The University of the State of New York

The State Education Department
State Review Officer
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No. 12-032

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 Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, Jesse Cole Cutler, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Alexander Fong, Esq., of counsel[1]

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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2010-11 school year was appropriate. 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 CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State

[1] By letter dated April 23, 2012, the district advised that Mr. Fong, Esq. had been substituted as counsel in this proceeding.

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

In this case, the student's eligibility for special education programs and related services as a student with autism is not in dispute (Tr. p. 238; Dist. Ex. 1 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The student has been attending Imagine Academy (Imagine), where he had been enrolled since the age of ten (Tr. p. 237).[2] On April 16, 2010, the CSE convened for the student's annual review and to develop his IEP for the 2010-11 school year (Dist. Exs. 1; 7). In

[2] Imagine has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 54-55; see 8 NYCRR 200.1[d], 200.7).

the resultant IEP, the April 2010 CSE recommended that the student be placed in a 12-month program in a 6:1+1 special class in a specialized school combined with related services and participation in adapted physical education (APE) (Dist. Ex. 1 at pp. 1, 17; 7 at p. 2).

By letter to the parents dated June 10, 2010, the district summarized the April 2010 CSE's recommendations and notified them of the particular school to which the student was assigned for the 2010-11 school year (Dist. Ex. 9). By letter to the district dated August 24, 2010, the parents advised that they did not believe the district's offer was appropriate and that they planned to unilaterally place the student at Imagine for the 2010-11 school year and seek payment of the student's tuition at public expense (Reply Ex. B).

A. Due Process Complaint Notice

By due process complaint notice dated May 13, 2011, the parents requested an impartial hearing, in which they sought tuition reimbursement for Imagine for the 2010-11 school year (Pet. Ex. A). The parents maintained that the proposed 6:1+1 program combined with related services was inappropriate to meet the student's special education needs, and resulted in a denial of a free appropriate public education (FAPE) for the 2010-11 school year (id. at pp. 2-6). The parents alleged, among other things, that (1) the district's special education teacher in attendance at the April 2010 CSE meeting was not qualified to serve in that capacity; (2) the student's providers from Imagine who participated in the April 2010 CSE meeting did not have copies of the reports and evaluations on which the CSE based its recommendation; (3) the parents did not have copies of the evaluations; (4) the April 2010 CSE did not "rely" on the necessary evaluations to properly gauge the student's skill levels; (5) the April 2010 IEP did not reference any testing or evaluative data; (6) the April 2010 IEP did not quantify the student's academic skill levels, to enable his teacher to establish a baseline from which to work; (7) the annual goals and short-term objectives contained in the April 2010 IEP were generic and vague; (8) the April 2010 IEP lacked health and physical management needs of the student; (9) the transition plan contained in the April 2010 IEP was inadequate; (10) the transition services listed in the April 2010 IEP were generic and vague; (11) the April 2010 CSE failed to include the student or his providers to participate in the development of the transition services; (12) the April 2010 CSE failed to develop annual goals and short-term objectives for the proposed transition services; (13) the transition services provision of the April 2010 IEP was not individualized; (14) the April 2010 CSE failed to conduct a vocational assessment of the student; (15) the behavioral intervention plan (BIP) contained in the April 2010 IEP was inadequate, generic and vague, and did not provide proper guidance to the individual expected to implement the plan; (16) the district failed to conduct a functional behavioral analysis (FBA); and (17) the April 2010 CSE failed to include parent counseling and training on the IEP as a related service (id. at pp. 2-5). The parents further maintained that the April 2010 CSE recommended the 6:1+1 special class without properly evaluating the student's ability to be placed in such a large environment (id. at p. 6). Moreover, the parents asserted that the April 2010 CSE made its program recommendation without seeking their input or that of the student's providers (id.). Additionally, the parents also contended that the proposed 6:1+1 special class would not have provided the student with a suitable and functional peer group (id. at pp. 5-6). Next, the parents contended that Imagine was an appropriate placement to meet the student's educational needs and equitable considerations favored their claim for relief (id. at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 10, 2011 and concluded on November 30, 2011 after four days of proceedings. In a decision dated January 3, 2012, the IHO denied the parents' request for tuition reimbursement for Imagine for the 2010-11 school year (IHO Decision at p. 19). The IHO concluded that the district presented sufficient evidence that the April 2010 IEP, which contained annual goals and short-term objectives proposed by Imagine staff, could have been implemented in a 6:1+1 setting and was designed to confer educational benefits to the student (id. at pp. 15, 19). Moreover, the IHO determined that the proposed 6:1+1 program constituted the student's least restrictive environment (LRE) (id.). In addition, the IHO noted that the parents did not disagree with the district's related services recommendation, nor did the evidence suggest that the student would not have received his related services mandate (id.). The IHO was not persuaded by the parents' claim that the district regular education teacher who participated in the April 2010 CSE was not qualified, and therefore, the CSE was invalidly constituted (id. at p. 13).[3] Next, the IHO acknowledged that the April 2010 IEP itself did not contain formal assessments of the student in reading and math, but he found that Imagine staff provided the CSE with subjective assessments of the student's academic functioning, and that the resultant IEP described the student's present levels of performance with respect to letter recognition and counting, which constituted the student's ability in reading and math (id. at p. 14). Under the circumstances, the IHO determined that Imagine provided the April 2010 CSE with the student's baseline functioning levels (id.). The IHO also rejected the parents' argument that the district could have offered the student a nonpublic full-time program, in light of its nonpublic summer program recommendation for the student, and explained that the CSE cannot recommend that the student be placed in a nonpublic school in a program that is not a State-approved program (id.). Additionally, the IHO found no evidence that the goals and objectives contained in the April 2010 IEP were inappropriate (id. at p. 15). Turning next to an analysis of the parents' claims regarding public school site to which the student had been assigned, the IHO was persuaded by district testimony, that in conjunction with the April 2010 IEP, it was appropriate for the student (id. at p. 15). He further found that the student would have received 1:1 instruction there (id.). Moreover, the IHO noted that the parents never visited the assigned school, nor did they present testimony that it was not appropriate for the student (id.).

In addition to his determination that the district offered the student a FAPE during the 2010-11 school year, the IHO found that Imagine was not appropriate for the student's educational needs (IHO Decision at pp. 15-19). Lastly, the IHO found that equitable considerations precluded the parents' request for tuition reimbursement relief (id. at p. 19).

IV. Appeal for State-Level Review

The parents appeal and seek reversal of the IHO's decision. Initially, the parents allege that the IHO conducted himself in an inappropriate manner throughout the impartial hearing and that his decision was not supported by legal authority or citations to the hearing record. Additionally, the parents argue that in reaching his determination that the district offered the student a FAPE, the IHO failed to address a number of issues raised in the due process complaint notice. With respect to the merits of their claims, the parents argue that the district denied the student a FAPE

[3] Although the parents made claims regarding the special education teacher's qualifications in their due process complaint notice, the IHO made findings with regard to the qualifications of the regular education teacher's qualifications based on arguments raised during the impartial hearing (IHO Decision at p. 13).

in part, because the district CSE members lacked knowledge of the student and the special education programs offered by the district. Further, they contend that the district failed to offer evidence regarding the proposed 6:1+1 special class or the services designed to address the student's educational needs. The parents also submit that the district failed to offer proof regarding the amount of individualized instruction that students at the assigned school received, or proof with respect to the level of individualized instruction the student in the instant case would have received. In addition, the parents maintain that, the district refused to recommend placement for him in a non-approved school which shows that the district's recommendation was not individualized for the student. Next, the parents allege that the April 2010 IEP lacked baseline levels of functioning for the student. Furthermore, they contend that the IHO blamed Imagine for the April 2010 CSE's failure to evaluate the student and identify his functioning levels, which in turn, they claim, improperly reassigned the burden of proper IEP development and burden of proof to the parents. The parents next assert that the April 2010 CSE improperly failed to include parent counseling and training on the IEP. Lastly, the parents contend that the CSE placed the responsibility to implement the student's transitional plan on the "receiving school;" however, the district failed to demonstrate the assigned school's ability to do so.

Regarding Imagine, the parents maintain that the hearing record was replete with evidence showing its appropriateness. Lastly, the parents claim that the IHO's decision that equitable considerations preclude their request for relief lacks support from the hearing record.

In an answer, the district requests that the IHO's decision be upheld. Initially, the district argues that the parents improperly raise a number of allegations regarding the provision of a FAPE to the student for the first time on appeal. Moreover, despite the parents' claims that the IHO failed to address a number of allegations raised in their due process complaint notice, the district submits that the parents failed to identify which allegations were not considered by the IHO. With respect to the merits of the instant matter, the district maintains that it offered the student a FAPE in light of the following reasons: (1) the CSE was properly constituted; (2) the IEP accurately portrayed the student's functioning levels; and (3) the assigned school could implement the student's IEP. Next, the district alleges that the IHO properly found that Imagine was not appropriate for the student and equitable considerations should bar the parents' request for relief, in part because the parents failed to afford it adequate notice of their intent to unilaterally place the student at Imagine.

The parents submitted a reply. The parents allege, in part, that regardless of the district's claims that they failed to properly preserve certain issues for appeal, they included that information in their petition to illustrate that the district failed to meet its burden of showing that it offered the student a FAPE. They also assert that the district should be precluded from asserting that the parents did not provide adequate notice of their intent to unilaterally place the student at Imagine, because the district failed to raise that issue below.[4]

[4] Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the parent's reply will only be considered to the extent that it responds to any procedural defenses arising on appeal that are asserted by the district (see 8 NYCRR 279.6; Application of a Student with a Disability, Appeal No. 10-118; Application of the Bd. of Educ., Appeal No. 10-036; Application of a Student with a Disability, Appeal No. 09-145).

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 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 also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see 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. Scope of Review

1. Waiver of Claims

Before reaching the merits of the instant case, I will address the parties' dispute regarding whether the district waived any claims relating to the equities because it failed to assert them in its response to the due process complaint notice. Here, the district submitted a response to the due process complaint notice that comported with federal and State regulations, and there is no indication in the hearing record that its failure to include an affirmative defense below resulted in a denial of a FAPE to the student (34 CFR 300.508[e]; 8 NYCRR 200.5[i][4]; see also Application of a Student with a Disability, Appeal No. 08-151). Moreover, State regulation does not require

the insertion of affirmative defenses in the response to the due process complaint notice, nor does it suggest that unasserted defenses will be waived (R.B. v. Dep't of Educ., 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011]). Accordingly, the district is not precluded from arguing whether the equities bar the parents' claims for relief, particularly in relation to the provision of the parents' notice to unilaterally place the student in Imagine.

2. Scope of Review

Next, a review of the pleadings supports the district's claim that the parents have raised the following claims for the first time on appeal: (1) the April 2010 CSE lacked familiarity of the student or the proposed program; and (2) the CSE could not recommend a non-approved school for the student.

With respect to these contentions, 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 CFR 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 IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see 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 parents' due process complaint notice, I find that it may not be reasonably read to raise the two claims described above (see Pet. Ex. A). Moreover, the hearing record does show that the district agreed to expand the scope of the impartial hearing to include these matters or that the IHO otherwise authorized an amendment to the due process complaint notice to include these issues (Application of the Bd. of Educ., Appeal No. 10-073).

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 these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't 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, these contentions are raised for the first time on appeal and are outside the scope of my review and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder, 2009 WL 3246579, at *7; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

Next, the parents allege that the IHO erred to the extent that he failed to address "a number of concerns" but the petition goes no further. A party appealing must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" and this includes clearly identifying which particular issues the that the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4). It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments] Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]). As the parents' petition did not any guidance as to which claims they believed were meritorious which the IHO did not decide, I will not sift through their due process complaint notice, the hearing record and the IHO decision for the purpose of asserting claims on their behalf and deem any such claims waived on appeal.[5]

B. IHO Bias

The parents contend that the IHO conducted himself in an inappropriate manner throughout the impartial hearing, in part, because he sustained his own objections and that his decision was not well-reasoned or thorough. State regulations provide that an IHO shall not have a personal or professional interest which would conflict with his or her objectivity in the impartial hearing (8 NYCRR 200.1[x][3]; Application of a Child with a Disability, Appeal No. 01-046). An IHO should avoid giving the appearance of impropriety (Application of a Child with a Disability, Appeal No. 07-008; Application of the Bd. of Educ., Appeal No. 03-015; Application of a Child with a Disability, Appeal No. 02-027; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child with a Disability, Appeal No. 99-061; Application of a Child with a Disability, Appeal No. 99-025; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child with a Disability, Appeal No. 98-55; Application of a Child with a Disability, Appeal No. 94-32). An IHO, like a judge, must be patient, dignified and courteous in dealings with participants in the impartial hearing process and must perform all duties without bias or prejudice in favor or against any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the opportunity to be heard (Application of a Child with a

[5] I have, however, carefully reviewed the entire hearing record to consider those claims that the parents have identified (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021; see 8 NYCRR 200.1[x][3], [4][v]). At all stages of the impartial hearing, an IHO may "assist an unrepresented party by providing information relating only to the hearing process" (8 NYCRR 200.5[j][3][vii]). An IHO must render a decision that is based solely upon the hearing record (8 NYCRR 200.5[j][5][v]; see Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). State regulations do not impair or limit the authority of an IHO to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (8 NYCRR 200.5[j][3][vii]).

After reviewing the entire hearing record, including the IHO's exchanges with the parties during the impartial hearing and his written decision, I find that the hearing record does not favor the parents' contention that the IHO acted with bias or prejudice against them. Regarding the parents' contention that the IHO sustained his own objections, I note that it is the IHO's responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]). Additionally, an IHO has the obligation in some instances to ensure that there is an adequate record to support his or her decision (Application of a Student with a Disability, Appeal No. 11-065). Although the practice of an IHO of formally raising and sustaining his or her own objections has not been especially common, it has some basis in adjudication (see, State v. Santos, 413 A.2d 58, 69 [R.I. 1980]). From time to time, it may leave open the possibility that the IHO will later be accused of bias or partiality, but neither the practice itself nor an adverse ruling inexorably leads to the conclusion that the IHO has acted with bias or renders the impartial hearing fundamentally unfair (see Menchaca v. Uribe, Jr., 2010 WL 3294249, *7 [C.D.Cal. Jun. 30, 2010]; U.S. v. Battles, 2003 WL 22227190, at *10-*11 [N.D.Ill. Sept. 26, 2003]).[6] In this case the hearing record reveals that the IHO sustained his own objections, but it also demonstrates that he explained the basis for his objections, which ultimately led to further clarification and development of the hearing record (Tr. pp. 56-58, 161-63, 249). Moreover, the hearing record also reflects that the IHO also sustained objections raised by both parties (Tr. pp. 41, 112). Further, although the parents disagreed with the conclusions reached by the IHO, that disagreement does not provide a basis for finding that the IHO acted with bias (Application of a Student with a Disability, Appeal No. 11-074; Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75).[7]

[6] I note however that the practice is not universally admired and has in some instances been disfavored —overuse of the technique can, in some instances, cross the line and result in prejudicial error to a party (see, e.g., State v. Steele, 23 N.C.App. 524, 527 [N.C.App. 1974]; De Bock v. De Bock, 184 P. 890, 897 (Cal. App. 3 Dist. 1919) ["Such procedure is not to be commended except in unusual cases"]). This is not the first time a party has unsuccessfully challenged limited use of the practice by an IHO (see Application of a Child with a Disability, Appeal No. 07-130) and, as in that case, impermissible overuse of the technique is not present in the circumstances in this case and is not a basis for disturbing the IHO's determination.

[7] Additionally, after reviewing the IHO's decision, I am not persuaded by the parents' claim that he failed to cite to applicable legal standards in rendering his decision and cited only minimally to the hearing record, which violates State regulation (see 8 NYCRR 200.5[j][v]; IHO Decision at pp. 1-19).

C. April 2010 IEP

1. CSE Process—Composition of the April 2010 CSE

The parents allege that the individuals who participated in the April 2010 CSE lacked familiarity with the student, which in turn resulted in an invalidly composed CSE and contributed to a denial of a FAPE to him. Participants at the April 2010 CSE meeting included the parents, a district school psychologist, a district special and regular education teacher, a district social worker, and an additional parent member (Dist. Ex. 1 at p. 2). Additionally, the student's Imagine teacher, speech-language pathologist, occupational therapist, and Floortime specialist participated in the CSE meeting by telephone (Dist. Exs. 1 at p. 2; 7 at p. 1).

To the extent that the parents argue that the April 2010 CSE lacked the requisite special education teacher, I note that the IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

The hearing record reflects that a special education teacher from the district and the student's teacher and other providers from Imagine participated at the April 2010 CSE meeting (Dist. Ex. 1 at p. 2). The district regular education teacher testified that the April 2010 CSE relied on the information presented from the student's providers at Imagine to develop the IEP, because those were the individuals who knew the student best (Tr. pp. 48-49, 51). Specifically, each of the student's providers reported on the student's progress, and the student's teacher, speech-language pathologist, and occupational therapist also suggested strategies, that proved useful with the student, such as the provision of positive reinforcement, which were incorporated into the April 2010 IEP (Tr. p. 52; Dist. Ex. 7 at p. 1; compare Dist. Ex. 1 at p. 21, with Dist. Ex. 7 at p. 1). The district regular education teacher added that the student's Imagine teacher's input was important in crafting the IEP, because she helped the CSE establish the student's skill levels at that time (Tr. p. 45). Moreover, the hearing record indicates that the CSE afforded all members an opportunity to be heard, given that the student's providers from Imagine disagreed with the 6:1+1 program recommendation, and stated that the student required a 1:1 setting (Dist. Ex. 7 at p. 2).[8] The hearing record also reflects that the district afforded the parents an opportunity to provide input in the development of the student's IEP (Tr. pp. 46-48; Dist. Ex. 7).

Although I find that the April 2010 CSE lacked a certified special education teacher who could have personally implemented the student's IEP had the student attended the district's proposed program, assuming without deciding that this constituted a procedural error, I am not persuaded by the evidence that it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]), particularly in light of the participation of the parents, the student's Imagine teacher, and other

[8] The district regular education teacher testified that he did not recall anyone disagreeing with the program recommendation (Tr. p. 29).

providers from Imagine (see Application of the Dep't of Educ., Appeal No. 11-040; Application of the Dep't of Educ., Appeal No. 08-105).

Additionally, to the extent that the parents argue that the regular education teacher was not included, I note that the IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the regular education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; see also 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). In this case, although a regular education teacher participated at the April 2010 CSE meeting, the hearing record demonstrates that the student was not being considered for placement in a general education classroom, and neither party has asserted below or on appeal that he would be appropriately placed in a general education setting (Tr. pp. 78-79; see Dist. Ex. 1 at p. 17). Therefore, I find that a regular education teacher of the student was not required at the April 2010 CSE meeting because the evidence does not support the conclusion that there was a reasonable likelihood that the student would have been assigned to such a teacher (34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see J.G. v. Kiryas Joel U.F.S.D., 777 F. Supp. 2d 606, 644-45 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 287-88 [S.D.N.Y. 2010]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 365-66 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *5-*6 [S.D.N.Y., July 3, 2008]; see also Application of the Dep't of Educ., Appeal No. 11-136; Application of the Bd. of Educ., Appeal No. 11-129; Application of a Student with a Disability, Appeal No. 08-035). Accordingly, I decline to find a denial of a FAPE based on the parents' allegation that the regular education teacher who participated at the April 2010 CSE was not appropriate.

2. Adequacy of Evaluative Information and Present Levels of Performance

I will next consider the parents' allegation that the district failed to evaluate the student and identify his levels of functioning. 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).

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]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

The district regular education teacher testified that in addition to an April 15, 2010 classroom observation of the student conducted by the district, the CSE utilized current documents provided by the student's Imagine providers, including a speech-language report, a teacher report, an occupational therapy (OT) report, and a Floortime report to develop the April 2010 IEP (Tr. pp. 43, 49-50; see Dist. Exs. 3-6; 8). He added that the CSE also relied on input from the student's then-current teacher, speech-language and OT providers, in addition to his Floortime specialist, and that based on the totality of information, the CSE had a full understanding of the student's then-present levels of functioning and his needs (Tr. pp. 46-48, 50). According to the district regular education teacher, the CSE sought input from Imagine specifically to ascertain the student's level of performance in each area (Tr. p. 52). Moreover, each of the student's Imagine providers reported on the student's progress (id.). A review of the academic performance and learning characteristics reflected on the student's April 2010 IEP reveals that they included information that was contained in the April 2010 special education progress report and the April 2010 speech and language progress report from Imagine, and the district's classroom observation (compare Dist. Ex. 1 at pp. 3-4, with Dist. Exs. 4 at pp. 1-3; 3 at pp. 1-2; 8 at p. 1). The hearing record further reflects that although the student's teacher did not provide specific reading and/or math levels for the student in his IEP, the handwritten portion of the academic performance section of the IEP described the student's functioning level based on the teacher report (Tr. pp. 82-83; see Dist. Ex. 1 at p. 3).[9] Furthermore, the student's Imagine teacher provided the information found in the social/emotional present levels of performance on the student's IEP (see Tr. p. 30; Dist. Ex. 1 at p. 5). Additionally, the student's occupational therapist and mother advised the CSE regarding the student's present levels of health and physical development and his speech-language pathologist provided the present levels of speech-language performance reflected in the IEP (Tr. pp. 83-84; Dist. Ex. 1 at pp. 6-7).

[9] The student's speech-language pathologist indicated in her April 2010 progress report that "[s]tandardized tests were deemed inappropriate due to the nature and severity of [the student's] deficits" (Dist. Ex. 3 at p. 2).

Based on the above, I find that the evaluative data considered by the April 2010 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).

3. Annual Goals and Short-Term Objectives

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

The April 2010 CSE developed annual academic goals and short-term objectives designed to address the student's deficits in reading, math, and vocational training (Dist. Ex. 1 at pp. 8-9). The CSE developed annual goals and short-term objectives that targeted the student's deficits in social skills/pragmatics, expressive and receptive language skills, visual motor skills, as well as fine motor and sensory motor skills (id. at pp. 9-13). Additionally, the CSE developed an annual goal and short-term objectives to address improving the student's participation in games and group activities through APE (id. at p. 15).

Although the April 2010 IEP did not indicate specific reading and math levels or otherwise reflect functional levels such as through standardized tests results, a review of the student's present levels of performance listed in the April 2010 IEP shows that they contained sufficient information to describe the student's academic, social/emotional, speech-language, and OT needs to enable measurement of his progress toward his IEP goals (Dist. Ex. 1 at pp. 3-5, 7-15; see also D.G. v. Cooperstown Cent. Sch. Dist., 746 F. Supp. 2d 435, 447 [N.D.N.Y. Oct. 29, 2010]). Regarding measurement, given that the student participated in the New York State alternate assessment, the student's progress toward his annual goals could be evaluated by teacher-made tests and observations as well as by his work portfolio (Tr. p. 81; 8 NYCRR 200.4[d][2][iv]). Furthermore, a careful review of the student's IEP goals reveals that they contained adequate evaluative criteria and also set forth sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision (see Dist. Ex. 1 at pp. 8-10, 12-13, 15). Thus, I find that overall the annual goals and short-term objectives contained on the student's April 2010 IEP target the student's identified areas of need and provide information sufficient to guide a teacher in instructing the student and measuring his progress (see Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y 2006]; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a

Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096).

4. 6:1+1 Special Class Placement

Next, I will consider the parties' claims regarding the recommended 6:1+1 special class placement. The parents contended in their due process complaint notice that the district recommended placement in a 6:1+1 special class without properly evaluating the student's ability to be placed in such a large and less supportive environment. Contrary to their claims, the hearing record supports the conclusion that based on the information before the April 2010 CSE, the recommended 6:1+1 placement was reasonably calculated to provide the student with educational benefits.

At the time of the April 2010 CSE meeting, the student had received a diagnosis of autism and presented with severe global delays including verbal dyspraxia, receptive and expressive language deficits, pragmatic/social skill deficiencies, academic delays, sensory deficits, gross, fine, and visual perceptual motor deficits, and exhibited interfering behaviors (Dist. Exs. 1 at pp. 3-7; 3-6; 7 at p. 1; 8). State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Although a CSE must consider parents' suggestions or input offered from privately retained experts, the CSE is not required to merely adopt such recommendations for different programming (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]). The IDEA does not require the district to offer the student what some may view as the "best opportunities" for the student (Watson, 325 F. Supp. 2d at 144) or "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132).

Consistent with the student's needs and State regulations, the April 2010 CSE recommended that the student be placed in a 12-month 6:1+1 special class in a specialized school and further recommended a BIP for the student (Dist. Ex. 1 at pp. 1, 21). The April 2010 CSE also included environmental modifications and human/material resources to address the student's needs, such as the provision of a small structured environment, visual, verbal and tactile cues and prompts, refocusing and redirection and additional behavioral support provided by adult supervision, speech-language therapy, and OT (id. at pp. 3, 5, 7). The April 2010 IEP also prescribed the implementation of a sensory diet which was to be monitored daily (id. at p. 7).

Although the parents requested placement in a 1:1 setting similar to the educational environment at Imagine during the April 2010 CSE meeting, as detailed below, the hearing record supports the IHO's finding that a 6:1+1 special class placement could appropriately meet the student's needs (Dist. Ex. 7 at p. 2; IHO Decision at p. 15). As described below, the hearing record demonstrates that the student did not actually need or receive full-time 1:1 teacher support at Imagine. According to the student's head teacher at Imagine during the 2010-11 school year, her class consisted of five adults, including one head teacher (herself), one teacher's assistant, and three instructors (Tr. pp. 185, 190, 192). She testified that the "instructors," who were also referred to by Imagine staff as paraprofessionals, served as 1:1 support for students, but needed to receive training from either the head teacher or the assistant in terms of implementing programs (Tr. p.

191). She further indicated that these instructors implemented a "whole variety of activities," such as "morning meeting" and "good bye circle" and also assisted her when she worked with students in order to learn and to facilitate whatever lesson is being given (Tr. pp. 191-92). Moreover, the hearing record reflects that the student successfully participated in speech-language therapy at Imagine once per week in a group of two setting (Dist. Ex. 3 at p. 1). Based on the above, the hearing record demonstrates that the student was able to function without 1:1 teacher support in a variety of educational activities throughout the school day.

Additionally, a review of the hearing record illustrates the level and type of support that the student required in order to function and learn. The student's teacher reported that the student demonstrated the ability to perform a variety of tasks given various levels of support, ranging from full or moderate prompting to demonstrating independent proficiency in areas such as dressing/undressing, teeth brushing, hand washing, bathroom skills, and in initiating interaction with adults and at times, with peers (Dist. Ex. 4 at pp. 1-3). Furthermore, his speech-language pathologist indicated in her April 2010 progress report, that given "minimal" verbal or visual prompts, the student could follow two to three-step directions (Dist. Ex. 3 at pp. 1-2). She also indicated that the student required "some prompting" to initiate interactions with his peers; however, he continued to show improvement in the group setting in his initiation of speech with other students (id. at pp. 2-3). Moreover, with "minimal prompting," the student had increased his ability to use his augmentative communication device to request items or activities not in the immediate context (id. at p. 3). The student's speech-language pathologist also noted that the student increasingly used longer, more complex utterances to communicate, especially with prompting, and that he could communicate for a variety of reasons, which included labeling common objects, protesting, greeting, and requesting (id. at p. 1). She further indicated that the student exhibited a variety of behaviors that hindered his academic and speech-language progress, and had difficulty with self-regulation; however, the student merely required time in the gym or time engaging in self-stimulatory behaviors in order to help him regulate (id. at p. 2). Likewise, the student's occupational therapist reported that the student was independent in his ability to choose areas within the gym to sit and calm himself (Dist. Ex. 5 at p. 4). The occupational therapist also described self-regulation and interest in the world as one of the student's strengths, and further noted that the student was able to be calm, recover from crying with comforting, be alert, look at one when spoken to, and "brighten up," when provided with visual, auditory and/or tactile experiences (id. at p. 1). She advised the April 2010 CSE that the student was able to tell adults when he needed sensory integration, such as rollerblading or bike riding in order to "self calm" (Dist. Ex. 7 at p. 1). In addition, according to the April 15, 2010 classroom observation report, when the student exhibited various repetitive behaviors, he responded to verbal cues to stop the behaviors, and he was particularly responsive and calm after one of his "teachers" placed her hands over his to guide him (Dist. Ex. 8 at p. 1). The observation report also indicated that although the student appeared not to be listening during a lesson, he could answer questions when called on; however, at times, the student needed to be asked twice (id. at pp. 1-2). Similarly, the student's teacher informed the CSE that the student benefited from positive reinforcement and social praise when he was doing the right thing, and also from staff not responding to his loud vocalizations (Dist Ex. 7 at p. 1). Furthermore, according to the student's teacher, although the student required consistent prompting and repetition to maintain focus during group activities, he had progressed in his ability to maintain attention and focus for individual academic sessions (Dist. Ex. 4 at p. 1).

Based on the above, given that the evidence contained in the hearing record suggests that the student did not require a high level of support, the hearing record demonstrates that in light of

the information before the CSE at the time it developed the April 2010 IEP, the district's recommendation for placement in a 6:1+1 special class combined with related services of speech-language therapy and OT as well as the provision of a BIP, was appropriate to address the student's needs.

5. Parent Counseling and Training

Next, I turn to the parents' assertion that the omission of parent counseling and training in the April 2010 IEP contributed to a denial of a FAPE to the student. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F., at *10; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. March 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011]; adopted at 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).[10]

In this case, the district's regular education teacher testified that while the provision of parent counseling and training was not included in the student's IEP, parent workshops were available at the assigned school (see Tr. pp. 23, 26, 76-77, 86-87). According to the regular education teacher, such workshops were provided to parents, based on their needs (Tr. pp. 88-89). Similarly, the unit coordinator testified that parent association meetings took place on a monthly basis, and covered a variety of topics, that were "important" to parents, such as transition and planning for their children's future (see Tr. p. 103; Tr. p. 106).

Under the circumstances presented herein, I find that although the district should have complied with State regulations by identifying parent counseling and training on the April 2010 IEP, given that parent counseling and training was available at the assigned school, the district's failure to incorporate it into the challenged IEP was violation of IDEA procedure that did not result in any substantive harm, nor did it, in this case, rise to the level of a denial of a FAPE to the student (see C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

[10] To the extent that P.K. or R.K. may be read to hold that the failure to adhere to the procedure of listing parent counseling and training on an IEP constitutes a per se, automatic denial of a FAPE, I note that Second Circuit authority does not appear to support application of such a broad rule (see A.C., 553 F.3d. at 172, citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y., Oct. 30, 2008]).

In view of the forgoing evidence I find that the student IEP was designed to provide the student with sufficient support and was reasonably calculated to provide him with educational benefits.

D. Assigned School

In addition to claims regarding the student's IEP, the parents also submit that the district failed to offer proof regarding the amount of individualized instruction that other students at the assigned school received, or proof with respect to the level of individualized instruction the student in the instant case would have received. Once a CSE formulates an IEP, a school district is required provide the special education services in conformity with the student's written IEP (20 U.S.C. § 1401[9][D]). The district correctly argues that this issue is in part speculative insofar as the parents did not accept the recommendations of the CSE or the programs offered by the district and instead enrolled the student in Imagine, a private school of their choosing. Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student actually attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; 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])). Additionally, the parents' concerns are not adequately supported by the evidence in the hearing record.

Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless does not support the conclusion that placement of the student in a 6:1+1 special class at the assigned school would have deprived him of a FAPE. Regarding the level of individualized instruction provided to students, the unit coordinator at the assigned school indicated that 6:1+1 classes in the assigned school had an official teacher and an official paraprofessional and that generally speaking, there was more than one teacher and one paraprofessional in the class, as some students had individual paraprofessionals (Tr. pp. 113-14). According to the unit coordinator, there were a lot of close 1:1 and 1:2 groupings in the 6:1+1 classes (Tr. p. 114). She further indicated that in order to differentiate and teach to the different reading and math levels, students were assessed at the beginning of the school year and grouped accordingly, and that the assigned school had a number of classes within each level so that students can be grouped according to their needs (Tr. pp. 106, 114). Therefore, although the hearing record does not specifically indicate the amount of individualized instruction that the student might have received in the offered program, it does reflect that the assigned school offered individualized support and attention in the 6:1+1 special class. Under the circumstances, the hearing record does not suggest that the assigned school was not capable of implementing the student's IEP.

VII. Conclusion

Having determined that the IHO properly found that the district offered the student a FAPE for the 2010-11 school year, it is not necessary for me to consider the appropriateness of Imagine,

or whether the equities support the parents' claim for tuition reimbursement (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).[11] I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
May 17, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

[11] Even if I were to review whether equitable considerations warrant relief in this matter, the district's allegations regarding the student's father's position at Imagine is not persuasive.