The University of the State of New York

The State Education Department
State Review Officer
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No. 13-185

APPLICATION OF A STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Center Moriches Union Free School District.

Appearances:
Thivierge & Rothberg, PC, attorneys for petitioners, Christine D. Thivierge, Esq., of counsel

Frazer & Feldman, LLP, attorneys for respondent, Jacob S. Feldman, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for relief directing respondent (the district) to reimburse them for their son's tuition costs at the Empowering Long Island's Journey Through Autism (ELIJA) School for the 2009-10 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

The present appeal was previously denied as moot by a prior State administrative decision in this case because the parents were entitled to all of the tuition reimbursement relief they were seeking by operation of law pursuant to the pendency provision of the IDEA (Application of a Student with a Disability, Appeal No. 12-011). The parents thereafter appealed the IHO decision in favor of the district and the SRO decision to federal court. The appeal was decided by the United States District Court, Eastern District of New York, by Memorandum & Order dated September 25, 2013. The Court remanded this matter for a determination on the merits, holding that the appeal was not moot.

The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). At the time of the impartial hearing, the student was attending the ELIJA School, where he has continuously attended since 2007 (see IHO Ex. 2 at p. 2). The ELIJA School has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On April 30, 2009, the CSE convened for the first of four CSE meeting conduct the student's annual review and to develop an IEP for the 2009-10 school year for the student. The progress report from the ELIJA School was reviewed, which reflects that the student was making progress on the goals that had been drafted by the ELIJA School for the student (Tr. pp. 108-09, 420, 2487-88). The parents' psychologist discussed his evaluation of the student, after observing the student at home and at the ELIJA School, and concluded that the student was making progress in a 1:1 setting at the ELIJA School, and that the student should be working on peer interaction in non-academic activities (Tr. pp. 110-12). The parents' psychologist presented a report, which indicated that the student "continues to require an intensive one-to-one individually designed education…" (Tr. p. 421, Dist. Ex. 3 at p. 4). A report by the parents' neurologist was considered at this CSE meeting, which noted that the student had autism along with anxiety, was taking medication for anxiety and was doing well in a 1:1 program (Tr. p. 422). The district's school psychologist read a psychoeducational evaluation from the Cody Center, which recommended a 1:1 ABA program for the student (Tr. pp. 117-18, Dist. Ex. 4). The meeting concluded with an understanding that updated evaluations for the student in speech, occupational therapy and physical therapy were required and that the CSE would reconvene after the new evaluations were received (Tr. pp. 119-20, 2490). The parent testified that the CSE meeting lasted approximately three hours and a substantial amount of time was spent discussing the student's present levels of performance and the progress report from the ELIJA School (Tr. pp. 2487-88).

The CSE reconvened on May 14, 2009. After review of the updated evaluations for the student, speech, occupational therapy and physical therapy services were recommended for the student (Tr. pp. 2501-02, Dist. Exs. 5-7). The district's representatives who had conducted the evaluations at the district's public school noted that the student was able to cooperate with the evaluations and entered the building and tolerated the evaluations without difficult behavior (Tr. pp. 124-30). It was discussed that goals would be prepared for those services (Tr. pp. 2502-03). The student's needs were discussed in the context of the student's evaluations and observations (Tr. pp. 2496, 3206). At the end of the meeting, there was discussion of a phone conference to discuss the student's goals prior to the next CSE meeting (Tr. pp. 2503-04).

A teleconference was held on June 9, 2009 with representatives of the district and the ELIJA School to further discuss the student's needs and goals prior to the CSE reconvening (Tr. p. 135). The testimony conflicted on whether the parent was either invited and did not attend, or was not invited to attend the teleconference (Tr. pp. 135, 2505). In any event, the parent indicated that her participation in the IEP goals was not ultimately affected by not attending the teleconference and she was able to review all the same material with the CSE prior to the IEP being finalized, stating "I wasn't that upset about it. I had access to the goals that they had discussed. . . . I didn't think it was that big of a deal, quite honestly. I still got to participate in getting the information together. I would have liked to have been a part of the meeting, but I was okay" (Tr. pp. 2507-

08). The draft goals were sent to the parent prior to the next CSE meeting (Tr. pp. 150, 2507, Dist. Ex. 9).

The CSE reconvened on June 19, 2009. The student's draft social, physical, academic and management needs (SPAMs) and goals were reviewed in detail and line by line at this meeting (Tr. pp. 157-58, 2509). The parent testified that she was able to discuss her concerns at the meeting, which included that there were too many related services goals, and that some of the goals would be too hard for the student (Tr. p. 2511). The parent indicated that she did not feel should have emphasis on his related services in light of the fact that the student had not been provided with related services for 2007 and 2008, and she indicated that she did not she had not raised the matter with ELIJA School either because she believed his needs were being addressed (Tr. pp. 2512-13). After hearing the parent's concerns, the CSE determined which SPAMs and goals were appropriate for the student (Tr. p. 158). The parent acknowledged that approximately 15 goals were deleted due to her concerns (Tr. p. 2522). The meeting lasted approximately three hours and ended with an agreement that the goals and objectives would be entered into the district's student management computer database by ELIJA School and that the CSE would reconvene thereafter (Tr. pp. 160, 438, 2523).

The CSE reconvened on July 21, 2009 (Tr. pp. 278, 1181, 3010). Certain changes had to be made to the SPAMs and goals inputted by the ELIJA School because the SPAMs did not break down the student's abilities and needs, and the goals did not set benchmarks for the student in accordance with the district's quarterly reporting system (Tr. p. 164). To allow the parent and the ELIJA School representative time to review the changes, the district's behavioral consultant sat with them separately at the beginning of the meeting to allow time for detailed review and discussion (Tr. p. 166). The parent testified that although she felt the goals were appropriate, she still felt that there were too many related service goals (Tr. pp. 2526, 3004-05). The CSE reached consensus regarding the SPAMs and goals and objectives and then discussed the student's program and placement (Tr. pp. 170-74).

The CSE recommended a 1:1:1 special class in the district for the student, along with related services of speech-language therapy and speech-language therapy direct consult services; occupational therapy (OT) and OT direct consult services; physical therapy; and parent counseling and training (see Dist. Exs. 17 at p. 29; 18 at pp. 1-2; see also Dist. Exs. 2-3; 5-14). In addition, the CSE recommended the services of an autism consultant, testing accommodations, extended school year services, the use of an augmentative communication device (assistive technology), special transportation, and supports for school personnel such as an autism consultant, a behavior management consultant, and a speech-language therapy consultation (see Dist. Exs. 17 at pp. 29-30; 18 at pp. 1-2). The district also developed a transition plan (see Dist. Exs. 16, 20).

By letter dated July 28, 2009, the parents rejected the public school program for the 2009-10 school year, and notified the district of their intention to unilaterally placed the student at the ELIJA School for the 2009-10 school year and to seek reimbursement for the cost of the student's tuition and transportation related to the placement (Parent Ex. U at p. 1). In a letter dated August 10, 2009, the parents admitted receiving the student's 2009-10 IEP on July 29, 2009 (see Parent Ex. C at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated August 19, 2009, parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year based upon procedural and substantive violations (see IHO Ex. 2 at pp. 1, 4-6). The parents indicated that throughout the proceedings, the student must remain in his pendency placement, which was described as the following: placement at the ELIJA school (including 30 hours per week of 1:1 applied behavior analysis (ABA) instruction in the classroom), ABA supervision, parent training, transportation, 1:1 speech-language therapy, 1:1 physical therapy (PT), and a 12-month program (id. at 1). The parents asserted that the district's program was overly restrictive, the district failed to consider the full continuum of services available for the student, the district's staff were not trained to use the student's augmentative communication device, the district's program was "unfinished and untested," the district failed to apply to other placements that offered 1:1 ABA, the district's program did not include other students, the district's program did not include a qualified behavior consultant, and the 2009-10 IEP contained too many related services goals and objectives (id. at pp. 4-6). As relief, the parents requested the student's continued placement at the ELIJA School (including 30 hours per week of 1:1 ABA instruction), ABA supervision and consultation, parent training and counseling, and transportation, and further, that the district pay the costs of the student's tuition at the ELIJA School for the 2009-10 school year (id. at p. 6).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on November 30, 2009, and after 28 nonconsecutive days, concluded on May 24, 2011 (see IHO Decision at pp. 1-4). Following the last day of testimony, the hearing record contains six extensions to the compliance date in this matter and the parties submitted post-hearing briefs to the IHO on September 6, 2011. In a 158-page decision, dated December 5, 2011, the IHO concluded that the district offered the student a FAPE in the least restrictive environment (LRE) (id. at pp. 145-57). The IHO found that the district considered a number of evaluations and observations of the student, as well as progress reports from the ELIJA School, in developing the student's 2009-10 IEP (id. 145-46). She also found that the district - relying upon this information - accurately identified the student's needs in the IEP, drafted the student's present levels of performance in the IEP, and drafted annual goals and short-term objectives to address the student's needs, and that CSE did so with the input of the parents, district staff, and the ELIJA School representatives (id. at 146-47). In addition, the IHO determined that the CSE recommended appropriate special education services to meet the student's needs, and that by definition, the district's recommended 1:1:1 special class was less restrictive than the student's unilateral placement at the ELIJA School, which was far from the student's local community and deprived him of access to his typically developing peers in a public school setting (id. at p. 148).

Next, the IHO approved of the district's plan to introduce typically developing peers into the student's classroom for social interactions and improving the student's social skills (id. at pp. 148-50). The IHO also determined that the autism consultation services, the speech-language therapy consultation services, the recommendation for staff training in crisis intervention procedures (behavior management consultation), and the recommendation for special transportation were appropriate to meet the student's special education needs (id. at pp. 150-51). In addition, she found that the district's transition plan, as drafted, was appropriate and that the

district's recommended program satisfied the criteria of the parents' own educational consultants (id. at pp. 151-55). Finally, the IHO concluded that the related services recommendations were also appropriate to meet the student's special education needs, and that the push-in direct consult services in OT and speech-language therapy were consistent with the recommendations made by the parents' own educational consultants (id. at p. 155). Based upon her determination that the district offered the student a FAPE in the LRE, the IHO did not analyze the appropriateness of the parents' unilateral placement at the ELIJA School for the 2009-10 school year, and she dismissed the parents' due process complaint notice in its entirety (id. at pp. 156-57).

IV. Appeal for State-Level Review

The parents appeal, and assert that the IHO erred in concluding that the district offered the student a FAPE in the LRE for the 2009-10 school year. Specifically, the parents argue that the IHO's entire decision does not comport with the evidence in the hearing record, the district's recommended program for the 2009-10 school year must be evaluated based upon the content of the IEP and not upon testimony describing what the district could have offered, the IHO improperly determined that the district's recommended program would operate similarly to the ELIJA School's program with respect to the proposed rotation of instructors, the student would not have been appropriately placed in an 8:1+1 special class or alongside nondisabled peers, the IHO improperly concluded that the district's program was the student's LRE, and the IHO improperly placed the burden on the parents to establish whether they meaningfully participated in the development of the student's IEP. In addition, the parents also argue that the district failed to consider the full continuum of services for the student, the district committed numerous procedural violations - including the failure to present any annual goals until June 2009, without the parents' participation; the 2009-10 IEP failed to reference "all" of the student's evaluation results; the comments in the 2009-10 IEP were inaccurate; the parents were denied a meaningful opportunity to participate in the development of the student's IEP; the district failed to develop a behavioral intervention plan (BIP) for the student; the district's staff lacked training and experience to adjust the student's BIP; and the district's transition plan was not appropriate for the student. The parents contend that the ELIJA School was appropriate to meet the student's special education needs, and equitable considerations do not preclude an award of the student's tuition costs in this case.

In its answer, the district responds to the parents' allegations with admissions and denials. The district asserts that the IHO properly concluded that the district offered the student a FAPE in the LRE for the 2009-10 school year. The district further contends that the ELIJA School was not an appropriate placement, that the testimony provided by the parents' witnesses was not credible, and that the parents point to little evidence to justify reversing the IHO's decision. The district seeks to dismiss the parents' petition.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; 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., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. 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. CSE Process

I will first address the parents' procedural challenges relating to development of the student's 2009-10 IEP. I concur with the IHO's determination that the CSE meetings were appropriate and the CSE process and the 2009-10 IEP were procedurally appropriate and the parents were provided the ability to meaningfully participate in the process.

The IDEA sets forth procedural safeguards that include providing parents and opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

First, as noted above, four CSE meetings were held to develop the student's 2009-10 IEP and I concur with the IHO's determination that the parents were afforded a meaningful opportunity to participate in the development of the student's IEP (IHO Decision at pp. 145-57). The record supports a finding that the parents were afforded ample time and opportunity at multiple CSE meetings to discuss the student's progress, needs, and goals and the parents' concerns and comments (Tr. pp. 158, 433-34, 609-12, 1468, 1751). The parents were active participants in the process, along with their counsel, their outside professionals and the administrators at the ELIJA School (IHO Decision, pp. 145-57; Tr. pp. 434, 439-40, 610). It is undisputed that the CSE made changes to the student's goals based upon the parents' concerns and comments (Tr. p. 2522). The record and testimony relating to the discussion and review by the CSE in the lengthy CSE meetings, detailed above, support a determination that the parents had an opportunity to participate in the CSE meetings and did in fact meaningfully participate. While the parents may disagree with the recommendations of the CSE, this does not set forth an IDEA violation or a basis for the parents to argue that they were not afforded the ability to meaningfully participate in the IEP process (see P.K., supra at 383). Based upon the foregoing, I find that the evidence in the hearing record does not support a finding that the parents were denied the opportunity to meaningfully participate. The record supports a finding that the parents meaningfully participated and contributed in the development of the student's 2009-10 IEP during the multiple CSE meetings.

B. 2009-10 IEP

1. 1:1:1 Placement

I concur with the IHO that the program and placement recommended for the student in the 2009-10 IEP is appropriate based upon the student's needs (IHO Decision, at pp. 145-57). The parents argue that the 1:1:1 program was not appropriate and would cause regression for the student (Petition at pp. 4-6). However, the evidence at the hearing, including testimony of the parents' outside professionals, supported the 1:1:1 program recommendation by the CSE (Tr. pp. 236-37, 240, 277, 295, 471, 491-92, 780, 928, 2828). The IHO noted that the program was consistent with the recommendations of the providers who had taught and observed the student (IHO Decision, pp. 145-57; Tr. p. 2309). The student was presently in a 1:1 program at the ELIJA School at the time of the CSE meetings and the parents' outside professionals concurred with the 1:1 program for the student for academics (Dist. Ex. 3; Tr. pp. 2597, 2636). At the ELIJA School,

the student was receiving 1:1 instruction, but at times there were up to three other instructors and students also in the same room, all receiving 1:1 instruction, although the student did not appear to notice or acknowledge the others (Tr. pp. 1189-90, 2661, 2734, 2910).

The evidence supported a finding that the district staff were appropriately trained and certified (IHO Decision, p. 150-52). The district's teachers and teaching assistants that would have worked with the student were all certified special education teachers who had experience with autistic students and ABA (Tr. pp. 213, 410). Data would have been collected related to the student's goals similar to the data collection methods at the ELIJA School (Tr. pp. 328-29). The district's speech pathologist was trained in the use of a Dynavox, the augmentative communication device used by the student, and at the time of the hearing she was working with a district student with the same device (Tr. pp. 724, 962-63, 3342-43). I concur with the IHO's determination that the recommendation for staff consultation with the speech therapist for staff training with the Dynavox was appropriate (IHO Decision, p. 151).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). The CSE in this case developed goals and objectives to address the student's specific needs described in the 2009-10 IEP over the course of multiple CSE meetings (Tr. pp. 609-10). As noted by the IHO, the CSE had numerous evaluations and observations of the student, in addition to input from participants at the CSE and IEP meetings, which they used to determine the student's needs (IHO Decision at pp. 145-46; Dist. Exs. 2, 3, 4, 5, 6, 7, 17; Parent Exs. E, T). The CSE requested input from the ELIJA School in light of the fact that the student had been attending the ELIJA School since 2007, and another entity operated by the same founder since 2004 (IHO Decision, p. 146; Tr. pp. 608, 1096-97). The IHO noted the collaboration between the ELIJA School, the District representatives and the parent to draft the student's needs and goals (IHO Decision, pp. 146-47). Upon review of the hearing record, I find that the annual goals and objectives were consistent with the student's needs in all areas (Dist. Ex. 17).

The hearing record supports that the student required a high degree of individualized attention and that an intensive 1:1 ABA-based program was appropriate based upon his needs (IHO Decision, pp. 145-57, Dist. Exs. 3, 17; Tr. pp. 2309, 2828). The district's program was designed to address the student's academic, social and behavioral needs and was therefore reasonably calculated to enable him to receive educational benefits (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). The IHO noted in her decision that parents' witnesses at the hearing were not familiar with the District's recommended program or the District's teachers and their qualifications (IHO Decision, pp. 82, 101-03, 112-13; Tr. pp. 1759-60, 2028, 2782, 2821).

The parents also allege that the program was not described to the parents until the Resolution Session in September 2009 (Petition, at pp. 4-5). However, the parent acknowledged

that the program recommended was described to the parent at the CSE meeting in July (Tr. pp. 3212-21). The program was set forth in the IEP (Dist. Ex. 17). The IHO noted that the parent had testified on cross-examination to the detailed description of the program provided to her at the July CSE meeting (IHO Decision, at pp. 18-19). The IHO summarized the parent's testimony in this regard as follows:

> On cross-examination, the Parent confirmed that Ms. Morris presented the following information about the proposed program. She spoke about the fact that it would be 1:1 teaching program; that there would be a rotation of the teachers; that there would be other students entering his classroom and working in the classroom at the same time that the Student was in the classroom; that there would be paraprofessionals rotating into the classroom to work with the Student; that the program would include 30 hours of ABA work; that the program would be located [at an in-District elementary school]; that all of the instructors who would be working with the Student would be trained in ABA techniques; that the District would begin with bringing one student in to work in the Student's classroom; that there would be desensitization that would ultimately enable the Student to participate in group sessions such as the cafeteria and the therapy room; that playing recordings of the cafeteria noise would be one means of desensitization; that staff working with the Student would transition, and that all of the teachers who would be working with the student would be certified special education teachers; that when Ms. Morris was out on maternity leave, Mr. Darcy would be the behavior consultant who would work with the Student for one hour per day; that a transition plan should be introduced to enable the Student to be introduced into the building, to the classroom, into the staff; that the student would have reinforcers in the class that he also had at ELIJA; that they would continue to use data collection and a reinforcement system; that the Student would be able to work on dressing, putting clothes away, brushing teeth and other ADL skills; that the Student would be exposed to typical children in the building; that incidental teaching would be part of the program; that the Student would have less travel time and a presence in the community, in the least restrictive environment; that there were several classes of autistic students in the school; and that typical students in the building were trained and sensitized to the needs of autistic children (R. 3212-3221).

(IHO Decision, pp. 18-19).

The parent requested written information concerning the program at the conclusion of the July CSE meeting (Tr. p. 2939). Additional information, specifically the IEP, profile of students and a transition plan, was sent to her approximately one week later, as she acknowledged in a letter to the District on August 10, 2009 (Tr. p. 2940; Parent Ex. C). At the hearing, the parent testified that she had not received certain program information in writing until September at the resolution session (Tr. pp. 2936, 2940). I note that the IHO properly admitted District Exhibit 14 into evidence over objection of the parents' attorney. Relevant information relating to the resolution process are not confidential may be admissible in an impartial hearing (see Friendship Edison Public Charter Sch. Chamberlain Campus v. Smith, 561 F. Supp. 2d 74, 81 [D.D.C. 2008]; Application of the Bd. of Educ., Appeal No. 11-130; Application of a Child with a Disability, Appeal No. 06-109). Moreover, the document, even if first presented to the parent at a resolution

session, was not prepared for the resolution session (Tr. pp. 203-209). It also contained the information that had been addressed orally previously, as set forth above (IHO Decision, pp. 18-19).

The District discussed the future plan of attempting to integrate the student into the District's 8:1:1 class at the July 2009 CSE meeting (Tr. p. 569). This was not required to be referenced on the student's 2009-10 IEP because the program recommendation was a 1:1:1 class (Dist. Ex. 17; Tr. p. 614). The plan was to integrate specially selected students from the 8:1:1 class into the student's classroom (Tr. pp. 473, 687-88, 2914, Dist. Ex. 13). Once the student was acclimated to the students coming into his classroom, the District would evaluate the ability of the student to integrate into the District's 8:1:1 class. It was clear from the testimony that there was no proposal for the student to enter into a 8:1:1 class immediately and therefore no need for goals in that regard (Tr. p. 3282). The IHO noted that one of the parents' outside professionals concurred with the District's plan to introduce select students into the student's 1:1 class (IHO Decision, p. 149). Further, the criteria for an appropriate program as determined by the parents' experts were consistent with the district's offered program for the student, as the IHO noted (IHO Decision, p. 152-53; Tr. pp. 2880-81, Dist. Ex. 3). It was also noted by the district that a 1:1 program is not unusual and the student's program was not considered a "test program" as the parents have asserted (Tr. pp. 488, 694).

2. Related Services

I find that the related services are appropriate to meet the student's needs and concur with the IHO's determination that the services were appropriate (IHO Decision, p. 155). The parent objected to the number of related service goals and I note that the number of goals were reduced based upon her comments. The parent acknowledged that the goals and SPAMs listed in the 2009-10 IEP were accurate (Tr. pp. 480, 3209), although she still disagreed with some of them for reasons unrelated to accuracy (id.). The goals were appropriate and based upon the student's needs as determined by the reevaluations for the student in speech, OT and PT (Dist. Ex. 17). I also concur with the IHO's finding that the goals and objectives were all determined with input and collaboration between the ELIJA School, the District representatives and the parent. I concur with the IHO's findings that the related services recommendations were appropriate and also consistent with the parents' experts' recommendations (IHO Decision, p. 155; Dist. Exs. 3, 5, 6, 7, 17).

3. Behavior Plan

I find that the use of the existing behavior plan and proposed revisions to the existing behavior plan were appropriate to meet the student's needs under the circumstances.

The record reflects that the student's behaviors have varied over time, and in fact increased for a time during his placement at ELIJA School, during which times he was removed to a separate classroom by himself (Tr. pp. 1905, 1912-13, 1968, 2027). The student was placed on medication for anxiety beginning in 2007, which reduced the intensity and duration of his behaviors (Tr. pp. 3103, 3122-23, Dist Ex. 17). The district representatives also noted that he was able to tolerate his reevaluations for speech, OT and PT at the district school without interfering behaviors and was in fact affectionate towards them (Tr. p. 913). The district also reviewed the ELIJA School records

regarding his behavior, and these records supported the fact that his interfering behaviors were very minimal, approximately 1% of his day (Tr. pp. 2345-46).

The parents allege that the district failed to appropriately complete an FBA or BIP. I note that the student was attending the ELIJA School at the time of the CSE meetings and the CSE was in receipt of the BIP of the ELIJA School for the student (Tr. p. 3338). The parents' experts acknowledged that the ELIJA School BIP could appropriately be used initially as a "jumping off point" for the District's BIP (Tr. pp. 2162-63). It was noted by one of the parents' experts that a behavior plan could change in a matter of weeks for the student at the ELIJA School, and that the plans necessarily are ongoing and evolving (id.). The district's representative noted that the strategy was to take the ELIJA School behavior plan to use only as an interim measure and to immediately start collecting data to access the student's behaviors and strategies to manage them (Tr. pp. 3338-39). The district representatives noted that the district has experience with BIPs, that students in the district program have BIPs, and some students have severe or aggressive behaviors (Tr. pp. 344, 820, 885-86, 3346). The district planned to use desensitization techniques for the student, which it had experience with for other students also (Tr. pp. 348-49).

I find that the district obtained and considered information sufficient to identify the student's interfering behaviors and the strategies and methods the ELIJA School used to address his behaviors (Tr. pp. 307-13). The district also indicated that the ELIJA School behavior plan would be appropriately modified once the student was in his new environment, as the ELIJA School plan necessarily related to that environment (Tr. pp. 310, 357, 3358). I find that the circumstances support that the CSE and the 2009-10 IEP appropriately addressed the student's behavior needs based upon the information provided by the student's providers.

4. Least Restrictive Environment

I concur with the IHO that the student's program offered by the CSE is consistent with the LRE for the student (IHO Decision, p. 156). 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, 995 F.2d at 1215; 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. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR

200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[1]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this case, the parents' outside professionals concurred that the student required 1:1 programming for academics (Dist. Ex. 3). The CSE also considers the location of the school, whether it is state approved, and opportunities for integration with peers, including typical students (Tr. pp. 452, 491-92). The testimony established that the district did consider other programs for the student, including BOCES and Martin Barrell, a private 6:1:1 program (Tr. pp. 449, 574-76, 616). The IHO noted that while the parents' outside professionals opined that the District's program was more restrictive than the ELIJA School setting that the student was presently in, the

[1] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

law provides that the ELIJA School program is in fact more restrictive (IHO Decision, p. 148; Tr. p. 452, 491-92). The ELIJA School is a private school with only disabled students (Tr. p. 77), which is more restrictive than a special class in a public school in the student's community where there are both disabled and non-disabled peers (IHO Decision, p. 148; 8 NYCRR 200.1(cc), 200.6(g), 200.13). The founder of the ELIJA School confirmed that all students there receive 1:1 teaching (Tr. p. 1091). While the parents wanted the student to continue at the ELIJA School, the district representatives noted its distance from the student's home, the fact it was not state approved, and the fact that the student was not having opportunities to integrate with other peers including typical students (Tr. pp. 452, 491-92, 699). In fact, the district representatives who observed the student at the ELIJA School noted that there was no interaction between the student and the other students and he was working 1:1 with an instructor on non-academic skills (Tr. pp. 80, 89-90, 101-04, 107, 430-31, 661).

In determining the student's least restrictive environment, the CSE relied upon evidence from the ELIJA School and the parents' outside professionals, who concurred with a 1:1 setting for the student for academics (Tr. pp. 110-12, 421, 453; Dist. Ex. 3). Based upon lengthy review and discussion of the student's current progress and abilities, including his functional and management needs, the CSE collectively determined the appropriate program for the student (Dist. Ex. 17). It is not disputed that the CSE had sufficient functional, developmental and academic information about the student and his individual needs to enable it to develop his IEP. The parents' professionals confirmed that the student was presently being educated at the ELIJA School in a 1:1:1 program (Tr. p. 2597). The student would initially be taught in a 1:1 setting, with other students eventually being integrated into his classroom, with the eventual goal that he may be able to be integrated into the district's 8:1:1 classroom if appropriate. While the parents may disagree with the CSE's recommendation, I concur with the IHO that the hearing record supports the conclusion that the student was offered a FAPE in the LRE for the 2009-10 school year (IHO Decision, pp. 145-57).

5. Transition Plan

The parents have asserted that the transition plan prepared by the district was not appropriate for various reasons, including the lack of participation by the parents and the lack of flexibility in the plan. I concur with the IHO that the transition plan was appropriate, and I also note that the plan was not required (IHO Decision, p. 152; 34 CFR 300.43(a)). It is undisputed that the parent did not want to participate in the transition plan after disagreeing with the program and placement recommendation of the CSE (Tr. pp. 465, 599, 841). The parent was present when the transition plan was first mentioned and was invited to participate with its drafting (Tr. pp. 216, 358). The transition plan was comprehensive and also subject to revision, depending on the progress of the student in transitioning successfully to the new placement it could be revised and shortened or lengthened in scope as necessary (Tr. pp. 229-30, 359, 477, 601; Dist. Ex. 16). Thus, the hearing record does not support the parents' contention that the district failed to consider the student's needs relating to transitioning to a new environment. Even assuming for the sake of argument that if the facts not adequately support the IHO's determination (which is not the case), the parent's entire argument rests on unsound ground in so far as there is no requirement under the IDEA or State law to develop a transition plan to support moving a student from a private placement selected by the parent to a public school (F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. 2012] citing R.E., 2012 WL 4125833, at *19).

VII. Conclusion

Based upon the hearing record evidence, I find that the recommended 1:1:1 special class in the district's elementary school with related services was reasonably calculated to provide the student with educational benefits and, therefore, offered him a FAPE during the 2009-10 school year. Having determined that the district offered the student a FAPE for the 2009-10 school year, it is not necessary for me to consider the appropriateness of the ELIJA School or whether the equities support the parents' claim for the tuition costs at public expense (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dept' of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D.-S. v. Southhold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 25, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER