The University of the State of New York

The State Education Department
State Review Officer
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No. 12-236

Application of a STUDENT WITH A DISABILITY, by her 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 petitioner, Alexander M. Fong, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for payment of the costs of the student's tuition at the Imagine Academy (Imagine) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, 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

During the 2010-11 school year, the student attended a 12:1+4 special class placement in a district public school and received related services consisting of occupational therapy (OT), physical therapy (PT), and speech-language therapy (see Dist. Exs. 2 at p. 1; 3 at p. 1; 4 at p. 1). In addition, pursuant to the settlement of a previous dispute between the parties, the student received home-based services, which included related services and special education teacher support services (SETSS) (see Tr. pp. 49-50, 221-22).

By letter dated April 2011, the district informed the parent of the student's "opportunity" to attend a particular public school site for the 2011-12 school year (Parent Ex. S).[1]

On May 27, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (see Dist. Ex. 1 pp. 1, 17-18). Finding that the student remained eligible for special education and related services as a student with multiple disabilities, the May 2011 CSE recommended a 12-month school year program in a 12:1+4 special class placement at a specialized school (id. at pp. 1, 13-14, 17-19).[2] The May 2011 CSE also recommended the following related services: two 30-minute sessions per week of individual speech-language therapy, two 30–minute sessions per week of speech-language therapy in a group, four 30-minute sessions per week of individual OT, and four 30-minute sessions per week of individual PT (id. at p. 10). In addition, the May 2011 CSE recommended the provision of an assistive technology device for daily use and specified an "[o]ther [v]oice [o]utput [d]evice" (id. at p. 13).[3] In addition, the May 2011 CSE developed annual goals with corresponding short-term objectives to address the student's needs, and recommended special transportation services for the student (id. at pp. 4-12, 17).

In an e-mail to the district dated June 6, 2011, the parent advised that she objected to the student's May 2011 IEP for a "number of reasons," and intended to seek an impartial due process hearing (Parent Ex. I at p. 1). In addition, the parent requested that a "second IEP team evaluate [her] requests, which were not even considered by the [May 2011] IEP team" because "it did not have the authority to do so" (id.). The parent expressed her "hope that another IEP team" would consider her requests and "review the documentation [she] presented at the [May 2011] IEP meeting" (id.). The parent indicated, more specifically, that she requested the following at the May 2011 CSE meeting: a "summer educational program" at a particular State-approved nonpublic school, a "sign language para[professional] who could understand what [the student was] trying to communicate in the classroom and help teach her additional signs," a continuation of the student's home-based services, and to review all reports created by the student's home-based providers and treating psychiatrist (id. at pp. 1-2).

In a letter dated June 28, 2011, the parent provided the district with a 10-day notice of unilateral placement of the student in an "educational/recreational program" for summer 2011 at a particular State-approved nonpublic school (see Parent Ex. D at p. 1). In addition, the parent notified the district of her intention to seek an impartial due process hearing to obtain reimbursement for the costs of the student's summer 2011 program (id.).

[1] The evidence in the hearing record indicates that the parent visited the assigned public school site on March 22, 2011 and April 1, 2011 (see Parent Ex. J at pp. 3-4).

[2] The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[3] Throughout the hearing record and within the May 2011 IEP, the assistive technology device is referred to as a "voice output communication device" or "VOCD" (see Dist. Exs. 1 at pp. 7, 9; 4 at pp. 1-2). For consistency, this decision will use the acronym VOCD.

In a handwritten notation dated August 4, 2011, the parent indicated that the student would attend Imagine for the 2011-12 school year, and she would request an impartial due process hearing to seek tuition reimbursement (Parent Ex. S at p. 1).[4]

In a 10-day notice dated August 22, 2011, the parent advised that the student's "recommended placement" for the 2011-12 school year was not appropriate (Parent Ex. E at p. 1). In addition, the parent indicated that she would "make every effort to observe" any offered program in September 2011, but if it was not appropriate she would request an impartial due process hearing to seek reimbursement or direct payment of the costs of the student's tuition at Imagine for the 2011-12 school year (id.).

On August 31, 2011, the parent made a tuition payment to Imagine (see Parent Ex. M; N at p. 2); on September 15, 2011, Imagine accepted the parent's executed enrollment agreement for the student's attendance during the 2011-12 school year (see Parent Ex. L at pp. 1, 3).

A. Due Process Complaint Notice

In a due process complaint notice dated December 29, 2011, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A at p. 2). The parent alleged that she disagreed with "many" of the recommendations made at the May 2011 CSE meeting (id. at p. 3). In particular, the parent alleged that—as noted in the May 2011 IEP—she requested the "'following revisions to [the student's] IEP:'" a "private summer camp" for summer 2011; a reevaluation for a "new speech device," because the student's "current device [was] too large" for the student; an "ABA" program; and a paraprofessional "familiar with signing as a form of communication" (id.). Next, the parent asserted that the May 2011 IEP failed to recommend a program and services that were reasonably calculated to enable the student to receive educational benefits (id.). The parent also alleged that on or about August 4, 2011, she advised the district that she would not "accept" the assigned public school site, and notified the district of her intention to enroll the student at Imagine for the 2011-12 school year (id. at pp. 3-4).

As relief, the parent requested reimbursement or direct payment of the costs of the student's tuition at Imagine for the 2011-12 school year, as well as a continuation of the student's home-based services for the remainder of the 2011-12 school year (see Parent Ex. A at p. 4). The parent also sought related services for the student, or reimbursement thereof, and round-trip transportation (id.).

B. Impartial Hearing Officer Decision

On April 4, 2012, the parties proceeded to an impartial hearing, which concluded on June 8, 2012 after three days of proceedings (see Tr. pp. 1-266). By decision dated November 15, 2012, the IHO concluded that the district offered the student a FAPE for the 2011-12 school year, and therefore, the IHO denied the parent's request for payment of the costs of the student's tuition at Imagine for the 2011-12 school year (see IHO Decision at pp. 13- 26, 28). More specifically, the IHO found that the May 2011 CSE was properly composed, and based upon the evidence in the

[4] The Commissioner of Education has not approved Imagine as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

hearing record and regulations requiring a reevaluation of the student "at least once every three years," the April 2008 psychoeducational evaluation report remained "relevant" to the May 2011 CSE meeting (id. at pp. 19-21). The IHO then described the evaluative information in evidence, including an April 2008 social history update, a May 2011 psychiatric evaluation report, as well as the recommendations in the May 2011 IEP (id. at pp. 21-22). After setting forth the applicable legal standards, the IHO determined that the 12:1+4 special class placement recommended by the May 2011 CSE was an appropriate placement in the least restrictive environment (LRE), and provided the student with the "intensive adult supervision" she required (id. at pp. 23-25). The IHO also noted that the student would receive related services on a "pull-out basis individually and in a group," and she would have been functionally grouped with respect to her communication and academic skills (id. at p. 25). Having concluded that the district offered the student a FAPE for the 2011-12 school year, the IHO indicated that he need not address whether the parent's unilateral placement of the student at Imagine was appropriate or whether equitable considerations weighed in favor of the parent's requested relief (id. at pp. 25- 26).

However, the IHO proceeded to find that because the "instant claim was brought on behalf of a non-party private school," the parent did not have standing to "seek full 'tuition reimbursement'" in this case (IHO Decision at pp. 26-28). More specifically, the IHO found that Imagine—and not the parent—incurred the "financial burden" associated with the student's education for the 2011-12 school year (id. at pp. 26-27). The IHO also concluded that the parent was not entitled to prospective funding of the student's tuition at Imagine (id. at pp. 27-28). Based upon the foregoing, the IHO denied the parent's request for payment of the costs of the student's tuition at Imagine for the 2011-12 school year, as well as payment of the costs of the student's attendance at a summer camp for summer 2011 (id. at p. 28). Further, the IHO denied the parent's request related to the costs of the student's related services and round-trip transportation for the 2011-12 school year (id. at pp. 28-29).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year. Initially, the parent asserts that the IHO ignored evidence that the 12:1+4 special class placement the student attended between September 2007 and June 2011 was not appropriate for the student without ABA, sign language instruction, and an "effective communication device" or staff willing to work collaboratively with the student's home-based providers. The parent asserts that the May 2011 IEP was not appropriate because it failed to recommend a home-based program consisting of SETSS, ABA, sign language instruction, and speech-language therapy; school-based ABA; a 1:1 paraprofessional; sign language instruction or a sign language paraprofessional; and an "effective communication device." The parent argues that the IHO also ignored evidence that the assigned public school site failed to provide the student with "verbal higher-functioning peers to serve as role models" and further, the assigned public school site would "continue to fight [her] in working with sign language—the student's "favorite, only spontaneous and most easily accessible form of communication." Next, the parent alleges that the district failed to offer the student a FAPE for the 2011-12 school year because the May 2011 CSE created a flawed IEP, refused her request for a "second IEP team to re-evaluate [her] requests," and failed to offer an appropriate assigned public school site. The parent also contends that the May 2011 CSE was not properly composed due to the absence of a school psychologist and an additional parent member. Further, the parent alleges that the May 2011 CSE relied upon outdated evaluative information to develop the student's IEP.

Next, the parent asserts that the IHO improperly rejected testimonial evidence regarding sign language instruction and improperly precluded testimonial evidence regarding the student's progress. The parent contends that the IHO also improperly precluded her from calling the student's home-based providers as witnesses at the impartial hearing. Also, the parent alleges that the IHO's final decision was untimely, and upon information and belief, the IHO harbors a personal bias against prospective relief cases, which may have affected the IHO's decision in this case. Further, the parent asserts that the May 2011 CSE ignored the concerns she expressed at the meeting regarding the recommended 12:1+4 special class placement. Next, the parent asserts that the 12:1+4 special class placement was not appropriate without ABA, and the May 2011 CSE failed to consider a May 2011 psychiatric evaluation report. According to the parent, the 12:1+4 special class placement was also not appropriate because it could not meet the student's sign language needs, due, in part, to the district's predetermined agenda to not use sign language. In addition, the 12:1+4 special class placement was not appropriate because it failed to provide the student with a VOCD to meet her needs. The parent further asserts that the IHO improperly relied upon testimony that inaccurately portrayed the student's progress during the previous school year. In addition, the May 2011 CSE failed to develop a behavioral intervention plan (BIP) for the student. Finally, the parent alleges that the IHO erred in failing to consider the appropriateness of the student's unilateral placement at Imagine, in finding that equitable considerations did not weigh in favor of the parent's requested relief, and that the parent lacked standing.

In an answer, the district responds to the parent's allegations and seeks to uphold the IHO's decision in its entirety. The district also asserts that while speculative, the assigned public school site could implement the student's May 2011 IEP. Further, the district asserts that the parent raised issues in the petition for the first time on appeal, and as such, the issues should not be considered. In addition, the district argues that the IHO properly limited duplicative testimony, he conducted the impartial due process hearing without any personal or professional conflicts or bias, and even if the IHO's decision was not timely it did not prejudice the parent. The parent submitted a reply to the district's answer. [5]

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

[5] The parent submitted a memorandum of law in support of her petition, and attached additional documentary evidence to the memorandum for consideration on appeal (see Parent Mem. of Law Exs. 1-4). The parent also attached additional documentary evidence to the reply (see Reply Exs. 1-3). 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 a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003). A brief review of the additional evidence reveals that the documents were either available at the time of the impartial hearing but were not submitted into evidence, or post-date the impartial hearing but are not necessary in order to render a decision in this matter. As such, in the exercise of my discretion I decline to consider the additional documentary evidence attached to both the parent's memorandum of law and reply on appeal. In addition, to the extent that the parent's reply exceeds the permissible scope, it will not be considered (see 8 NYCRR 279.6 [limiting a reply to any "procedural defenses interposed by respondent or to any additional documentary evidence served with the answer"]).

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, 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. Conduct of Impartial Hearing and IHO Bias

The parent contends that the IHO ignored evidence, improperly rejected or precluded testimonial evidence, issued an untimely decision, and upon information and belief, harbored a personal bias against prospective relief cases, which may have affected the IHO's decision in this case. Upon a careful and complete review of the hearing record, neither the IHO's management of the impartial due process hearing nor his decision manifested bias or prejudice against—or in favor of—either party. Therefore, the parent's contentions must be dismissed.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see 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; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see 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 (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021). In addition, State regulations require that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious," and moreover, empower an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[d]).

Here, the parent—as the party bearing the burden to provide evidence with respect to the IHO's alleged bias—levels nothing more than bald, conclusory assertions unsupported by the evidence in the hearing record. Thus, while the parent may not be happy with the IHO's decision and may believe that the IHO ignored or precluded evidence that the parent deemed to be persuasive and relevant, this, alone, does not establish that the IHO manifested a bias or improperly exercised his discretion in conducting the impartial due process hearing. Accordingly, the parent's allegations are dismissed.

2. Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. First, a review of the hearing record reveals that the IHO exceeded his jurisdiction by sua sponte deciding that the May 2011 CSE was properly composed

because the parent did not raise this as an issue in dispute in the due process complaint notice (compare IHO Decision at pp. 19-22, with Parent Ex. A at pp. 1-5).

Second, a review of the hearing record also reveals that the parent now raises the following issues in the petition—which she did not raise in the due process complaint notice for the first time on appeal: (1) whether the May 2011 CSE was properly composed, (2) whether the May 2011 IEP was not appropriate because it failed to recommend a home-based program consisting of SETSS, ABA, sign language instruction, and speech-language therapy; (3) whether the student would be functionally grouped at the assigned public school and whether the assigned public school site was appropriate and could implement the student's IEP, (4) whether the district ignored the parent's request for a "second IEP team to re-evaluate her requests," (5) whether the May 2011 CSE relied upon outdated evaluative information, (6) whether the May 2011 CSE failed to consider a May 2011 psychiatric evaluation report, and (7) whether the May 2011 CSE failed to develop a BIP for the student (compare Pet. ¶¶ 3-5, 8-9, 25-27, with Parent Ex. A at pp. 1-5).

With respect to the issue raised and decided sua sponte by the IHO in the decision as well as the allegations now raised by the parent in the petition for the first time on appeal, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151; 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 due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; 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]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 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. S. 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 *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; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87; 2013 WL 3814669 [2d Cir. July 24, 2013]). 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 a Student with a Handicapping Condition, Appeal No. 91-40; 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 those issues (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]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the issue raised sua sponte by the IHO regarding the composition of the May 2011 CSE or the challenges enumerated above and now raised in the parent's petition for the first time (see Parent Ex. A at pp. 1-5). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-266; Dist. Exs. 1-7; Parent Exs. A-V).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, these issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 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 studentren" (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded his jurisdiction by addressing in the decision whether the May 2011 CSE was properly composed and that particular finding must be annulled. In addition, the allegations as enumerated above and raised now, for the first time by the parent on appeal, are outside the scope of my review, and therefore, these allegations will not be considered (see N.K., 2013 WL 4436528, at *5-*7; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery Co. Pub. Schs., 2009 WL 3246579, at *7 [D. Maryland Sept. 29, 2009]).[6]

B. May 2011 IEP

Generally, the parent asserts that the 12:1+4 special class placement was not appropriate because it failed to provide the student with a VOCD to meet her needs, it did not include ABA,

[6] 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 217, at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, *9; B.M., 2013 WL 1972144, at *5-*6). Here, the issue raised and addressed sua sponte by the IHO in the decision and the allegations raised in the parent's petition for the first time on appeal were initially raised by testimony of the parent or parent's witnesses, during cross-examination of district witnesses, or during counsel for the parent's closing statement (see, e.g., Tr. pp. 37-39, 48-52, 221-22, 234-35). Accordingly, the district did not "open the door" to these issues under the holding of M.H.

and it could not meet the student's sign language needs. As explained more fully below, a review of the evidence in the hearing record does not support the parent's assertions.

1. Special Factors—Assistive Technology

In this case, the parent argues that the 12:1+4 special class placement was not appropriate because it did not provide the student with a VOCD to meet her needs. More specifically, the parent asserts in the petition that although the district evaluated the student's assistive technology needs during the 2009-10 school year—which resulted in replacing the student's "Go-Talk" device with the student's current "Pro-Talker" device—the May 2011 CSE failed to reevaluate the student's assistive technology needs in order to potentially replace the "Pro-Talker" device with an iPad. However, a review of the evidence in the hearing record indicates that even if the May 2011 CSE did not reevaluate the student's assistive technology needs, the May 2011 IEP recommended an assistive technology device and services that were consistent with the student's needs as identified by the May 2011 CSE.

One of the special factors that a CSE must consider in developing a student's IEP is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are necessary for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121). In addition, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]).

Based upon a review of the evidence in the hearing record, the student's assistive technology needs for a VOCD or a communication device are well documented. An April 2008 psychoeducational report indicates that the student demonstrated "severely impaired" receptive and expressive language skills (Dist. Ex. 5 at p. 2). While noting the student's relative strength in the area of receptive language skills, the evaluator indicated that the student expressed herself using a "few understandable words," word approximations, various sounds, gestures, and some basic sign language (id. at pp. 2-3).

In a March 2011 speech-language progress report, the student's therapist—who also attended the May 2011 CSE meeting—indicated that the student typically communicated "her wants and needs in school using one word verbal approximations and a distal reach" (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 1 at p. 21). In the March 2011 progress report, the therapist described the student's use of her then-current VOCD to augment her communication in the classroom setting (see Dist. Ex. 4 at pp. 1-2). At that time, the student's VOCD consisted of a "binder containing 5 pages with approximately 90 symbols," which the student "independently navigate[d] . . . to select the picture symbol of a desired item during art activities, mealtime, and

free play and in the classroom" (id. at p. 1). The student could combine three to four picture symbols with minimal to moderate "gestural and verbal prompts to create an utterance" (id.). The student did not, however, seek out the device to initiate communicative attempts (id.). With respect to her annual goals in this area, the student demonstrated an improvement in "using verbalizations in conjunction with the device" and made "good progress" combining two to three picture symbols to "request and label' during therapy and in the classroom (id. at p. 2). Furthermore, the therapist indicated that the student demonstrated the ability to 'initiate requests" using the VOCD during "highly motivating activities" such as art and mealtime, and the student was beginning to create three to four word utterances using the device at these times (id.). In the March 2011 progress report, the therapist recommended a new annual goal targeting the student's use of "verbalizations, her VOCD and/or picture symbols" to take turns, interact with peers, and identify and label her emotional states (compare District Ex. 4 at p. 3, with District Ex. 1 at pp. 7-8).

A review of the May 2011 IEP reveals that the May 2011 CSE incorporated the student's ability to use her then-current VOCD to communicate in the present levels of performance and individual needs section of the IEP, noting that the student communicated "using word approximations, sounds and a voice output device" (Dist. Ex. 1 at p. 1). The May 2011 CSE also recommended the use of an assistive technology device both in school and at home (id. at p. 3). Moreover, the May 2011 CSE created annual goals related to the student's use of the VOCD, specifically for communicating during peer interactions and structured turn taking, as well as for helping the student identify her own emotions and those of a peer (id. at pp. 7-9).

At the impartial hearing, the district representative who attended the May 2011 CSE meeting testified that the student "would have to initiate communication" using the VOCD in school—especially for social interaction skills such as taking turns and requesting and exchanging items with peers—and the VOCD "started to work really, really well" for the student (Tr. pp. 21-22). In addition, the district representative testified that the student used the VOCD, in conjunction with gestures, vocalizations, word approximations, and some sign language to communicate (see Tr. pp. 22-23). However, the parent testified that the student needed an assistive technology reevaluation because the current device "was not an effective device for her at all," and in particular, the "Pro Talker" device was too large for the student to use effectively, and the student could not "easily carry it around" (Tr. pp. 217-21).

Based upon the foregoing, the evidence in the hearing record supports a finding that the May 2011 IEP assistive technology recommendations—similar to those the student successfully used during the 2010-11 school year—were appropriate to meet her needs. Accordingly, the failure to conduct an assistive technology reevaluation of the student did not result in a failure to offer the student a FAPE, especially considering her previous success with the recommended technology (H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 67 [2d Cir. 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *20 [E.D.N.Y. Aug. 19, 2013]). Furthermore, even if the May 2011 CSE's failure to conduct an assistive technology evaluation of the student constituted a procedural violation, the hearing record does not contain sufficient evidence to support a finding that such procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

2. ABA Program

Turning to the parent's assertions that the 12:1+4 special class placement was not appropriate because the May 2011 CSE failed to recommend ABA in the May 2011 IEP, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-045; see also K.L. v New York City Dep't of Educ., 2012 WL 4017822 at *12 [S.D.N.Y. Aug. 23, 2012], affd, 2013 WL 3814669 [2d Cir. July 24, 2013]).

A review of the entire hearing record indicates that while the student received ABA through a home-based provider, the student did not receive any ABA as part of her school-based program during the 2010-11 school year and the evidence does not indicate that the May 2011 CSE was otherwise required to recommend ABA in the May 2011 IEP in order for the student to receive a FAPE (see Dist. Exs. 1-6; see also Tr. pp. 12-56; Parent Ex. O at pp. 1-5).[7] Here, although the hearing record does not clearly establish which evaluative information the May 2011 CSE reviewed or considered in the development of the May 2011 IEP, the IEP itself reflects student descriptions, evaluative information, and assessments of the student's progress that were consistent with an April 2008 psychoeducational evaluation, an April 2008 social history, and the April 2011 and May 2011 progress reports submitted by the student's school-based related services' providers (see Tr. pp. 51-52; compare Dist. Ex. 1 at pp. 1-20, with Dist. Ex. 2 at pp. 1-3, and Dist. Ex. 3 at pp.1-4, and Dist. Ex. 4 at pp. 1-3, and Dist. Ex. 5 at pp.1-4, and Dist. Ex. 6 at pp. 1-3).

Moreover, the evaluative information reflected in the May 2011 IEP also demonstrated the student's progress during the 2010-11 school year. For example, the May 2011 IEP indicated that the student's attention span "greatly increased" and that she could "complete an assignment with prompts, cues and redirection" (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 1, and Dist. Ex. 4 at p. 2). In addition, the April 2011 OT progress report cited "dramatic improvements" in the student's behavior, while both the April 2011 speech-language therapy progress report and the May 2011 PT progress report noted progress in the student's ability to transition from the classroom to the therapy room and from one activity to another without oppositional behavior (see Dist. Exs. 2 at p. 1; 3 at p. 2; 4 at p. 2). The May 2011 IEP also noted that, academically, the student "greatly increased her knowledge of vocabulary words" and used "more one syllable words to express herself when prompted" (Dist. Ex. 1 at pp. 1-2). The May 2011 IEP further noted that the student recognized numbers one through five; counted to 12 when prompted; traced lines, shapes, and small words; knew shapes and colors; recognized her name; and knew the symbols for daily weather and the days of the week (id.). In an April 2011 OT progress report, the therapist indicated that the student made "great progress" toward annual goals, including dressing skills (manipulating

[7] The evidence in the hearing record does not clearly indicate whether the May 2011 annual review report prepared by the student's home-based ABA provider was available to the May 2011 CSE or whether the May 2011 CSE considered this report (see Tr. pp. 1-266; Dist. Exs. 1-7; Parent Exs. A-V).

buttons, zippers and snaps), writing skills (coloring and tracing), and recognizing letters and vocalizing many of the letter sounds (see Dist. Ex. 2 at pp. 1-3).

According to the May 2011 PT progress report, the student "mastered her motor planning goal" and no longer bumped into "people or obstacles in the classroom and the hallway," and noted improvement in her "gross motor skills" (Dist. Ex. 3 at p. 2). Regarding self-help skills, the student could independently remove her backpack and coat and place the contents of her backpack on her desk; she could feed herself, including selecting her food, carrying her tray, using utensils, and cleaning up; and the student was conditionally toilet trained on a three hour schedule and could independently complete some parts of her toileting routine though she still needed prompts (id. at pp. 1-2).

Furthermore, the April 2011 speech-language progress report indicated the student's progress towards her annual goals, including "good progress" on combining two to three picture symbols on her device to request and label during therapy and in the classroom (Dist. Ex. 4 at p. 2). In addition, the student "increasingly us[ed] verbalizations" in conjunction with the device, and could initiate requests using the device, creating three to four word utterances during highly motivating activities such as art and mealtime (id.). At that time, the student worked on vocally labeling verbs during activities when provided with a visual, she could state the verb in response to a "what" question when provided with visual choices, she could produce a verbal approximation after signing the word when prompted, and she could identify emotions by pointing to the correct picture (id. at pp. 2-3).

In addition, the May 2011 CSE documented additional strategies, supports, and environmental modifications throughout the May 2011 IEP to enable the student to receive educational benefits academically, socially, and behaviorally (see generally Dist. Ex. 1 at pp. 1-20). For example, the May 2011 IEP included the use of positive reinforcement; prompts and cues to attend to task; assistance in completing all her assignments; verbal prompts, cues, modeling, and repetition drills to help her learn; and the use of a multisensory approach to education, including music, tapes, CDs, choral repetition drills, singing, rhymes, and movement activities (id. at pp. 1-2). The May 2011 IEP further indicated that the student "must be redirected and prompted to stop" when displaying self-stimulatory behaviors, and recommended a combination of "small group instruction, positive behavior supports and assistance from classroom paraprofessionals" to help the student become a more independent learner (id. at p. 2). Moreover the May 2011 IEP noted that the student did well with both individual and small group instruction (id. at p. 1).

At the impartial hearing, the district representative testified that overall the student made progress in the 12:1+4 special class placement (see Tr. pp. 33-34). The district representative testified that when the student first entered the program, she engaged in tantrums; she "threw furniture," "objects," and "food;" and she hid in the closet or sat under a desk (Tr. pp. 33-34). However, by the end of the 2010-11 school year, the student was "totally independent at mealtime," she responded to the "behavior plan" and reduced oppositional behaviors, such as "throwing herself on the floor and refusing to move;" and she advanced her communication and academic skills, such as writing and counting (id.). At the impartial hearing, the parent testified that the student learned "most effectively" through the home-based ABA services, and described ABA as the "only modality" proven effective for the student (Tr. pp. 217-19, 222-25). However, the parent also acknowledged that since entering the 12:1+:4 special class placement, the student's behaviors improved, she "progressed forward," and the student's tantrums were reduced (Tr. pp. 245-48).

Based upon the foregoing, the evidence in the hearing record supports a finding that the May 2011 CSE was not required to recommend ABA in order to offer the student a FAPE for the 2011-12 school year (see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]).

3. Sign Language

Finally, the parent argues that the 12:1+4 special class placement was not appropriate because it could not meet the student's sign language needs. Initially, the parent asserted in the due process complaint notice that the May 2011 CSE did not provide the student with a 1:1 paraprofessional "familiar with signing as a form of communication; " on appeal, the parent asserts that the 12:1+4 special class placement did not—and would not—provide the student with sign language instruction. Regardless of the theory underlying the parent's assertions, the evidence in the hearing record does not support a finding that the student required either a 1:1 paraprofessional familiar with sign language or sign language instruction in order to receive educational benefits.

At the time of the May 2011 CSE meeting, the evidence in the hearing record established that the student—who functioned at a prekindergarten level academically—communicated through a variety of means, including gestures, sounds, word approximations, sign language, picture symbols and symbol sentence strips, and a VOCD (see Tr. pp. 23-24, 218; Dist. Exs. 1 at p. 1; 4 at pp. 1-3). In addition, the district representative testified that while the student's 12:1+4 special class placement during the 2010-11 school year used basic sign language with all of the students in the classroom—and that the 12:1+4 special class placement used the same "basic, individual signs" the student knew and used—they incorporated some of the student's own particular sign language developed at home into the classroom if the signs were appropriate (Tr. at pp. 47-48, 53-54). Most importantly, the district representative testified the 12:1+4 special class placement used sign language related to the "things that would be important to [the student], to get through the day, and to be able to communicate to us" (Tr. at pp. 53-54). In addition, the hearing record indicates that sign language was not such an integral part of the student's needs, given her improved ability to vocalize and increased verbalizations, as well as her improved behaviors (see Tr. pp. 23-27, 47-48, 53-54, 229-30; Dist. Exs. 2 at p. 1; 3 at p. 2; 4 at pp. 2-3). Further, none of the student's related services providers indicated in their respective April 2011 or May 2011 progress reports that they required a 1:1 paraprofessional to aid in communicating with the student or in understanding the student's communications, and the May 2011 IEP indicated that the student's educational needs could be met with individual and small group instruction, as well as the assistance of the classroom paraprofessionals in the 12:1+4 special class placement (see Dist. Exs. 1 at pp. 1-2; 2 at pp. 1-3; 3 at pp. 1-4; 4 at pp. 1-3). Moreover, there is no evidence in the hearing record to suggest that the level of sign language offered in the 12:1+4 special class placement would not have enabled the student to receive educational benefits. In light of the foregoing, the evidence in the hearing record does not support a finding that the May 2011 CSE's failure to recommend a 1:1 paraprofessional familiar with sign language or formal sign language instruction resulted in the district's failure to offer the student a FAPE for the 2011-12 school year.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issues as to whether

Imagine was an appropriate unilateral placement for the student or whether equitable considerations supported the parent's request for relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134). [8]

THE APPEAL IS DISMISSED.

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

CAROL H. HAUGE
STATE REVIEW OFFICER

[8] Rather than being a question of standing in the traditional sense, the IHO's determination instead goes to the question of what forms of equitable relief would be available to the parent in the event that the district failed to offer the student a FAPE. Under the IDEA and New York State law, a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the student, or the provision of a free appropriate public education to such student" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). In this case, there is no dispute that petitioner is the parent of the student within the meaning of the IDEA (see 20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; see also 8 NYCRR 200.1[ii]). Accordingly, the parent was permitted by the IDEA to file a due process complaint notice asserting that the district failed to offer the student a FAPE on the basis that the May 2011 CSE did not comply with the procedural requirements set forth in the IDEA, or that the May 2011 IEP was substantively inadequate and not reasonably calculated to enable the student to receive appropriate educational benefits (see Winkelman, 550 U.S. at 531, 533; 34 CFR 300.507[a], 8 NYCRR 200.5[i]). To the extent that the IHO found otherwise, he erred in relying on concepts of standing not applicable to due process proceedings under the IDEA. Moreover, the only courts in New York to have addressed the question have found that the denial of a FAPE constitutes an injury in fact sufficient to confer standing on a parent to bring a claim in federal court under the IDEA (M.F. v. New York City Bd. of Educ., 2013 WL 2435081, at *13 n.9 [S.D.N.Y. June 4, 2013]; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, at *6 [S.D.N.Y. Mar. 14, 2011], rev'd on other grounds by 2014 WL 3377162 [2d Cir. July 11, 2014]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 359-360 [S.D.N.Y. 2009]; see also E.M. v. New York City Dep't of Educ., 2014 WL 3377162, at *10-*16 [2d Cir. July 11, 2014]; Heldman v. Sobol, 962 F.2d 148, 154-56 [2d Cir. 1992]; M.M. v. New York City Dep't of Educ., 2014 WL 2757042, at *8 [S.D.N.Y. June 17, 2014]; but see Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007], quoting Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]). The other relevant factor in determining whether the parents have standing is whether the relief requested is likely to redress the injury (see S.W., 646 F. Supp. 2d at 356). Another element of standing doctrine, that the injury be traceable to the district's conduct, is not at issue here as it is undisputable that the district has the obligation to offer the student a FAPE (see 20 U.S.C. § 1412[a][1][A]; 34 CFR 300.101[a]). Consistent with the court's determination in S.W., an award of tuition would redress the denial of a FAPE in circumstances where a nonpublic school has provided an appropriate education to the student and the parents have not made any payments to the private school (see S.W., 646 F. Supp. 2d at 359; see also M.F., 2013 WL 2435081, at *13 n.9). A request for tuition reimbursement would also redress the denial of a FAPE in circumstances where a nonpublic school has provided an appropriate education to the student and the parents have made or will make payments to the private school (see Burlington, 471 US at 369-370). The inquiry regarding standing ends there, without needing to determine whether the relief requested is in fact available (S.W., 646 F. Supp. 2d at 359-60). A party who has satisfied the foregoing conditions has standing to bring a claim under the IDEA even if the relief requested is ultimately unavailable to that party (see E.M., 2014 WL 3377162, at *16; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *7-*8 [S.D.N.Y. Mar. 17, 2010]). Accordingly, under the circumstances of this case the IHO erred in determining that the parent lacked standing to pursue a claim for public funding for the costs of the student's tuition at Imagine for the 2011-12 school year.