The University of the State of New York

The State Education Department
State Review Officer
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No. 13-114

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Neal Howard Rosenberg, attorneys for petitioner, Karen Newman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, 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 to be reimbursed for her son's tuition costs at a nonpublic school (NPS) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination insofar as it found that the IEP did not accurately describe the student and that equitable considerations did not affect the parent's sought relief. The appeal must be dismissed. The cross-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

I was appointed to decide this appeal on October 29, 2013. I have conducted an impartial review of the hearing record and offer the following independent decision (see 20 U.S.C. § 1415[g]; Educ. Law 4404(2); 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

On May 23, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Parent Ex. B at pp. 1, 7).[1] Finding the student eligible for special education as a student with an other health-impairment, the May 2012 CSE recommended placement in a general education classroom with integrated co-teaching (ICT) services for math,

[1] At the time of the May 2012 CSE meeting, the student attended the NPS (Tr. p. 34; see Parent Ex. B at p. 9).

English language arts, social studies, and sciences (id. at pp. 1, 4).[2] In addition, the May 2012 CSE recommended one weekly session of the related service of counseling (id. at pp. 4-5). The CSE also recommended supports for the student's management needs (i.e. prompts, redirection, and structure), nine annual goals, and testing accommodations (i.e. double time and separate location/room for all standardized tests) (id. at pp. 1, 2-4, 5).

By final notice of recommendation (FNR) dated June 29, 2012, the district summarized the ICT and counseling services recommended in the May 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 2).

In a letter dated July 11, 2012, the parent acknowledged receipt of the FNR and noted that she was "deeply concerned" about whether the assigned public school site would be appropriate for the student (Parent Ex. L at p. 1).[3] Specifically, the parent expressed concerns as to the size of the assigned public school and averred that the student required a "small class placement in order to make academic and social/emotional gains" (id.). The parent also complained that, contrary to an offer made at the May 2012 CSE meeting, there were "no classes with a third teacher at the [ ] school" (id.). The parent stated that she would visit the assigned public school site in September and further indicated that, if she deemed it inappropriate, the student would continue at the NPS (id.). The parent also requested copies of the May 2012 IEP and the student's "testing results" (id.).

In a letter dated September 14, 2012, the parent rejected the May 2012 IEP and indicated that she would unilaterally place the student at the NPS for the 2012-13 school year (Parent Ex. M at p. 1).[4] With regard to the recommendations made at the May 2012 CSE meeting, the parent averred that an ICT classroom was too large for the student, who needed "a great deal of individualized instruction" and "a small class" (id.). Further, the parent argued that the district would have been unable to implement the May 2012 IEP because there was "no evidence" that the student's classroom would have included a second classroom teacher (id.). Further, the parent contended that the May 2012 CSE offered the student a classroom with a third teacher and the assigned public school did not offer any classrooms with three teachers (id.). The parent also relayed the details of a visit to the assigned public school site, concluding that the school was too large for the student (id.). Therefore, the parent rejected the May 2012 IEP and indicated that she would continue the student's enrollment at the NPS and seek the costs of this placement from the district (id.).[5]

[2] The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[3] The hearing record indicates that this letter was submitted by facsimile transmission on July 14, 2013 (see Parent Ex. L at p. 2).

[4] The hearing record indicates that this letter was submitted by facsimile transmission on September 20, 2013 (see Parent Ex. M at p. 2).

[5] Additionally, the parent reiterated her requests for a copy of the May 2012 IEP and the May 2012 psychoeducational evaluation (Parent Ex. M at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated September 21, 2012, the parent contended that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (IHO Ex. 1 at pp. 1-2).[6]

First, as to the process by which the May 2012 IEP was developed, the parent alleged that the May 2012 CSE was improperly composed (IHO Ex. 1 at p. 1). The parent also contended that the May 2012 CSE's failure to clarify that its offered placement containing three classroom teachers did not exist resulted in a denial of FAPE to the student (id.). Next, with regard to the May 2012 IEP, the parent alleged that its annual goals were "insufficient" (id.). Turning to the IEP's placement recommendation of a general education classroom with ICT services, the parent contended that it was inappropriate because the evaluative information considered by the May 2012 CSE did not support this recommendation (id.). Further, argued the parent, a general education classroom with ICT services was "too large" and could not provide the student with sufficient "individualized attention and instruction" or "adequate support" (id.).

The parent also argued that the assigned public school site could not implement the May 2012 IEP and was otherwise inappropriate for the student (IHO Ex. 1 at p. 1). Specifically, the parent contended that, based upon communications with an employee at the assigned public school, the assigned public school did not offer ICT classrooms with a "third teacher" (id.). Moreover, the parent alleged that the assigned public school site could not guarantee that each ICT classroom would have two teachers (id. at p. 2). The parent further posited that the assigned public school classroom and building were too large for the student (id.).

For remedies, the parent requested "[c]ontinuation of [the student's] placement" at the NPS, tuition reimbursement for the 2012-13 school year, and the "provision" of transportation and related services to the student (IHO Ex. 1 at p. 2). The parent also invoked her right to the student's pendency (stay-put) placement at the NPS (id.).

B. Impartial Hearing Officer Decision

An impartial hearing commenced on December 6, 2012 and concluded on April 9, 2013 after four days of proceedings (Tr. pp. 1-142). In a decision dated May 24, 2013, the IHO found that the district offered the student an appropriate program for the 2012-13 school year (IHO Decision at pp. 9-12, 15). In the alternative, the IHO found that the NPS was an inappropriate unilateral placement and that equitable considerations would not affect the parent's requested relief (id. at p. 14).[7]

[6] The due process complaint notice was not entered into the hearing record as an exhibit as required by State Regulations (8 NYCRR 200.5[j][5][vi][a]). For purposes of clarity, the due process complaint notice shall be referred to as "IHO Ex. 1."

[7] The IHO also issued an order on December 28, 2012 indicating that a prior unappealed IHO decision constituted the student's pendency placement (Interim IHO Decision at p. 3).

First, with regard to the composition of the May 2012 CSE, the IHO found that the CSE was composed of all members required by the IDEA and the Education Law (IHO Decision at p. 9; see id. at pp. 8-9).

Next, the IHO identified and summarized the evaluative information considered by the May 2012 CSE (IHO Decision at pp. 9-11). After reviewing this evidence, the IHO concluded that although the IEP's "description" of the student "d[id] not comport" with the evaluative information before the May 2012 CSE, the IEP's placement recommendation was nonetheless "consistent" with this evaluative information (id. at p. 11). The IHO also found that the evaluative information considered by the May 2012 CSE indicated that the student could "receive an educational benefit from" a general education classroom with ICT services (id.). The IHO further found that the district's offered placement constituted the least restrictive environment (LRE) for the student (id. at p. 14). Therefore, the IHO concluded that the May 2012 IEP offered the student a FAPE (id. at pp. 11-12).

The IHO also issued alternative findings as to the appropriateness of the unilateral placement and equitable considerations (see IHO Decision at pp. 12-14). First, with regard to the unilateral placement, the IHO noted that the student's classes at the NPS bore a 2:1 classroom ratio which, according to the IHO, was "overly restrictive" for the student (id. at pp. 12, 14). The IHO further found that a 2:1 classroom ratio was inappropriate given the student's "cognitive levels and academic and social progress to date" (id.). Next, the IHO found that no equitable considerations affected the parent's sought relief and that, were it an appropriate inquiry, he would not reduce or deny an award of tuition reimbursement on this basis (id.). Accordingly, the IHO denied the parent's sought relief (id. at p. 15).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year and that the NPS was an inappropriate unilateral placement. The parent raises several arguments for the first time on appeal; namely, that: (1) the May 2012 CSE "lacked adequate justification" to recommend placement in a general education classroom with ICT services; (2) the CSE did not conduct a vocational assessment of the student as required by State regulations; (3) the May 2012 IEP did not accurately report the student's present levels of academic performance; and (4) the IEP did not offer sufficient "social supports."

The parent additionally argues that the student was entitled to attend the NPS at public expense pursuant to a prior unappealed IHO decision. Relatedly, based upon this prior IHO decision, the parent contends that she was not obligated to demonstrate the appropriateness of the unilateral placement and that equitable considerations were not relevant to this proceeding.

The parent also argues that the May 2012 CSE's failure to clarify that an offered placement containing three classroom teachers did not exist resulted in a denial of FAPE to the student. With regard to the May 2012 IEP, the parent argues that the IHO erred by considering evidence that was not before the May 2012 CSE to support his conclusion that the May 2012 IEP offered the student a FAPE. The parent further avers that the IHO erred by failing to address the parent's argument that the May 2012 IEP's goals contained inaccurate information and were impermissibly vague. The parent also contends that the assigned public school site was inappropriate because it was too

large, did not contain a classroom with three adults, and was otherwise unable to implement the May 2012 IEP.

The parent further contends that the NPS was an appropriate placement for the student, citing the school's low student to teacher ratio, supports for the student's management needs, social supports (including counseling), and vocational services. Additionally, the parent avers that the student made progress in this setting. The parent also submits that the IHO correctly found that no equitable considerations would affect the parent's sought relief. Accordingly, the parent requests that the IHO's decision be reversed and that the parent be awarded the costs of the student's tuition at the NPS for the 2012-13 school year.

The district answers, denying the parent's material assertions and arguing that the IHO correctly concluded that the district offered the student a FAPE for the 2012-13 school year. As a preliminary matter, the district argues that the parent may not raise the issue of pendency on appeal because the IHO granted her pendency request and, as such, she was not "aggrieved" by this determination. The district further contends that the May 2012 CSE possessed sufficient evaluative information about the student and used this information to generate an IEP reasonably calculated to provide educational benefits. The district further posits that its offered placement constituted the LRE for the student, and that the IHO's unappealed finding on this issue is final and binding upon the parties. The district also contends that the May 2012 IEP's goals were appropriate, measurable, and developed in conjunction with the student's teacher at the NPS.

With respect to the parent's contentions regarding a third classroom teacher, the district avers that the parent's testimony was "not credible" and that this issue pertains to the assigned public school site's ability to implement the IEP which is an inappropriate inquiry under the facts of this case. The district also argues that the IHO correctly determined that the NPS was an inappropriate unilateral placement because its small classroom and school size were "too restrictive" and did not permit the student to develop social skills, an area of need for the student.

The district also interposes a cross-appeal challenging the IHO's findings that the May 2012 IEP did not accurately reflect the student's present levels of academic performance and that equitable considerations did not affect the parent's requested relief of tuition reimbursement. As to the latter contention, the district argues that the parent did not intend to enroll the student in a public school as evidenced by her prior execution of a contract and remittance of a deposit to the NPS. Moreover, given the student's 2:1 ratio at the NPS, the district argues that the parent would not have seriously considered a general education classroom with ICT services.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

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

First, it is necessary to determine the issues which are properly before me. The parent raises several arguments on appeal that cannot be reasonably read in her due process complaint notice; specifically, that: (1) the CSE "lacked adequate justification" to recommend placement in a general education classroom with ICT services; (2) the district did not conduct a vocational assessment of the student as required by State regulations; (3) the May 2012 IEP did not accurately

report the student's present levels of academic performance; and (4) the IEP did not offer sufficient "social supports."[8] The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (20 U.S.C. § 1415[b][6], [7]; 34 CFR 300.507; 300.508; 8 NYCRR 200.5[i], [j]). 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., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 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]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]). Here, the parent did not seek to amend her due process complaint notice and the due process complaint notice cannot be reasonably read to include these claims. Accordingly, they are outside of my jurisdiction and cannot be considered.

Similarly, the parent's due process complaint notice cannot be reasonably read to include the issue raised in the first instance by the IHO regarding the accuracy of the student's present levels of performance (see IHO Decision at p. 11). 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 her due process complaint notice. 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 Child 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]). Therefore, the IHO's finding regarding the alleged inaccuracy of the student's present levels of performance is hereby annulled. Consequently, the district's cross-appeal pertaining to this finding is dismissed.[9]

2. Pendency; Applicable Burden of Proof

On appeal, the parent makes the novel argument that, because a prior IHO decision found that the NPS was an appropriate unilateral placement for the 2011-12 school year, the parent was

[8] The parent's allegation pertaining to the May 2012 CSE's alleged offer of a classroom with three teachers, however, was raised in her due process complaint notice and is properly presented on appeal (see IHO Ex. 1 at p. 1).

[9] Additionally, the district did not raise any of the claims addressed in this section in the first instance at the impartial hearing "in support of an affirmative, substantive argument" (B.M. v. New York City Dep't of Educ., 569 Fed.Appx. 57, 59 [2d Cir. Jun. 18, 2014]; see M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]).

entitled to attend the NPS for the 2012-13 school year.[10] Moreover, the parent contends that this procedural posture relieved her of her burden to demonstrate that the NPS was an appropriate unilateral placement in this proceeding (see Parent Ex. A).[11] While the parent is correct that the student was entitled to remain in his then-current educational placement during the pendency of these proceedings (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m])—and, further, that an unappealed IHO decision may constitute the basis of a student's pendency placement (Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008]; Letter to Hampden, 49 IDELR 197 [OSEP 2007])—the parent's specific argument is without merit. An administrative determination favorable to a parent does not affect the parent's burden in subsequent administrative proceedings. While the parent cites an SRO decision in support of her argument, this decision is inapposite as it did not concern a claim for tuition reimbursement (Application of a Student With a Disability, Appeal No. 11-053 [overturning IHO's application of a Burlington/Carter tuition reimbursement analysis because "[t]he parent did not unilaterally place the student in a private school or seek reimbursement for her expenses related to services that she unilaterally obtained without the consent of the district"]). Therefore, I find that the IHO appropriately determined the student's then-current educational placement (see Interim IHO Decision at pp. 2-3) and applied the correct burden of proof in this proceeding (see Educ. Law § 4404[1][c]).

B. Parent Participation

Next, I address the parent's argument that the May 2012 CSE's representation that the student's placement included a third classroom teacher resulted in a denial of FAPE to the student. As the parent indicates, the IHO failed to address this claim in his decision. Upon review of the hearing record, I find that the district's actions in this respect constituted a procedural violation of the IDEA, but not one that "significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of [FAPE to the student]" (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

At the impartial hearing, the parent testified that the district representative who served on the May 2012 CSE indicated that the placement would include a third classroom teacher (Tr. pp. 120-21; Parent Ex. B at p. 9). The parent further testified that, when she left the May 2012 CSE meeting, she was offered a "two-team teaching [placement] with a third teacher" (Tr. p. 121). After she received the June 2012 FNR, the parent testified that she spoke with a district employee at the assigned public school site (Tr. pp. 122-23). This employee told her that she "didn't know of any program [within the assigned public school] with a third teacher" (Tr. p. 123; see Tr. pp. 122-23). As more fully detailed above, the parent sought clarification on this issue from the district in letters dated July 11, 2012 and September 14, 2012 (Parent Exs. L at p. 1; M at p. 1).

On appeal, the district does not refute these allegations but argues that the parent's testimony was "not credible." I reject the district's argument; a review of the hearing record reveals no information suggesting that the parent's reliance was misplaced.[12] The district also argues that

[10] The parent's argument is more nuanced than the district's characterization suggests; accordingly, it is properly presented on appeal.

[11] The parent further argues that these facts render a weighing of equitable considerations unnecessary.

[12] To this point, State regulations would not preclude additional teaching staff within an ICT classroom (8 NYCRR

the May 2012 IEP contains no mention of a third classroom teacher. While this is true, the evidence in the hearing record reveals that, despite two written requests, the district failed to convey the May 2012 IEP to the parent until at least September 14, 2012 (Parent Ex. M at p. 1). Accordingly, the district committed a procedural violation of the IDEA by failing to address the parent's concerns.

Nevertheless, I conclude that this procedural violation did not rise to the level of a denial of FAPE to the student. The parent's correspondence to the district reveals that the parent's concern with the district's recommended placement was its size—i.e. its number of students—and not the number of adults in the classroom (Parent Exs. L at p. 1; M at p. 1). In her July 11, 2012 letter, the parent objected to the size of the student body at the assigned public school and indicated that the student "require[d] a small class placement in order to make academic and social/emotional gains" (Parent Ex. L at p. 1). Similarly, in her September 14, 2012 letter, the parent reiterated her concern that the assigned public school site was "far too large" for the student (Parent Ex. M at p. 1). The parent also objected to the size of an observed ICT classroom, noting that it was too "large" for the student who required a "small, nurturing classroom and school" (id.). Thus, a review of the evidence in the hearing record reveals that the provision of a third classroom teacher would not have assuaged the parent's specific concerns with the May 2012 IEP's placement recommendation (see Parent Exs. L; M).[13]

Accordingly, I cannot conclude that the district's procedural violation "significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of [FAPE to the student]" (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). By no means, however, do I endorse the district's actions.[14]

C. May 2012 IEP

1. Annual Goals

The parent next argues that the May 2012 IEP's annual goals were vague and "incorrect." Upon review of the hearing record, I find that the IEP's annual goals corresponded to the student's areas of need as identified in the IEP and were appropriate.

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

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200.6[g][2] ["[s]chool personnel assigned to each [ICT] class shall minimally include a special education teacher and a general education teacher"] [emphasis added]).

[13] Another factor relevant to my disposition is that, although she was not obligated to do so, the parent did not request a new CSE meeting to address this issue (compare Application of the Dep't of Educ., Appeal No. 12-128 [denial of FAPE where CSE failed to reconvene in response to parent's reasonable request]).

[14] While misunderstandings between parents and districts can and do occur, the district has offered no justification whatsoever for its failure to respond to the parent's July 2012 and September 2012 letters. The district's nonfeasance thus undermined the "cooperative process" between parents and districts that constitutes the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Bd. of Educ. v. Rowley, 458 U.S. 176, 205-06 [1982])

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]).

According to the district representative who served on the May 2012 CSE, he and the school psychologist developed the May 2012 IEP's annual goals at the CSE meeting (Tr. p. 36). A "school representative" from the NPS also participated in the development of the annual goals (Tr. p. 36).[15] The May 2012 IEP contains nine annual goals which addressed the student's attention/accuracy, reading, writing, and social/emotional needs (Parent Ex. B at pp. 2-4). Further, these annual goals provided criteria for measurement to determine if a goal had been achieved (i.e. 70, 75, or 80 percent accuracy), the method of how progress would be measured (i.e. teacher/provider, counselor, and class activities), and a schedule of when progress toward the goals would be measured (i.e. one time per quarter, one time per two months) (id.).

On appeal, the parent argues that the annual goals were impermissibly vague. In support of this contention, the parent points to the language of two annual goals. First, an annual goal designed to target the student's attention needs provided that the "[s]tudent w[ould] be able to complete a given task in the present of distraction (visual, auditory) with minimal redirection" (Parent Ex. B at p. 2). The parent complains that the contemplated "task" and the word "minimal" are not defined, thus rendering this goal inappropriate. Similarly, the parent complains that a counseling goal that provided, in part, that the student would "reduce tangential thoughts from 3 per session to 2 or less per session" was "unclear" (id. at p. 4). I disagree with the parent's contentions and find that the language of these goals is sufficient to reasonably guide an educator tasked with their implementation.

Additionally, the parent contends that the annual goals were inappropriate because one goal is silent as to its evaluative criterion. The parent is correct that the evaluative criterion for this annual goal was left blank and, further, that this was inappropriate (Parent Ex. B at p. 3). Nevertheless, overall, the hearing record supports a finding that the annual goals in the May 2012 IEP targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring his progress (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 360-61 [S.D.N.Y. 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

[15] It appears that the district representative meant the director of special education at the NPS, who attended the May 2012 CSE meeting (see Parent Ex. B at p. 9).

2. General Education Class Placement with ICT Services

The parent contends on appeal that a general education classroom with ICT services was not reasonably calculated to address the student's needs. Upon review of the evidence in the hearing record, I agree with the IHO that this placement was reasonably calculated to provide educational benefit to the student.

In order to assess the May 2012 CSE's placement recommendation, it is necessary to briefly review the May 2012 IEP's present levels of performance. With regard to the student's academic strengths and needs, the IEP noted the student's strength in reading comprehension and needs with respect to his word attack/decoding skills and multi-step problem solving (Parent Ex. B at p. 1). The IEP further noted that the student could "often be tangential when he communicate[d] or ma[de] comments" (id.). The IEP additionally observed that the student received a diagnosis of ADHD and was "often inattentive [and] unfocused" (id.). The IEP further indicated that the student "need[ed] significant supports to help him overcome these deficits" (id.). The May 2012 IEP also included standardized scores achieved following an administration of the Wechsler Abbreviated Scale of Intelligence (WASI) in May 2012: verbal IQ 113, performance IQ 111, and full scale IQ 114 (id.; see Dist. Ex. 3 at p. 2).

With regard to the student's social/emotional needs, the May 2012 IEP noted that the student "reportedly ha[d] difficulty initiating and maintaining social contacts with peers" and "often prefer[red] to be alone" (Parent Ex. B at p. 1). Additionally, the IEP indicated that the student "ha[d] a history of depression" (id.). As for the student's physical needs, the May 2012 IEP reported that the student evinced "graphomotor concerns" when he rushed to complete assignments, but that he could "produce [work with] better legibility if given structure and prompts to proceed slowly and more carefully" (id.).

After ascertaining the student's present levels of performance and developing annual goals to address his areas of need, the May 2012 CSE recommended placement in a general education setting with ICT services. ICT services are defined as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "[s]chool personnel assigned to each class shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]).

A review of the hearing record indicates that the May 2012 IEP's placement recommendation, in conjunction with the supports and services in the IEP, was appropriate to meet the student's needs. With respect to academics, the student's needs in the areas of writing, attention/accuracy, word attack/decoding skills, and multi-step problem solving as described in the IEP could be managed by a full-time regular education teacher and a special education teacher. Moreover, a general education curriculum was appropriate for the student given the scores he achieved during the administration of the WASI in May 2012 reflecting high-average cognitive abilities (see Dist. Ex. 3 at p. 2).

Further, the May 2012 IEP addressed the student's attention needs by prescribing supports for the student's management needs including "prompts, redirection[,] and structure to overcome attention deficits and tangential tendencies" (Parent Ex. B at p. 1). Additionally, the student would

have been supported by a full-time special education teacher who could provide such prompts and redirection (id. at pp. 1, 4). The May 2012 CSE also recommended individual counseling services to address the student's social/emotional needs (id. at pp. 4-5).

Moreover, the May 2012 CSE's recommendation represented the LRE for the student. The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]).

While the parent does not appeal the IHO's determination that a general education classroom with ICT services represented the LRE for the student, she avers that a general education classroom with ICT services was inappropriate because the student required a small class size in order to achieve educational benefit (Pet. at p. 7).[16] The District Court for the Southern District of New York rejected a similar argument in D.B. v. New York City Dep't of Educ. and I find the Court's analysis persuasive (2011 WL 4916435 [S.D.N.Y. 2011]). In D.B., the parent objected to a general education placement with ICT services because the "class size was too large" (2011 WL 4916435, at *10). The Court noted that the student "was at or near grade level in several subject areas" and that the CSE offered one weekly session of individual counseling to address the student's social/emotional needs (id. at *11). Based upon the student's academic levels and the extent to which the IEP otherwise addressed her needs, the Court found that the district's offered placement was appropriate and, further, constituted the LRE for the student (id. at *11, *12). Although the Court acknowledged that the size of the ICT class was "larger than [the parents'] preferred class size" it concluded that the ICT class "met the IDEA's objectives of fulfilling [the student's] educational needs while mainstreaming [her] in a [general] education class to the maximum extent possible" (id. at *11).

For similar reasons, I conclude that the May 2012 IEP's placement recommendation offered the student a FAPE in the LRE. Although an ICT classroom may not have been ideal for the student who, according to the May 2012 IEP, was "often inattentive [and] unfocused", I nevertheless conclude that the hearing record supports the IHO's determination (Parent Ex. B at p. 1).

[16] The IHO's determination that the district's offered placement constituted the LRE is, thus, final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

D. Assigned Public School Site

On appeal, the parent argues that the assigned public school site could not implement the May 2012 IEP and, further, was too large for the student. For the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I find these assertions without merit. The parent's claims regarding the size of the assigned public school and the availability of a three-teacher classroom within the building (see IHO Ex. 1 at pp. 1-2) turn on how the May 2012 IEP would or would not have been implemented. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. L; M), the parent cannot prevail on these speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice"]; K.L., 530 Fed. App'x at 87, 2013 WL 3814669; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

A review of the evidence in the hearing record supports the IHO's conclusion that the May 2012 IEP offered the student a FAPE in the LRE for the 2012-13 school year. Therefore, it is not necessary to reach the issue of whether the NPS was appropriate for the student or whether equitable considerations support the parent's claim (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *10 [S.D.N.Y. Aug. 21, 2014]; D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]).

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
November 14, 2014

DANIEL W. MORTON-BENTLEY
STATE REVIEW OFFICER