The University of the State of New York

The State Education Department
State Review Officer
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No. 12-136

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 New York City Department of Education

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 a decision of an impartial hearing officer (IHO) which determined that the educational services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2011-12 school year was appropriate and that the district implemented those services. 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, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record shows that student underwent chemotherapy to treat an optic chiasm glioma with progressive optic nerve atrophy, which resulted in impaired peripheral vision in both eyes, deficits in complex attention and executive functioning skills, as well as significant difficulties with processing speed and scattered skills in working memory (Tr. pp. 174-79; Parent Ex. 5 at pp. 1-8). The hearing record also shows that the student's verbal abilities were "exceedingly well developed" and his perceptual reasoning skills were in the average range (Parent Ex. 5 at pp. 2-4, 7; see Tr. p. 174). With regard to the student's educational history, the hearing record shows that the student attended a district public school for pre-kindergarten through first grade (Tr. p. 174; Parent Ex. 5 at p. 2). Subsequently, pursuant to CSE recommendation, the

student attended a State-approved nonpublic school for his second through eighth grade years (Tr. pp. 12, 175, 216, 218; Parent Ex. 5 at p. 2).

The student entered a district public high school for the 2010-11 school year (ninth grade) (Tr. pp. 12, 397; Dist. Exs. C at p. 1; D). The hearing record reflects that the student's IEP that was in place at the beginning of the 2010-11 school year provided that the student would receive special education teacher support services (SETSS) (Tr. p. 438).[1] The hearing record also reflects the district did not provide the student with any SETSS until February 1, 2011 (Tr. pp. 333, 438, 467-71). As a consequence, in December 2010 and January 2011, the parent procured services for the student from a private tutor (Tr. pp. 206-207, 333-38; see Parent Ex. 7 at pp. 1-4).

In February 2011, the CSE convened to conduct the student's annual review and to develop an IEP to be implemented for approximately one year, beginning February 11, 2011 (see generally Parent Ex. 27). Finding the student eligible for special education as a student with a learning disability, the February 2011 CSE recommended five 50-minute session per week of 1:1 direct SETSS in a separate location and two 50-minute sessions per week of indirect SETSS (id. at pp. 1, 6). In addition, the February 2011 IEP included various strategies to address the student's management needs, testing accommodations, a recommendation for assistive technology in the form of a laptop, seven annual goals, and post-secondary goals (id. at pp. 2-7).

The student continued at the district public school for the 2011-12 school year (tenth grade) (see Dist. Exs. C at p. 1; E at pp. 1-4; Parent Exs. 4; 22 at pp. 6-8).

At the request of the parent, the CSE reconvened on September 22, 2011 (Parent Ex. 17 at p. 3; see Dist. Ex. C at pp. 1, 10). The September 2011 CSE changed the student's eligibility classification to a student with a traumatic brain injury (Dist. Ex. C at pp. 1, 10; see Parent Ex. 17 at p. 3).[2] The September 2011 CSE continued the recommendation that the student attend a general education class placement with the same SETSS mandate as set forth in the February 2011 IEP (Dist. Ex. C at pp. 5, 6; see Parent Ex. 27 at p. 6).[3] In addition, the September 2011 IEP included various strategies to address the student's management needs, testing accommodations, a recommendation for assistive technology in the form of a laptop, six annual goals, and a transition plan with post-secondary goals and a coordinated set of transition activities (Dist. Ex. C at pp. 2-8).

A. Due Process Complaint Notice

In a due process complaint notice dated January 17, 2012, the parent requested mediation and an impartial hearing (Dist. Ex. A at p. 1). The parent alleged that, during the 2010-11 school year, the student did not receive SETSS until February 2011 (id. at p. 4). The parent also alleged

[1] The student's IEP for the 2010-11 school year is not a part of the hearing record.

[2] The student's eligibility for special education and related services as a student with a traumatic brain injury is not in dispute in this proceeding (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

[3] Two of the pages in the September 2011 IEP appear in the exhibit out of order, in that the fifth page of the September 2011 IEP appears as the sixth page of the exhibit and the sixth page of that IEP is the fifth page of the exhibit (see Dist. Ex. C at pp. 5-6).

that the student did not receive his "full mandate" of five periods per week of direct SETSS during the 2011-12 school year because the student's SETSS teacher would leave sessions "for extended periods of time" or "handled issues that ha[d] arisen for other students" or "administered class tests" during the student's SETSS sessions (id.). The parent contended that the student's individual teachers had also not consistently provided him with the "accommodations" recommended in the student's IEP, "likely due to the fact that [the accommodations were] vague and generalized in the IEP itself" and that this had resulted in grades "well below expectations in several subject areas" (id.). In addition, the parent contended that the student's IEP did not include a sufficient recommendation for assistive technology and that the district "refused" the parent's request to amend the IEP to reflect the student's needs in this respect (id.).

As relief, the parent requested reimbursement for the costs related to the student's private tutor for the 2010-11 and 2011-12 school years (Dist. Ex. A at p. 4). Additionally, the parent requested that the student's five hours of direct SETSS be broken down into (1) two hours with the student's current SETSS provider to address academic content and (2) the other three hours with a teacher with specialized training in remediating executive function/organization deficits to address the student's needs in those areas (id.). The parent also requested that the district provide an additional hour of indirect SETSS to allow the specialized teacher to communicate with the student's other teachers (id.). The parent also requested that the "IEP . . . provide more detailed guidance on implementing the accommodations" (id.). Finally, the parent requested that "[s]pecific assistive technology recommendations and goals" be included in the student's IEP and that "all items" be provided to the student "consistently and in a timely manner" (id.).[4]

B. Impartial Hearing Officer Decision

On March 5, 2012, an impartial hearing convened and concluded on May 9, 2012, after four days of proceedings (see Tr. pp. 1-550). In a decision dated May 22, 2012, the IHO ordered the district to reimburse the parent for the cost of the student's tutoring services delivered prior to the time that the district began implementing the student's SETTS mandate during the 2010-11 school year (IHO Decision at pp. 44, 49). With respect to the 2011-12 school year, the IHO denied the parent's request for reimbursement for the cost of the private services as a remedy for the district's alleged failure to ensure the student's receipt of a "full mandate of SETSS" (id. at pp. 46, 50). The IHO found that, based on a view of "the overall picture," as opposed to "isolated occurrences," the hearing record did not support the parent's assertions that the student's SETSS teacher left for extended periods of time or attended to other students' needs during the student's SETSS session such that the student was deprived of a FAPE (id. at pp. 45-46). Turning to a particular incident addressed at the impartial hearing, the IHO found that the SETSS teacher's failure to attend a scheduled session, at which a quiz would be administered to the student, also did not result in a denial of a FAPE (id. at p. 45). The IHO also indicated that the hearing record did not show that the student's SETSS teacher failed to provide the student accommodations included on his IEP (id.). To the extent that the other teachers did not provide the accommodations, the IHO noted that such failure could not be deemed "the responsibility" of the SETSS teacher (id.).

[4] In a mediation agreement dated February 10, 2012, the parties resolved the parent's claim relating to assistive technology (Parent Ex. 24 at p. 2).

As to the parent's request that a portion of the student's SETSS be provided by a teacher with specialized training to address the student's executive functioning and organizational needs, the IHO found that the annual goals in the September 2011 IEP addressed the student's executive functioning "skills" and that the student's SETSS teacher was working with the student on his executive functioning needs and organizational and planning skills (IHO Decision at pp. 46-47). Addressing a question that arose during the impartial hearing, the IHO also found that the student's grades and/or struggles in mathematics and science could not be attributed to any inexperience or failure on the part of the SETSS teacher (id. at p. 47). Noting that SETSS is not intended to be a form of "tutoring" to address a student's struggles in a particular subject matter, the IHO found that the student did develop skills that enabled him to receive educational benefit as reflected by his grades (id. at pp. 47, 49). Finally, the IHO rejected the parent's allegation that the student's IEP should provide additional guidance regarding implementation of the recommended accommodations, finding that the September 2011 IEP was reasonably calculated to provide the student with meaningful benefit (id. at pp. 49, 50).[5]

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2011-12 school year. In particular, the parent requests that she be reimbursed for the cost of the student's private tutor for the 2011-12 school year, that the district be compelled to provide a teacher with specialized training to remediate the student's areas of deficit, and that the district also be compelled to provide more detailed guidance on the implementation of the September 2011 IEP's mandated accommodations.

The parent asserts that the IHO improperly stated that the parent had the burden of persuasion to demonstrate that the district failed to offer the student a FAPE. The parent contends that, as a consequence, the IHO's decision was not based on a correct application of the law. The parent further asserts that statements in the IHO's decision evidence bias against the parent and the student. The parent also alleges that the IHO did not properly conduct the impartial hearing in that she inconsistently determined which documents to admit or to exclude from evidence. In particular, the parent contends that the IHO should have accepted into evidence the student's IEP resulting from a March 9, 2012 CSE meeting. Additionally, the parent asserts that the IHO arbitrarily requested that the parent submit an itemized list of information relative to documents she offered into evidence and that the IHO did not make the same request of the district.

With respect to the merits of her claims, the parent contends that the district did not meet its burden of proving that it provided the student with a FAPE. The parent contends that the IHO misrepresented the claims in the parent's January 2012 due process complaint notice. Specifically, the parent asserts that the IHO erroneously suggested that the parent's request for reimbursement for the costs of private services during the 2011-12 school year arose from her allegation that the student's SETSS teacher did provide the student with the accommodations indicated on the September 2011 IEP; whereas, the parent argues that the due process complaint notice alleged that the student's regular education teachers failed to implement the accommodations. The parent also

[5] Finally, as a consequence of the February 2012 mediation agreement, the IHO concluded that the part of the parent's January 2012 due process complaint notice relating to assistive technology, including that the student be provided with electronic texts, was moot and would not be addressed (IHO Decision at pp. 49, 50).

asserts that the IHO did not give proper weight to the accommodation implementation chart which had been prepared by the student's prior SETSS teacher.

With respect to implementation of the student's direct SETSS mandate during the 2011-12 school year, the parent asserts that the IHO minimized testimony and evidence regarding the SETSS teacher not being present in her classroom and did not address the parent's allegations that the student's SETSS teacher attended to other students and administered tests to the student during the student's SETSS instructional time. The parent also disputes the IHO's conclusion that that SETSS teacher's actions constituted isolated incidents and contends that the IHO relied upon the testimony of the student's SETSS teacher without the support of other evidence. Additionally, the parent asserts: that the student did not receive SETSS from the first day of school; that the student's direct SETSS instructional time was regularly used as a time and place for the student to meet with his other teachers; that the SETSS teacher was encouraged to provide SETSS outside of her classroom; that the amount of time the SETTS teacher testified that she allocated for the student, which the IHO accepted, was not supported by the evidence; that the SETTS teacher did not work on all of the student's annual goals; and the district offered no evidence to indicate that the SETSS teacher implemented the indirect SETSS mandate. The parent also asserts that the student's grades in relevant classes significantly declined and that, therefore, the IHO erred in finding "a causal connection" between the student's grades and his receipt of a FAPE.

Next, the parent also contends that the IHO did not properly weigh the testimony of the student's private psychologist with respect to the student's deficits, needs, and appropriate interventions and did not properly address what the parent contends is the SETSS teacher's lack of experience and specialized training. The parent alleges that the hearing record establishes that the student's SETTS teacher had limited experience and understanding of the student's needs. Additionally, the parent alleges that the testimony of the student's private psychologist demonstrates that the assistance provided by the student's SETSS teacher was insufficiently individualized and specialized and inadequate to address the student's executive functioning and organizational needs.

Finally, the parent asserts that the IHO provided no description of how she had arrived at the conclusion that the September 2011 IEP was reasonably calculated to provide meaningful benefit to the student. Further, the parent asserts that the district failed to provide the accommodations in the September 2011 IEP to the student, even to the "within reason" implementation standard articulated by the IHO. The parent asserts that the student was provided with inadequate texts to accommodate his visual deficits and that the student's mathematics teacher did not provide weekly previews of math vocabularies, concepts, and skills. The parent further asserts that the district's response to her subpoena did not provide any evidence that the student received a number of accommodations specified on the September 2011 IEP. The parent also contends that the district's response to her subpoena included only one progress report despite the September 2011 IEP's mandated schedule of measured progress.

In an answer, the district responds to the parent's petition by admitting or denying the allegations and asserting that the IHO correctly determined that the district offered the student a

FAPE for the 2011-12 school year.[6] Initially, the district asserts that, when viewed in its entirety, the IHO's decision shows that she applied the correct burden of proof. The district contends that, in any event, it met its burden of persuasion with respect to the issues raised in the parent's January 2012 due process complaint notice. With respect to the conduct of the impartial hearing, the district asserts that the IHO correctly used her discretion to exclude the IEP resulting from the March 9, 2012 CSE meeting and objects to the parent's attachment of the IEP to her petition as additional evidence.[7] The district also asserts that the IHO's request for information relating to the parent's evidence was reasonable. Next, the district contends that the hearing record does not demonstrate any bias on the part of the IHO against the parent and asserts that the IHO's findings are based on the hearing record. As to the merits, the district asserts that the IHO correctly determined that the student's September 2011 IEP was reasonably calculated to result in educational benefit and that the district implemented the SETSS mandate and accommodations included in the IEP. The district also asserts that the IHO correctly declined to award the parent relief in the form of a modified SETSS mandate with a specialized teacher. Further, the district asserts that the private services for which the parent seeks reimbursement were not appropriate because the provider was not a certified special education teacher and the services constituted tutoring, rather than the SETSS recommended in 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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119,

[6] The district has not cross-appealed the IHO's decision to the extent it awarded the parent reimbursement for private services obtained relative to the district's failure to implement the student's SETSS mandate during the beginning of the 2010-11 school year (see IHO Decision at pp. 44, 49). Accordingly, this determination has become final and binding on the parties (34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[7] Except as otherwise indicated herein, as the additional documentary evidence submitted with the parent's petition could have been offered (or was offered but not admitted) at the time of the impartial hearing and the evidence is not necessary in order to render a decision, it will not be considered (see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Allegations of IHO Bias

Turning first to the parent's contention that the IHO evidenced bias against the parent, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004). An IHO must also render a decision based on the hearing record (see, e.g., Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in

favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (see, e.g., Application of a Student with a Disability, Appeal No. 12-064; Application of a Child with a Disability, Appeal No. 07-090).

After a careful review of the hearing record, I conclude that the IHO was unbiased and observed the procedures of due process throughout this proceeding. 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 (see Application of a Student with a Disability, 13-083; Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013). Moreover, review of the hearing record shows that the IHO granted the parent's request that the district be limited to one representative at the impartial hearing, made sure that the student had the opportunity to testify at the impartial hearing and attend the proceedings, responded to the parent's questions relating to the procedures used at the impartial hearing and allowed the parent the opportunity to call whoever she wished as a witness, and ensured that the parent had an opportunity to object to the district's evidence prior to considering whether it should be admitted (see Tr. pp. 8, 136-37, 149-53, 156-59, 201-02, 237-50, 303, 430, 453, 476, 483, 548-49). The hearing record also reflects that the IHO ruled against the district either in whole or in part with respect to certain objections (see Tr. pp. 42, 298-301, 504-506). Thus, upon careful consideration of the hearing record, there is no evidence that the IHO displayed bias against the parent.

2. Evidentiary Questions

The parent asserts that the IHO inconsistently determined which documents to admit or to exclude from evidence, and in particular, that the IHO should have accepted into evidence the IEP resulting from the March 2012 CSE meeting. The parent asserts in her petition that the March 2012 IEP should have been admitted into evidence as within the scope of the January 2012 due process complaint notice because it supported her contention that the student needed a more specialized SETSS teacher (see Dist. Ex. A at pp. 3, 4).

While impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 C.F.R. 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]), the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

Here, the IHO properly determined that the May 2012 IEP was not relevant to the issues at the impartial hearing, since it postdated the parent's due process complaint notice. Therefore, any claims relating to the May 2012 IEP would be outside the scope of the impartial hearing in this case (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]). Further, to the extent the parent argues that the May 2012 IEP would be relevant to her claims relating to the September 2011, such evidence constitutes improper retrospective evidence (see, e.g., R.E., 694 F.3d at 185-88).

As to the parent's assertion that the IHO arbitrarily requested that she submit an itemized list of information relative to her exhibits, the IHO's e-mail request stated that "after reviewing the evidence submitted at the previous hearings," she found that "some of the submitted evidence [was] not specific as to the purpose/relevance" (Pet. Appx. 2). In light of the purpose of the IHO's instructions—to facilitate the IHO's understanding of the parent's evidence—the IHO did not act arbitrarily and it was not an abuse of her discretion to request that the parent provide, in writing, the requested information. Regarding the utility of such a list, the parent herself characterized the process of compiling the list as "very helpful" (id.). Additionally, review of the parent's exhibits shows that the explanatory information provided by the parent does, in fact, facilitate an understanding of the parent's evidence, particularly as to the numerous emails included in the hearing record (see generally Parent Ex. 32). With respect to the parent's assertion that the IHO did not request the same proffer from the district, a review of the district's exhibits shows that their relevance was more evident from the face of the documents (see generally Dist. Exs. A-G). More importantly, all of the evidence, both the parent's and the district's, has been considered.

3. Burden of Proof

The parent argues that the IHO misallocated the burden of proof to the parent regarding the appropriateness of the district's recommended program. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G., 2010 WL 3398256, at *7). Here, although the IHO incorrectly stated that the parent carried the burden of persuasion to demonstrate that the district failed to offer the student a FAPE, a review of the IHO's decision in its entirety and of the complete impartial hearing transcript, taken together, demonstrates that the IHO properly placed the burden on the district to prove that it offered the student a FAPE (see IHO Decision at pp. 45-46, 49). Furthermore, even if the IHO had allocated the burden of proof to the parent, the harm would be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; A.D. v. New York City Dept. of Educ., 2013 WL 1155570 at *5 [S.D.N.Y. Mar. 19, 2013]). However, assuming for the sake of argument that the IHO misapplied the burden of proof, an independent examination of the hearing record reveals that the evidence favoring the district is sufficient to support the IHO's ultimate determination that the district offered the student a FAPE (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 336 [E.D.N.Y. June 13, 2012], aff'd 725 F.3d 131 [2d Cir. 2013]). Thus while clearly a mistep on the part of the IHO, it is not the kind of error that warrants reversal of the outcome.

B. IEP Implementation

Turning to the merits of the parent's implementation claims, once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a

FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297, at *2 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Houston Indep. School District v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]).

1. Direct SETSS

As indicated above, both the February 2011 and September 2011 IEPs in effect during the 2011-12 school year provided that the student receive 1:1 direct SETSS five times per week (see Dist. Ex. C at pp. 5-6; Parent Ex. 27 at p. 6). The hearing record shows that the student received the disputed sessions of direct SETSS (Tr. pp. 67, 74; see Dist. Ex. C at pp. 5-6).[8] The student's SETSS teacher testified that during every one of those periods she worked with the student on his IEP annual goals and on his content areas, including mathematics and chemistry—two courses with which, as the year progressed, the student struggled (Tr. pp. 68, 83-84, 86-87, 90, 93-94, 108, 114; see Dist. Exs. C at pp. 4-6; E at pp. 2, 4; Parent Exs. 4; 22 at pp. 7-8).

With respect to the parent's assertion that during the student's SETSS sessions, the SETSS teacher left for extended periods of time, the student testified that this occurred "a considerable number" of times and that, on such occasions, the teacher left for "maybe five to ten" minutes (Tr. pp. 374, 417). However, the student also testified that this happened "probably once a week" and that it was "not regular" (Tr. p. 417). Regarding the parent's allegation that "on many occasions" the student's SETSS teacher administered classroom tests during the student's SETSS session, the evidence in the hearing record shows that this only occurred during three of the student's SETSS sessions and during part of a fourth (see Tr. p. 375; Parent Ex. 31 at pp. 2, 3, 5, 6). Further, while the student testified that this took place, the SETSS teacher indicated that this was no longer the case and that it had taken place only "occasionally" during the first semester of the 2011-12 school year (Tr. pp. 125-26, 375). Next, the student clarified at the impartial hearing the claim relating to the teacher's attention to other students during the SETSS sessions, indicating that, as the student received his SETSS in an office, the teacher would answer the telephone or converse with other students visiting the office "about their needs" (Tr. p. 175). While not specifically articulated in the due process complaint notice, as to the claim in the parent's petition that the student did not receive direct SETSS services during the first week of school, the hearing record indicates that this reflected the student's participation in a school-wide "thinking and writing" educational program (Parent Ex. 18 at p. 1).

Next, while also not clearly articulated in the due process complaint notice, the hearing record supports the parent's assertion in the petition that the student's SETSS sessions were also used to hold regular meetings with the student's other teachers; however, one of the transition activities set forth on the September 2011 IEP indicated that the SETSS teacher would work with the student "to meet with teachers" (Tr. pp. 69, 104-105, 368; Dist. Ex. C at p. 8; Parent Exs. 31 at pp. 2-11; 35 at p. 1). Further, the hearing record indicates that such meetings did not take place every day and, when they did occur, they lasted 10 or 15 minutes, with the result that the majority of the SETSS session was available for other activities (Tr. p. 105; see Tr. pp. 68, 83-87, 107-108, 114-15; Parent Ex. 31). The teacher meetings focused on areas of the student's needs, including

[8] Although the parent asserts on appeal that the district did not fully implement the indirect SETSS, the parent did not raise this claim in her due process complaint notice.

his organization and proofreading, provided feedback, and facilitated the teacher's ability to schedule things for the student (Tr. pp. 68, 109, 368; Dist. Ex. C at pp. 1, 2, 4; Parent Ex. 31 at pp. 2, 3, 5, 8). Further, the hearing record indicates that such meetings addressed the student's needs and were considered important by relevant content area teachers (see Tr. pp. 68-69, 104-105, 109; Parent Exs. 20 at p. 4; 35 at p. 1; see also Dist. Ex. C at p. 1).

Finally, there is some support in the hearing record that the student's SETSS teacher did not address all of the annual goals included in the student's IEP for at least a portion of the school year and, in particular, did not target the student's annual goals designed to improve the student's writing strategies or note taking skills (Tr. pp. 67-68, 93-94, 408-12; Dist. Ex. C at pp. 4, 6; Parent Ex. 31 at pp. 1-5; but see Tr. pp. 68, 69, 83, 86-87, 93-94, 104-105, 109, Parent Ex. 31 at pp. 2-11).[9] However, review of the parent's due process complaint notice reveals that the parent did not assert an implementation claim on this basis (see generally Parent Ex. A). Based on the foregoing, the hearing record does not reflect that the district deviated from substantial or significant provisions of the student's September 2011 IEP in a material way.

2. SETSS Teacher / Executive Functioning & Organizational Needs

As to the parent's request that a portion of the student's SETSS be provided by a teacher with specialized training to address the student's executive functioning and organizational needs, the IHO appears to have interpreted this request, at least in part, as an allegation that the September 2011 IEP insufficiently addressed these needs and/or the SETSS teacher failed to implement these needs (IHO Decision at pp. 46-47). The parent elaborates in her petition that the SETSS teacher lacked experience and specialized training and further asserts that the testimony of the student's private psychologist demonstrated that the assistance provided by the student's SETSS teacher was inadequate to address the student's executive functioning and organizational needs. Out of an abundance of caution, both interpretations of this issue are addressed below.

First, as to the student's organizational and executive functioning needs, the hearing record supports the IHO's conclusion that the September 2011 IEP appropriately targeted these needs. For example, the student's annual goals relating to the development of an organizational system to keep track of assignments and maintain course material and notes targeted the student's executive functioning/organizational needs (see Dist. Ex. C at pp. 1, 4). Additionally, the IEP included annual goals addressing the student's preparation and organization of written assignments and identification of key points from class notes (see Dist. Ex. C at pp. 4, 6; Parent Ex. 5 at pp. 7, 8). Further, while the student's private psychologist indicated that some of the annual goals in the September 2011 IEP were not specific enough, he agreed that they addressed aspects of executive functioning (Tr. pp. 189-90, 196-99; see Dist. Ex. C at pp. 1, 4).

Regarding the experience and training of the student's SETSS teacher, the parent asserts that she taught for not longer than two years and had not previously worked with a student with

[9] The student also testified he did not work on his self-advocacy goal with the SETSS teacher; however, the IEP did not specify that this annual goal, which provided that the student would approach his teachers and request assistance and accommodations, would be addressed by the SETSS provider (Tr. p. 409; see Dist. Ex. C at p. 6). Furthermore, the SETSS teacher's session notes indicate that she checked in with the student regarding the student's meetings with his regular education teachers (see Parent Exs. 25, 31).

traumatic brain injury. The student's SETSS teacher had a bachelor's degree in psychological and brain science and a master's degree in special education (Tr. p. 66). The hearing record indicates that the student's SETSS teacher was a certified teacher (see Tr. pp. 19, 528-29). Further, at the time of her testimony, she was in her third year of teaching students who received special education (Tr. pp. 66-67). The SETSS teacher reported to the assistant principal for pupil personnel services (Tr. pp. 75, 131). She testified that, among other staff, she was able "to go to" the school's special education instructional coach, a specialist who had more than 20 years of experience in teaching, supervision, and special assignments in the area of special education, with questions (Tr. pp. 16-19, 75). In addition, as provided for in the student's September 2011 IEP, the student's SETSS teacher attended a professional training on traumatic brain injury given by the student's private psychologist for school staff (Tr. pp. 120, 123; see Dist. Ex. C at p. 5). In light of this, the evidence in the hearing record does not support the parent's contention regarding improper training and experience of the student's SETSS teacher (see Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11 [W.D.N.Y. Sept. 26, 2012], aff'd, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]).

3. Accommodations

Next, the parent continues to assert that the "[i]ndividual teachers" failed to consistently implement the "accommodations" on the student's September 2011 IEP, "likely due to the fact that they [were] vague and generalized in the IEP itself" (Parent Ex. A at p. 4). To address the student's management needs, the September 2011 IEP provided that the student should receive the following classroom accommodations: (1) "a copy of either a peer's class notes or a teacher's lecture outline;" (2) copies of "examples/work to be completed and discussed in class;" (3) "guides/scaffolds for assignments which will include (in writing) expectations in terms of length, detail, evaluation, organization and deadlines;" (4) feedback from teachers about work completion/submission;" (5) an "opportunity to proofread his written work orally with a teacher;" (6) "weekly preview of math vocabulary, concepts, and skills;" (7) preferential seating; and (8) "enlarged print (12 point or larger)" (Parent Ex. C at p. 2). The September 2011 IEP also indicated that the student required assistive technology in the form of a laptop computer (id. at p. 5). For testing accommodations, the September 2011 IEP recommended the following: extended time in all classroom and State exams; use of a calculator in mathematics and science exams, except where specifically prohibited on State exams; use of a scribe in mathematics exams in accordance with State guidelines; use of the student's laptop to draft essay/extended responses; use of the student's laptop or tablet to record answers in all classroom and State exams; and administration of exams over multiple days for Regents and final exams longer than two or more hours (id. at p. 7).

Initially, review of the strategies, supports, and accommodations listed above do not appear vague or generalized as the parent alleged. As a consequence, there is no reason to consider modifying the student's IEP to include any additional elaboration regarding implementation, such as that proposed in the February 2012 accommodation implementation plan endorsed by the parent (see Parent Ex. 2 at pp. 2-4).[10] Absent evidence that the student required the particular

[10] Although not relevant to the dispute in this case, at a CSE meeting, the parent is free to propose specific wording regarding the accommodations on the student's IEP, and if the district does not agree with the parents' suggestions, the district should provide the parent with prior written notice in conformity with State regulations on the form prescribed by the Commissioner of Education that describes the reason for the refusal and the evaluative information upon which the accommodations decision(s) is based.

implementation strategies proposed in the plan in order to receive educational benefit, this level of detail addresses the sort of approach that is usually a matter left to the discretion of the teacher (Rowley, 458 U.S. at 208; M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; see K.L. v New York City Dep't of Educ., 2012 WL 4017822, at *12 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013]).[11]

As to implementation of the supports and strategies set forth in the September 2011 IEP, as written, the student's SETSS teacher testified that "the teachers always try to adhere to the accommodations, yes" (Tr. p. 97). She also testified that "it was the very rare occasion that a teacher" did not do so (Tr. p. 98). Further, she testified that she consulted with the teachers to make sure that the student's work was appropriately modified or scaffolded (Tr. p. 96). She also discussed with the teachers the time it would take the student to complete assignments, the possibility of providing him with additional time, as well as the manner in which to break up assignments (id.).

In contrast, the student provided testimony relative to general education teachers' inconsistent implementation of the accommodations in the September 2011 IEP (see Tr. pp. 365-74). The student testified that his mathematics teacher: did not provide him with legible class notes; provided him with examples of work only some of the time, and provided him with only limited information regarding assignments (Tr. pp. 366-68; see Parent Ex. 26; see also Dist. Ex. C at p. 2). Regarding his chemistry teacher, the student testified that the teacher provided him with an opportunity to proofread his work only "sparingly" (Tr. p. 370; see also Dist. Ex. C at p. 2). The student also testified that his chemistry class "absolutely" included mathematics and that the chemistry teacher did not provide him with a weekly preview of the mathematics vocabulary, concepts, and skills (Tr. pp. 370-71; see also Dist. Ex. C at p. 2). The student also testified that his literature teacher did not provide him with class notes and that his history teacher did not provide him with copies of examples of work to be completed or discussed in class (Tr. pp. 371, 373; see also Dist. Ex. C at p. 2). With respect to the extent to which his chemistry, literature, and history teachers provided the student with particularized information relative to his assignments (guides/scaffolds), the student testified that he received the same information as the other students in the class and that he was not provided as much detailed information as he believed he should have been (Tr. pp. 370-73; 399-402; see also Dist. Ex. C at p. 2).[12] The inconsistency in implementation described by the student does not appear to rise to the level of a material deviation

[11] The student's SETSS teacher testified that some of the suggestions in the accommodation implementation plan had been utilized during the 2011-12 school year (Tr. p. 101).

[12] With respect to the teachers' provision of "feedback," the hearing record shows that the student testified that the teachers failed to provide him with "weekly" feedback relative to the completion and submission of work (Tr. pp. 368, 370, 372-73); however, the IEP did not specify that such feedback be weekly (see Dist. Ex. C at p. 2). It appears that the question was posed to the student in this way in reliance on a document that misstated that the feedback should be weekly (see Tr. pp. 365-66; Parent Ex. 2 at p. 2).

from the IEP, particularly in light of the student's own testimony that when he needed help, the teachers were responsive (Tr. p. 420).[13]

Based on this evidence, I find the hearing record reflects that the student's general education teachers did not consistently provide the student with the classroom accommodations set forth in the September 2011 IEP, however, the hearing record does not support a finding that such deviations were material and rose to the level of a denial of a FAPE (A.P., 2010 WL 1049297, at *2; see Van Duyn, 502 F.3d at 821-22; Houston Indep. School District, 200 F.3d at 34).

VII. Conclusion

Based on the foregoing, the hearing record supports the IHO's finding that the district provided the student with a FAPE for the 2011-12 school year. I have considered the parties' remaining contentions and find it is unnecessary to address them in light of the determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 29, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[13] The parent also submitted documentary evidence relating to the extent to which the district had provided the student with "enlarged print [12 point or larger]," which indicated that many of the documents provided to the student were illegible in relevant part (Tr. pp. 38-39; 498-504, 510; see Parent Exs. 1; 36; see also Dist. Ex. C at p. 2). The district did not disagree that this had occurred but only relied on the fact that the February 10, 2012 mediation agreement had addressed the party's dispute regarding assistive technology and electronic texts and that, in light of the mediation agreement, the student was no longer receiving such documents (Tr. pp. 39-40, 504-505).