teacher services, addressed the student's needs and were reasonably calculated to enable the student to receive educational benefits. Thus, I find that the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Having reached this determination, it is not necessary to reach the issue of whether Camphill is an appropriate placement for the student; thus, the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; Application of the

[7] Although an IEP must provide for specialized instruction in a student's areas of need, the IDEA does not explicitly require a CSE to specify methodology on an IEP and, in many cases, the precise teaching methodology to be used by a student's teacher is generally a matter to be left to the teacher (Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46; Matter of a Handicapped Child, 23 Ed. Dept. Rep. 269).

Dep't of Educ., Appeal No. 10-094; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 22, 2012

STEPHANIE DEYOE
STATE REVIEW OFFICER