



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-195

**Application of the BOARD OF EDUCATION OF THE  
MANHASSET UNION FREE SCHOOL DISTRICT for review  
of a determination of a hearing officer relating to the provision  
of educational services to a student with a disability**

**Appearances:**

Frazer & Feldman, LLP, attorneys for petitioner, Jacob S. Feldman, Esq., of counsel

Moritt Hock Hamroff, LLP, attorneys for respondents, Nancy A. Hampton, Esq., of counsel

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the School for Language and Communication Development (SLCD) for the 2011-12 school year. The appeal must be sustained.

#### 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**

A review of the student's educational history reflects that the student has received a diagnosis of pervasive developmental disorder—not otherwise specified and exhibits delays in language, communication, and socialization (Tr. pp. 1215, 1406; Parent Exs. F at p. 1; G at p. 15).<sup>1</sup> For the 2009-10 and 2010-11 school years, the student's second and third grade years,<sup>2</sup> the student

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<sup>1</sup> Regarding the student's educational history, the student began receiving early intervention services at the age of two and a half and continued to receive special education services from the district thereafter (Tr. pp. 1406-07; Parent Exs. F at p. 1; T at p. 1).

<sup>2</sup> The hearing record shows that the student repeated first grade for the 2008-09 school year (Tr. p. 1430).

attended a district 12:1+2 special class and was "mainstreamed" into a second grade integrated co-teaching (ICT) classroom (Tr. pp. 672; 1534-35). Specifically, for the 2009-10 school year, the student attended the second grade ICT class for some specials, science lab, lunch and recess, as well as for special events, birthday parties, and class presentations (Tr. pp. 672-73). For at least a portion of the 2010-11 school year, he attended the second grade ICT class for English language arts (ELA), social studies, science and specials, as well as lunch and recess (Tr. pp. 156, 454, 679, 1102, 1110, 1637-38, 1661).<sup>3</sup> Additionally, during the 2010-11 school year, the student received speech-language therapy, occupational therapy (OT), counseling, and extended school day services in the children at play plus (CAPP) program (Dist. Ex. 3 at p. 2).<sup>4</sup>

The CSE convened on May 27, 2011 and June 16, 2011, to conduct the student's annual review (Dist. Exs. 1 at p. 2; 8 at p. 1).<sup>5</sup> In attendance at both CSE meetings were the executive director of special education for the district (who participated as the district representative), the district coordinator of preschool and elementary special education, a district school psychologist, the student's special education teacher from the 12:1+2 special class; the student's special education teacher from the ICT class, the student's regular education teacher from the ICT class, a district social worker, a district speech-language therapist, the student's occupational therapist, a behavior intervention specialist, a private speech-language therapist, a private psychologist, the student's mother, and attorneys for both the district and the parents (Dist. Exs. 1 at p. 1; 8 at p. 1). The coordinator of the CAPP program, who is also a special education teacher, was in attendance for the May 2011 CSE meeting (Tr. p. 154; Dist. Ex. 8 at p. 1). Both of the meetings were recorded and transcribed (Parent Exs. AA at pp. 1-73; BB at pp. 1-58; see Tr. pp. 272-74).

The CSE found the student eligible for special education programs and related services as a student with autism and recommended a 12-month special education program (Dist Ex. 2 at pp. 1, 18).<sup>6</sup> The CSE recommended that the student's program from July 4, 2011 through August 12, 2011 consist of a 12:1+1 special class for three hours per day, five times per week, and the related services of individual OT and individual and group speech-language therapy (id. at p. 19). For the student's program from September 2011 through June 2012, the CSE recommended that the student attend a fourth grade general education classroom and a 12:1 special class for math and English language arts (ELA) instruction (Tr. pp. 213-16; Dist. Ex. 2 at p. 15). The particular program recommended for the student was described as a "supported class," in which special

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<sup>3</sup> I note that the student's April 2010 IEP for the 2010-11 school year does not reference the student's participation in the ICT class (see Dist. Ex. 3). However, there is indication on the IEP that a classroom assistant would assist the student with transition and attending when he attended the "general education class" and when he was participating in science, art, and library (id. at p. 4).

<sup>4</sup> According to the executive director of special education, CAPP is an after school, structured program geared toward working on academics and socialization (Tr. pp. 73-74).

<sup>5</sup> The CSE reconvened on June 16, 2011 to continue the May 27, 2011 meeting, which had lasted in excess of three and a half hours (Tr. p. 170; Dist. Ex. 1 at p. 2).

<sup>6</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

education students attend a general education classroom, supported by a classroom assistant,<sup>7</sup> and receive their primary instruction in a special class (Tr. p. 209; Parent Ex. BB at pp. 317, 319-20; see also Tr. pp. 385-86, 389; Parent Ex. BB at pp. 322, 328, 333). The CSE also recommended direct and indirect consultant teacher services and related services consisting of individual and group behavior intervention services, both at the student's home and as an extended school day, group counseling, individual and group OT, and individual and group speech-language therapy (Dist. Ex. 2 at pp. 15-16). One individual 30-minute session each of OT and speech-language therapy was recommended to take place in the classroom (id.). The CSE further recommended various modifications within the classroom environment, addressing the student's academic, social/emotional, and health/physical management needs, as well as specific testing accommodations (id. at pp. 10-11, 16-19). In addition, the CSE recommended parent counseling and training, as well as consultations between and among providers, teachers, staff, and parents (id. at pp. 16, 18). At both CSE meetings, the parent and the private evaluators expressed their preference that the CSE recommend more in the way of language related goals and services and/or that the student attend "a language-based program" (Parent Exs. AA at pp. 43, 178, 188; BB at pp. 202-03, 205-07, 212-13, 227-28, 344).

On June 20, 2011, the parents signed an enrollment contract with the SLCD and remitted a deposit to reserve the student's seat for the 2011-12 school year (Parent Exs. FF; GG). By e-mail dated June 29, 2011, the parents requested that the CSE reconsider its recommendations, specifically noting their preference for a language-based program and opining that a fourth grade general education classroom was not appropriate for the student (Parent Ex. E.1 at p. 2). In response, the district representative offered to reconvene the CSE, to which the parents replied that they did not request another meeting but requested only that the CSE reconsider the recommendations set forth in the June 2011 IEP (id. at p. 1).

Pursuant to the June 2011 IEP, the student attended the district's public school from July 5, 2011 through August 12, 2011, for the summer portion of the 12-month school year (Tr. pp. 515; 1523-24). On September 6, 2011, the student began attending the SLCD (Parent Ex. FF at p. 1; see Tr. p. 1500).

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

On October 20, 2011, the parents filed a due process complaint notice, alleging, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. A at p. 3).<sup>8</sup> With regard to the 2011-12 school year, the parents alleged, among other things, that: (1) the CSE failed to review private evaluations provided by the parents to develop the student's IEPs; (2) the CSE ignored input and concerns expressed by the student's teachers and parents; (3) the CSE recommended a less restrictive educational program despite the student's lack of progress during the 2010-11 school year under the more restrictive

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<sup>7</sup> I note that the "classroom assistant" is also referred to as a "teaching assistant" or "teacher assistant" throughout the hearing record (see, e.g., Tr. pp. 68, 70, 71, 74, 157, 158). For the sake of consistency, I will refer to the assistant as a "classroom assistant" in this decision.

<sup>8</sup> There is a notation on the Parent's Exhibit List, included with the hearing record, that Parent's Exhibit A was not actually entered into evidence; however, the hearing transcript indicates that it was entered into evidence (Tr. pp. 228, 658-59).

program; and (4) the CSE failed to recommend a language-based program (*id.*). The parents sought an order from an IHO directing the district to fund the student's tuition costs at the SLCD for the 2011-12 school year (*id.*).

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

On January 11, 2012, the parties proceeded to an impartial hearing, which concluded on July 10, 2012, after 15 days of proceedings (Tr. pp. 1-2506). On August 28, 2012, the IHO issued a decision finding, among other things, that the district failed to offer a FAPE for the 2011-12 school year, that the SLCD was an appropriate placement for the student for the 2011-12 school year, and that equitable considerations supported the parents' request for the costs of the student's tuition at the SLCD for the 2011-12 school year (IHO Decision at pp. 2, 43). Specifically, the IHO found that the recommendations in the June 2011 IEP did not comport with the private evaluations obtained by the parents (*id.* at p. 25). Furthermore, the IHO held that the recommendations contained in the June 2011 IEP offered less special education support than the IEP for the 2010-11 school year even though the student made little, if any, progress during the 2010-11 school year (*id.* at pp. 4-5, 16-17, 27). According to the IHO, the June 2011 IEP should have included a language-based program and a 1:1 aide for the student (*id.* at pp. 8-9, 27). The IHO held that the mainstream, general education setting recommended by the CSE was inappropriate for the student, given the student's need for particular supports and his low functioning (*id.* at p. 8). The IHO further found that the annual goals were not appropriate for the student and that the IEP failed to include provisions for team meetings and support services to address the student's difficulty with comprehension and attention (*id.* at pp. 25-27).

Relative to the student's placement at the SLCD, the IHO found that the student had made progress since he began attending there in September 2011 and that the SLCD addressed the student's needs because it provided a language-based program, used a transdisciplinary approach, and followed the New York State curriculum (IHO Decision at pp. 29-39). The IHO also found that the SLCD was the least restrictive environment available to the parents (*id.* at p. 40). Turning to the equities, IHO concluded that the parents fully cooperated with the CSE, rejecting the district's argument that the parents had no intention of accepting a public school offered by the district (*id.* at pp. 41-42). Accordingly, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at the SLCD for the 2011-12 school year (*id.* at p. 43).

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

The district appeals, arguing, among other things, that the district offered the student a FAPE for the 2011-12 school year, that the SLCD was not an appropriate placement for the student for the 2011-12 school year, and that equitable considerations favor the district and preclude granting the parents' request for relief. Initially, the district alleges that the IHO erred in deciding that the June 2011 IEP should have provided for a 1:1 aide for the student, lacked appropriate annual goals, and did not provide for team meetings or strategies to address the student's difficulty with attention and comprehension because the parents did not raise these issues in the due process complaint notice.

With respect to the IHO's determination that the CSE recommended an inappropriate program for the 2011-12 school year on the basis that the student exhibited a lack of progress

during the 2010-11 school year while enrolled in a more restrictive district program, the district contends that: (1) the student did make progress during the 2010-11 school year; (2) the IHO improperly relied on standardized test scores as a measure of progress; and (3) the IHO incorrectly indicated that all of the annual goals in the IEP should have been achieved to indicate the student's progress. In response to the IHO's conclusions regarding the student's need for a language-based program, the district alleges that the district program was language enriched. The district further asserts that even if the IHO had properly reached the issue of whether the student should have been assigned a 1:1 aide, the IHO erred by comparing the district program to SLCD. The district alleges that student would have benefited from peer modeling in the general education environment recommended by the June 2011 IEP and that he would have been in a classroom with regular education students only 75 minutes per day during science and social studies. The district also alleges that, even if properly addressed by the IHO, the June 2011 IEP provided for numerous supports for school personnel and indirect consultation for the team of educators and providers, and included 12 program modifications to address the student's attention difficulties. The district also objects to various determinations by the IHO relating to witness credibility and the weight afforded to the district's evidence.

The parents answer the district's petition, countering among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that the SLCD was an appropriate placement for the student for the 2011-12 school year, and that equitable considerations favor the parents' request for relief. In response to the district's allegation that the parents did not raise certain issues in the due process complaint notice, the parents assert that the due process complaint notice could be reasonably read to address the student's need for a 1:1 aide and that the district "opened the door" to the issue of the annual goals set forth in the June 2011 IEP. The parents also assert that: (1) in determining the student's lack of progress during the 2010-11 school year, the IHO did, in fact, rely on progress reports and testimony, in addition to standardized test scores; (2) the district did not provide evidence that the program recommended in the June 2011 IEP was language-based; (3) the evidence relating to the 2010-11 school year showed that the student needed 1:1 support in both his 12:1 and ICT classes; and (4) the annual goals in the June 2011 IEP did not reflect the student's needs.

In a reply, the district principally objects to the consideration of a "comparison chart" submitted with the parents' memorandum of law.

## **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., 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; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2013 WL

3155869 [2d Cir. June 24, 2013]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [U.S. June 10, 2013]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 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], aff'd, 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, 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, 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. 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 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. Additional Evidence**

The district objects to the consideration of the parents' submission of a "comparison chart." Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability,



Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-047). In this instance, the comparison chart submitted with the parents' memorandum of law simply summarizes evidence that properly appears elsewhere in the hearing record and therefore it is unnecessary to admit the comparison chart as additional evidence (see Parent Exs. G at pp. 19-20; T at p. 5).

## 2. Scope of the Impartial Hearing

Next, the district alleges that the IHO exceeded the scope of her jurisdiction by deciding issues that were not raised in the parents' due process complaint notice. Specifically, the district asserts that the IHO erred in making the following determinations: (1) that the June 2011 IEP should have provided for a 1:1 aide for the student; (2) that the June 2011 IEP lacked appropriate annual goals; (3) that the June 2011 IEP did not provide for team meetings; and (4) that the June 2011 IEP did not provide for strategies to address the student's difficulties with attention and comprehension (see IHO Decision at pp. 25-27).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, 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][III]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*11-\*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue, which the parties have not raised, as a matter of basic fairness and due process of law (Application of the Dep't of Educ., Appeal No. 12-103; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Initially, contrary to the parents' position, the fact that the disputed issues were discussed at the May or June 2011 CSE meeting did not suffice to raise these issues for the purposes of the impartial hearing (see 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]). Moreover, I am not persuaded by the parents' assertion that, by alleging that the

June 2011 IEP was inappropriate, the due process complaint notice sufficiently raised these issues (see Parent Ex. A at p. 2; Dist. of Columbia v Pearson, 2013 WL 485666, at \*5 [DDC Feb. 8, 2013] [declining to hear all potential claims flowing from a general foundational basis and addressing the specific claims alleged]). Upon review of the parents' due process complaint notice, I find that a sole reference to the individualized attention received by the student during the 2010-11 school year cannot be reasonably read to include a claim that the CSE failed to provide a 1:1 aide to the student for the 2011-12 school year and the due process complaint notice cannot be reasonably read to put the district on notice that the parents were disputing the June 2011 IEP's annual goals, management strategies, or provision for team meetings (see Parent Ex. A). The hearing record also does not indicate that the parents filed an amended due process complaint notice or sought the district's agreement to expand the scope of the impartial hearing to include resolution of these issues.

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 find that it was not appropriate for the IHO to render determinations on these issues (S.M. v. Taconic Hills Cent. School Dist., 2013 WL 773098, at \*4 [N.D.N.Y. Feb. 28, 2013]). The failure to allege these issues in the original due process complaint notice, file an amended due process complaint notice, or obtain the opposing parties' agreement inhibits the development of the hearing record for the IHO's consideration, and thereby 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]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; see also B.P., 841 F. Supp. 2d at 611 [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., 2011 WL 6307563, at \*13). "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. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [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]).

Based on the foregoing, the IHO exceeded her jurisdiction in finding that the June 2011 IEP's lack of a 1:1 aide for the student, team meetings, or strategies to address the student's difficulties with attention and comprehension contributed, in part, to the overall determination that the district failed to offer the student a FAPE for the 2011-12 school year. These determinations must, therefore, be annulled.

However, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51), I find that the district's attorney did raise the annual goals at the impartial hearing on direct examination of more than one of its witnesses (see Tr. pp. 188-91, 509, 704, 1166, 1608, 1633). Accordingly, I find that the district "opened the door" to the issue of the appropriateness of the annual goals in the June 2011 IEP for the student and the

IHO did not exceed her jurisdiction in rendering a determination on this issue. Therefore, I will address the parties' contentions regarding the annual goals in this decision.

### **B. Progress During the 2010-11 School Year**

I turn now to the IHO's finding that the June 2011 IEP recommendations were not appropriate based, in part, on her determination that the student did not make progress during the 2010-11 school year while enrolled in a more restrictive district program (IHO Decision at pp. 4-5, 16-17, 27). A review of the hearing record reveals that, notwithstanding the results of standardized tests and the student's failure to master all of his April 2010 IEP goals, the student made functional progress in school, academically, socially, and behaviorally, during the 2010-11 school year.

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C., 2013 WL 3155869, at \*2); Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation" at p. 18 [NYSED Office of Special Education, December 2010]). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch., 62 F.3d at 530; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at \*3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

As an initial matter, I note that there are differences between the program recommendations found in the April 2010 IEP as compared to the June 2011 IEP. Notably, the June 2011 IEP provided for two hours per week of consultant teacher services and an additional individual speech-language therapy session, to be pushed into a content area of the general education classroom, as well as a twice monthly speech-language therapy consult (compare Dist. Ex. 3 at p. 2 with Dist. Ex. 2 at pp. 15, 18; see also Parent Ex. BB at pp. 292-97).<sup>9</sup> The June 2011 IEP also reflected an increase in the student's OT for the 2011-12 school year from twice monthly sessions

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<sup>9</sup> I note that, according to the testimony of the district speech therapist as well as the transcript of the June 2011 CSE meeting, the speech-language consultation was to be provided twice a month for the 2011-12 school year, but is reflected in the June 2011 IEP as twice per month for 30 minutes from September 6, 2011 through September 30, 2011 (compare Dist. Ex. 2 at p. 18, with Tr. pp. 944-45; Parent Ex. BB at pp. 293-97).

in a small group to a once weekly individual session pushed into the general education classroom (compare Dist. Ex. 3 at p. 2 with Dist. Ex. 2 at pp. 15-16; see also Parent Ex. BB at pp. 291-92). Furthermore, at the parents' request, the June 2011 IEP also provided extended school day services in his home for an additional two days per week for two hours per day, on the days that the student did not attend the CAPP program, along with a monthly session for supervision of the home-based program (compare Dist. Ex. 2 at pp. 15, 18 with Dist. Ex. 3 at p. 2; see also Parent Ex. BB at pp. 301-12).

With respect to the student's progress during the 2010-11 school year, initially, the district asserts that the IHO relied too heavily upon the standardized test results included in the hearing record in determining that the student had not made progress during the period of time leading up to the CSE meeting (see IHO Decision at pp. 5, 8, 9, 14, 15-17, 19, 25, 26, 33). The hearing record reflects the opinion of the district educators and related services providers that the standardized test results were not an accurate or reliable source of information as to the student's abilities (Tr. pp. 542, 914-15, 1024, 1031-33, 1738-41, 1801-04). Assuming, without deciding, that the results of standardized testing showed the student made minimal progress during the period leading up to the May and June 2011 CSE meetings, I find the hearing record as a whole supports the conclusion that the student made meaningful progress in the district's program during the 2010-11 school year.

Specifically, the student's special education teacher from his ICT class reported that over the course of the 2010-11 school year the student had become more social, was engaging in conversation with peers, and was beginning to regulate his own behaviors, including self-correcting his scripting (Tr. pp. 680-81, 695; Parent Ex. AA at p. 24).<sup>10</sup> She also testified that, from March 2011 to the end of the school year, the student became more focused and his writing improved, particularly with the use of a graphic organizer, and she observed a "marked difference" in his ability to stay on task (Tr. pp. 682-89, 797; see Parent Ex. O). Additionally, she reported that, in the beginning of the 2010-11 school year, the student needed prompts to "get ready" to be called on during group lessons, but, as the year progressed, he began to raise his hand on his own more frequently (Tr. p. 798). Testimony from the district coordinator for preschool and elementary special education further supports this description of the student's progress. She described her observations of the student in the beginning of the 2010-11 school year when he would answer questions under his breath and did not raise his hand without prompting; whereas, toward the end of the school year, the student was more apt to raise his hand (Tr. pp. 446-47). The district coordinator also noted that, toward the end of the school year, the student engaged in more spontaneous conversation with his peers, engaged in less scripting behavior, and was more on-task, particularly during the ICT class (Tr. pp. 447-49, 451-52). Furthermore, the district coordinator described how, by the end of the 2010-11 school year, the student would use his surroundings and typical peers to help himself if he missed or did not understand a direction (Tr. p. 451).

The student's special education teacher from his 12:1+2 special class also indicated that, during the 2010-11 school year, the student made "nice amounts of growth in language arts and math" (Tr. pp. 1110-11). According to the special education teacher, the student's reading

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<sup>10</sup> Scripting is described in the hearing record as the recitation of a portion of a TV show, movie, video game or conversation that the student repeated verbatim (Tr. pp. 143, 873).

curriculum included weekly stories accompanied by vocabulary (high frequency words) and comprehension tests (Tr. p. 1311; Dist. Ex. 16 at p. 1). She indicated that the student's comprehension assessment score was an overall average of 60 percent, which, in turn, was an average of the scores for fictional stories (71 percent) and non-fictional stories (43 percent), noting that the discrepancy between the two was due to the student's preference for fictional stories (Tr. pp. 1133; Dist. Exs. 2 at p. 6; 16 at p. 1; Parent Exs. AA at pp. 97-98; DD at p. 1). She also reported that the student's high frequency word assessments average was 92 percent (Tr. p. 1132; Dist. Ex. 2 at p. 6; Parent Ex. AA at p. 98). With regard to math, she expressed surprise in response to the student's low scores on the neuropsychological assessment and reported that the student was working on second grade material and was two units behind the ICT class with an overall average of 84 percent and a score of 96 percent on the midyear assessment (Dist. Exs. 2 at p. 6; 16 at p. 2; Parent Exs. AA at pp. 98-99; DD at p. 2). She explained that the student's math tests differed from those typical for the second grade curriculum only with respect to the format, which included fewer problems per page and enlarged items, such as graphs (Parent Ex. AA at pp. 98-99). The special education teacher indicated that, although the student had difficulty with word problems, he was able to solve them if the whole assignment consisted of the same operation; for example, addition only (Dist. Ex. 2 at p. 6; Parent Ex. AA at p. 99). She further reported that she collected data quantifying the student's off-topic behavior in both the ICT class and the 12:1+2 special class, and reported that the average in the ICT class was lower, which indicated that the student was better able to stay on topic in the ICT class (Tr. p. 830; Parent Ex. AA at pp. 99-100; see Parent Ex. DD). She opined that, because the student was with typical peers, he modeled their behaviors and referenced them if he missed or did not understand a direction (Tr. pp. 1130-31; Parent Ex. AA at p. 100; see Parent Ex. DD at p. 2). When off-task, the special education teacher noted that the student was easily redirected by non-verbal gestures (Tr. p. 1130; see Parent Ex. DD).

The district speech-language therapist reported the student's improvement to the May 2011 CSE, indicating that, even though "progress [was] inconsistent in therapy it [had] been a phenomenal year of growth" (Parent Ex. AA at p. 82; see Dist. Ex. 15). She further clarified that the student's inconsistencies included a pattern of progress until the Christmas break, then a decrease in skills with a "return to higher levels some time in the spring" (Parent Ex. AA at p. 82). She specifically noted more consistent growth in the ICT classroom (Dist. Ex. 15 at p. 2). She also reported "a tremendous growth" in the student's modeling of his peers' speech and behavior (Parent Ex. AA at p. 82). The speech therapist reported that the student needed fewer verbal prompts to stay engaged in tasks (Dist. Ex. 15 at p. 1; Parent Ex. AA at p. 82). The speech-language therapist further indicated that the student was able to respond to "wh" questions, with "how" and "why" being the most difficult, but reported that when she used graphic organizers to help him break down the answers to "why" question, he could generalize the information to the next question (Dist. Ex. 15 at p. 1; Parent Ex. AA at p. 83). She indicated that, at the beginning of the 2010-11 school year, the student was scripting "a great deal" and was not able to socially engage with his peers or engage in a class lesson (Tr. pp. 890-91). However, as the year progressed, the speech-language therapist reported a decrease in the student's scripting, noting that, when he was more regulated, he scripted less and that, by the end of the 2010-11 school year, he was "able to engage in an entire language arts class" in his 12:1+2 classroom and also engage socially with other students in the group (Tr. p. 893; Parent Ex. AA at pp. 83-84). Additionally, she reported that the student's scripting levels increased after school breaks, but returned to prior levels within two weeks (Dist. Ex. 15 at p. 1). She also indicated that, although the student could only recall one detail about an orally presented story, if he had visual organizers, he performed

better (Parent Ex. AA at p. 85; see Dist. Ex. 15 at p. 1). Finally, she reported that the student had improved in his social and pragmatic language skills (see Dist. Ex. 15 at p. 2) and she opined that, in her opinion, the student had "really improved leaps and bounds" relative to the preceding school year (id. at p. 86).

The January 2011 progress report from the student's private speech language therapist also indicated improvement, specifically that the student was improving in: correct responses to "why" questions; use of spontaneous language and social language; use of scripting, shared intentions, affective engagement, reciprocity, language form and content; as well as in his play, responsiveness, range of interests and independence (Dist. Ex. 6 at pp. 1-3).

At the May 2011 CSE meeting, the student's social worker reported that the student had learned to verbally communicate his feelings and was responding "more fluidly to social cues" (Parent Ex. AA at p. 51). Although noting that that student's generalization to settings outside of counseling sessions was inconsistent (id. at pp. 53-54), the social worker indicated that, when the student was emotionally regulated, he showed improvement in taking conversational turns and that he was self-regulating with non-verbal cues from teachers (id. at p. 49-50).

The coordinator of the CAPP program also reported to the CSE the student's progress during the 2010-11 school year (Parent Ex. AA at p. 60-64). She indicated that the student had become a "preferred peer partner" and that he was initiating and maintaining activities on the playground, which according to the coordinator "took years for us to see that" (id. at pp. 60; 63). She also indicated that the student's scripting had decreased and that he was scripting a lot less when he was "just with his group" (id. at p. 61). She further indicated that, during activities in the CAPP program in which the student was less interested, he would disengage more often than he would script (id. at p. 61-62).

Improvement was also observed by the student's behavior consultant, who reported that the student had made "considerable gains" during the 2010-11 school year, and also noted that the student was better able to detect verbal cues from both peers and adults (Parent Ex. AA at pp. 91-92). She further observed that the student's scripting occurred more often with adults than with peers (id. at p. 95). The behavior consultant also reported that the student was demonstrating improvement engaging in a non-preferred topic or task with same-age or similar age peers in an "out-of-school" setting, specifically noting that, during the 2010-11 school year, if a peer asked for help, the student would agree to help; whereas, during the 2009-10 school year, the student would have refused to help the peer, stating "no thank you" (id. at pp. 92, 94).

During the May 2011 CSE meeting, the student's occupational therapist indicated that the student had made slight improvement in his scores on the fine motor precision test, as well as with discrimination and visual memory, and had "improved dramatically" in fine motor integration (Parent Ex. AA at p. 77-79). Furthermore, the occupational therapist also reported that the student had made progress towards his goals, specifically noting that his level of attention had increased to 20 minutes following a five minute movement or strengthening activity with three verbal redirections (Parent Ex. L at p. 4). She also reported that the student's ability to use proper spacing between words when writing had improved to approximately 60 percent accuracy (id.). She also indicated that he was able to complete a three step obstacle course with written steps (id.). Finally, the occupational therapist reported that the student had shown improvement in his fine motor

integrations skills, sensory processing skills, and modulation skills (*id.*). Based on the foregoing information provided by the teachers, therapists, and administrators, who worked with the student during the 2010-11 school year, I find that the student made meaningful progress during the 2010-11 school year.

Turning now to the student's April 2010 IEP goals, upon review of the hearing record, I find that the IHO erred in determining a lack of progress based on the number of IEP goals the student "achieved," during the 2010-11 school year, rather than focusing on the extent to which the student had progressed (IHO Decision at p. 27; see *Gavriity v. New Lebanon Cent. Sch. Dist.*, 2009 WL 3164435, at \*31, \*36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]). Contrary to the IHO's finding that the student had not made progress during the 2010-11 school year because he had "achieved only 2 out of his 15 goals," I note that the student's progress report included approximately 27 annual goals and that the report indicated that he had achieved four out of the 27 goals (IHO Decision pp. 26-27; Dist. Ex. 10 at pp. 2-3, 5). I further note that the majority of the approximately 27 annual goals indicated that the student had made at least some progress toward achievement (*id.* at pp. 1-6).

Accordingly, upon review of the hearing record, I find that the evidence does not adequately support the IHO's conclusion that the student exhibited a lack of progress during the 2010-11 school year, and I further find that the weight of the evidence shows that the student made meaningful progress in school academically, socially, and behaviorally during the period of time leading up to the May and June 2011 CSE meetings.

### **C. June 2011 IEP**

#### **1. Adequacy of the Goals**

I now turn to the IHO's determination that the goals in the June 2011 IEP were "too ambitious" and "completely inappropriate" (IHO Decision at p. 25-26). 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]). Determinations about the individual needs of a student shall provide the basis for the written annual goals. (8 NYCRR 200.1[ww][3][i]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).<sup>11</sup>

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<sup>11</sup> I note that the June 2011 IEP recommended that the student participate in the same State and district-wide assessments of student achievement that are administered to regular education students (Dist. Ex. 2 at p. 20).

An independent review of the June 2011 IEP shows that the CSE developed approximately 34 annual goals to address the student's needs, as set forth in the present levels of performance in the June 2011 IEP (see Dist. Ex. 2 at pp. 6-15). The IEP contained annual goals to address the student's needs in math, reading, writing, organizational/study skills, social/emotional, speech and language skills, and fine motor and sensory integration needs (*id.* at pp. 12-15).

The hearing record shows that the May 2011 CSE reviewed the student's goals from the 2010-11 school year, and some of the student's annual goals were carried over or modified from the April 2010 IEP to the June 2011 IEP (Tr. pp. 164-65; see also Dist. Ex. 7; Parent Ex. AA at pp. 105-45). At the May 2011 CSE meeting, the student's 12:1+2 special education teacher, the district social worker, and the district speech-language therapist all explained why specific goals from the 2010-11 school year would not be carried over to the 2011-12 IEP and how other goals would be altered to better meet the student's needs based on his progress (Parent Ex. AA at pp. 109-34). For example, the social worker reported that the student had "progressed tremendously" on a goal to demonstrate appropriate listening skills by sitting attentively and orienting himself toward the speaker (*id.* at p. 130). She indicated that she was carrying the goal over to the 2011-12 school year, but wanted to "bump up the criteria" and focus it as a goal in the classroom (*id.*). Additionally, the 12:1+2 special education teacher also reported that some of the annual goals that were not mastered were to be carried over "in a different way to help [them] be mastered" (Tr. p. 1635). For example, the 12:1+2 special education teacher indicated that the student was doing well with two of the math goals involving the solving of two-digit addition or subtraction problems with regrouping, which had been initiated later in the school year but had not yet been mastered (Tr. pp. 1774-75; Dist. Ex. 10 at pp. 2-3). Addressing the math goals, the IHO pointed out that, "although the student was still working on addition and subtraction goals, the CSE recommended multiplication, division, and fraction word problem goals" (IHO Decision at p. 27). However, the 12:1+2 special education teacher explained the rationale underlying the goal referenced by the IHO. According to the special education teacher, the student had made progress solving basic operations problems, including simple multiplication problems and identification of fractions (Tr. pp. 1615, 1774-75). Given this progress, but noting the student's continued difficulty with the language of word problems, the special education teacher explained that she created new goals for the 2011-12 school year that were more language based, while keeping the mastery levels at an attainable level for the student (Tr. pp. 1615, 1774-75; Dist. Ex. 2 at p. 12-13). Under these circumstances, I decline to find the math goals inappropriate for the student, particularly where they were designed to address the student's needs as identified in the June 2011 IEP.

At the May 2011 CSE meeting, the private speech-language therapist indicated her concern that the goals being discussed were "too ambitious" for the student (Parent Ex. AA at pp. 171, 178). The district representative testified that, at the May 2011 CSE meeting, she attempted to identify the goals about which the private speech-language therapist had expressed concern and that, in discussion with the district speech-language therapist, the concern was addressed (Tr. pp. 346-47). The transcript of the May 2011 CSE meeting reflects this exchange and indicates that, in response to the concern about the student's ability to achieve an annual goal "identifying four of the details to answer 'why' and 'how' questions," the CSE agreed to split the proposed annual goal into two annual goals with a more achievable measure for the "why" goal, which was more difficult for the student (Parent Ex. AA at pp. 171-72; Dist. Ex. 2 at pp. 13-14). Moreover, these annual goals were consistent with the description of the student's present levels of performance, which



indicated that the student was already able to answer "who," "what," "when," and "where" questions (Dist. Ex. 2 at p. 7).

At the impartial hearing, the private psychologist testified that the goals were "too ambitious" for the student, citing her discontinuance of the WJ-III testing exercise because the student had only completed two sentences in a three-minute time frame, as compared to the more expansive writing goals set forth in the June 2011 IEP (Tr. pp. 1254-55). However, this goal would be achieved in a different environment than the standardized testing allowed, and the multiples management strategies set forth in the June 2011 IEP would be available to help the student succeed (see Dist. Ex. 2 at pp. 12, 16-18). For example, management strategies specifically targeted to writing assignments included the use of a graphic organizer and additional time to complete assignments (Dist. Ex. 2 at p. 17); whereas, such strategies were not available during the standardized testing (Tr. p. 1976). The present levels of performance set forth in the June 2011 IEP reported that the student did best when he was given a graphic organizer to "write out his thoughts," so that he was able to generate ideas on a given topic, complete the organizer, and write a cohesive short paragraph with minimal prompts (Dist. Ex. 2 at p. 6; see Tr. pp. 685, 803, 838-39, 1135-36, 1770). Consistent with this description of the student's abilities, the June 2011 IEP included an annual goal to help the student improve his ability to use a graphic organizer to create subtopics and fill in information on a given topic (Dist. Ex. 2 at p. 12). Moreover, the ICT special education teacher testified that this particular writing goal was a modified, more achievable version, of the goal from the 2010-11 school year, which had required the student to "write a passage of 5-6 sentences about a story that he read and explain what he like[d] or disliked about the story" (Tr. pp. 852-53; Dist. Ex. 10 at p. 2). The special education teacher elaborated that the explaining part of the previous goal had been too challenging and, therefore, the CSE modified the goal for the June 2011 IEP (Tr. p. 853).

In view of the foregoing, I find that the hearing record shows that the annual goals contained the student's June 2011 IEP were appropriate for the student based on his identified needs and present levels of performance.

## **2. Appropriateness of Program Recommendations**

I now turn to the IHO's finding that the program recommended in the June 2011 IEP was inappropriate to the student's needs because it was not language-based and included a recommendation for placement in a fourth grade general education classroom (IHO Decision at pp. 5, 6, 8-9). A review of the hearing record reveals that, in accordance with the evaluative data, progress reports, and input from the student's teachers, related service providers, and the private evaluators, the CSE recommended an appropriate program for the student based on his abilities, as well as his needs.

Regarding the recommendation that the student attend a general education classroom, the IHO found that the "child likely could not function in such a fourth grade general education setting," citing the number of students in the classroom, as well as the pace of the lessons (IHO Decision at p. 8). However, the hearing record shows that the administrators, educators and related service providers, who participated in the May and June 2011 CSE meetings, indicated that the program would have been in the LRE, individualized to the student's strengths and needs through

a modified curriculum and incorporation of a variety of modifications and accommodations to enable the student to receive appropriate educational benefit (see, e.g., Tr. pp. 524-27, 709-10).

The hearing record indicates that the student would have been in the fourth grade general education classroom for approximately one and a half hours per day (Tr. pp. 213, 335, 381, 518-19, 577, 1729). The recommendation of a fourth grade general education classroom was based, in part, on the student being a fourth grade student programmatically,<sup>12</sup> as well as his improvement in his social/emotional skills, his ability to reference his peers and model their behaviors, and the decrease in the student's inappropriate behaviors and scripting when he was in a setting with similar aged, typical peers (Tr. pp. 210-11, 215-18, 711; Parent AA at pp. 44-45, 63-64; BB at pp. 223-24, 315-17). The hearing record indicates that the fourth grade social studies and science curriculums were to be modified by the student's special education teacher from the past two years and a fourth grade regular education teacher, specifically to meet the student's language and reading levels (Tr. pp. 512-14). The consultant special education teacher would also have modified the curriculum further, if needed (Tr. p. 512). Moreover, the hearing record demonstrates that the student was able to function and succeed in a general education environment (see, e.g., Tr. pp. 212-13, 682-89, 695, 797, 893, 1130-33).

The June 2011 IEP also recommended the provision of consultant teacher services to provide two hours of direct and indirect consultant teacher services pushed into the fourth grade general education classroom, which could be broken up and "spread out over the days within the given week" (Tr. pp. 203, 214; Dist. Ex. 2 at p. 15; Parent Ex. BB at p. 317). The consultant teacher would have provided support for the student and the staff, and would have provided the modified curriculum and visual supports the student required (Tr. pp. 388-89; Parent Ex. BB at pp. 319-20). Moreover, the classroom assistant would have been trained and supported by the consultant special education teacher on modifications and instruction for the student (Tr. p. 517; Parent BB at p. 317, 320).

The hearing record reflects that the student would have received his primary instruction in a 12:1 special class, consisting of 90 minutes of direct ELA instruction and 60 minutes of direct math instruction, individualized to meet the student's language and academic needs (Tr. pp. 210, 524-25; Dist. Ex. 2 at p. 15; Parent Ex. BB at pp. 314-15).<sup>13</sup> Additionally, the curriculums for reading/ELA and math were to be modified by the teacher of the 12:1 special classes, based on the student's needs (Tr. pp. 511-12, 525). Furthermore, the district coordinator of elementary and preschool special education testified that she was creating a separate classroom in the reading program "for students who required more modification of work" or "a slower pacing" (Tr. p. 525).

Finally, to the extent that it has not been adequately addressed above, I will discuss the parent's contention that student needed a language-based program. Initially, I note that there is no

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<sup>12</sup> According to the hearing record, although the student attended some classes in a second grade ICT class during the 2010-11 school year, he participated in the third grade State tests at the end of that year (Tr. p. 523). Moreover, the hearing record reveals that, chronologically, during the 2011-12 school year, the student would have been a fifth grade student, but that he repeated first grade (Tr. p. 216).

<sup>13</sup> State regulations provide that a 12:1 special class is designed for students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting (8 NYCRR 200.6[h][4]).

standard for a language-based program in the IDEA or federal or State regulations. However, a comparison of the descriptions of a language-based program, by the private psychologist, the district speech-language therapist and the district's coordinator of preschool and elementary special education, to the recommended program indicates that the June 2011 IEP offered the student a supportive, structured environment with an intense language-based curriculum, multisensory instruction, individual attention, individualized instruction, and small group classes, and that the program effectively addressed the student's language, attention, academic, and social deficits (compare Tr. pp. 480, 936-37, 1246, 1249-50, with Dist. Ex. 2; see also Tr. pp 947-48, 551). For example, the hearing record indicates that the student would be provided several modifications and accommodations all designed to facilitate language development, communication, and comprehension of materials and instruction, using a variety of multisensory modalities, such as visuals, manipulatives, and auditory information (Tr. p. 1649; Dist. Ex. 2 at pp. 16-19; Parent Ex. AA at pp. 179-87; see also Tr. p. 937). Additional program modifications found in the June 2011 IEP included the use of scaffolding to simplify presented tasks and the use of minimal words, wait time and checks for understanding to aide the student in the comprehension of language (Dist. Ex. 2 at pp. 16-18).

Additionally, the June 2011 IEP specifically addressed the student's speech-language needs by recommending the provision of two 30-minute individual sessions of speech-language therapy per week (one in the therapy room and the other in the classroom, pushed-in into a content area) and three 30-minute sessions of speech-language therapy per week in a small group in the therapy room, as well as a speech-language consultation to support the student's educational team twice per month (Dist. Ex. 2 at pp. 15, 18; Parent Ex. BB at pp. 292-97).<sup>14</sup> Moreover, I note that the district speech-language therapist testified that one of the individual sessions was to take place in the classroom during a content area, and that the other individual session could be utilized to reteach that information in order "to ensure comprehension" (Tr. p. 945). The district speech-language therapist further testified that the other three group sessions exposed the student to appropriate peer models, giving him an opportunity to model pragmatic language and content areas (Tr. p. 945). Furthermore, the June 2011 CSE also recommended that the twice monthly speech-language consultation be provided with all staff interacting with the student (Tr. pp. 944-45; Dist. Ex. 2 at p. 18; Parent Ex. BB at pp. 293-97). Additionally, the June 2011 IEP contained approximately seven annual goals specifically designed to improve the student's ability: to respond to nonverbal cues, such as a shoulder shrug to signal that he was not understood and needed to clarify his narrative; to increase his content area vocabulary; to verbally formulate sequential steps of a task, such as making a sandwich, and present them to his peers; to orally organize, sequence, and formulate parts of a direction; to respond to "how" and "why" questions about an orally presented story; and to verbally sequence a story and relate information the information in a logical manner (Dist. Ex. 2 at pp. 15-16).

Based on the foregoing, I find that the hearing record reflects that the CSE developed an IEP for the 2011-12 school year that was designed to support the student's special education, language, academic and social/emotional needs, while providing him with appropriate access to

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<sup>14</sup> I note that, according to the testimony of the district speech therapist as well as the transcript of the June 2011 CSE meeting, the speech-language consultation was to be provided twice a month for the 2011-12 school year but is reflected in the June 2011 IEP as twice per month for 30 minutes from September 6, 2011 through September 30, 2011 (compare Dist. Ex. 2 at p. 18, with Tr. pp. 944-45; Parent Ex. BB at pp. 293-97).

his nondisabled peers. In light of the student's meaningful progress during the 2010-11 school year, as discussed above, in addition to the multiple supports, modifications, and individualized aspects of the program recommendation, I find that the IHO's conclusion that the recommended program was inappropriate for the student to be unsupported by the hearing record.

## **VII. Conclusion**

Accordingly, upon review, I find that the hearing record reflects that the CSE developed an IEP for the 2011-12 school year that was designed to continue to support the student's special education needs and progress academically and socially while providing him with appropriate access to his nondisabled peers (see Dist. Ex. 2). In light of the student's meaningful progress during the 2010-11 school year and a review of the hearing record, I find that the IHO's conclusion that the recommended placement and program was inappropriate for the student for the 2011-12 school year is unsupported by the hearing record and that the district's recommended program, consisting of a "supported" general education classroom, 12:1 special classes for ELA/reading and math, consultant teacher services and related services, was designed to address the student's instructional needs and was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07). Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary to reach the issue of whether SLCD was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at \*12; D. D-S, 2011 WL 3919040, at \*13).

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

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated August 28, 2012 is modified by reversing the determination that the district failed to offer the student a FAPE in the LRE for the 2011-12 school year and by annulling the IHO's order directing the district to reimburse the parents for the costs of the student's tuition at SLCD for the 2011-12 school year.

**Dated:**            **Albany, New York**  
                         **July 29, 2013**

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**STEPHANIE DEYOE**  
**STATE REVIEW OFFICER**