The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-196

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

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, H. Jeffrey Marcus, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and related services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2011-12 and 2012-13 school years were appropriate. The appeal must be sustained in part.

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 CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The hearing record reveals that the student received special education and related services through the Early Intervention Program (EIP) in the form of speech-language therapy and "behavioral" therapy and that she attended a 12:1+1 special class in preschool (Tr. pp. 245-46; Dist. Ex. 3 at p. 2; Parent Ex. C at p. 1). The student received integrated co-teaching (ICT) services in a general education classroom and related services of speech-language therapy and counseling from kindergarten through second grade (Tr. pp. 72, 203, 246; Dist. Ex. 3 at p. 2; Parent Ex. C at p. 1).

On June 2, 2011, a CSE convened to develop an IEP to be implemented between June 3, 2011 and May 30, 2012 (Dist. Ex. 1 at pp. 1, 14). Finding the student eligible for special education as a student with an other health-impairment, the June 2011 CSE recommended ICT services in a

general education classroom (id. at pp. 1, 10, 14).[1] The June 2011 CSE also recommended related services consisting of one 30-minute session per week of group counseling in a separate location and two 30-minute sessions per week of group speech-language therapy in a separate location (id. at p. 11).

The student attended a general education class at a district public school for the 2011-12 school year and received the ICT and related services mandated by her June 2011 IEP (Tr. pp. 9, 34, 72, 203; Dist. Exs. 6; 7; 8). In early 2012, pursuant to the parent's request, the district completed a re-evaluation of the student (Tr. pp. 53, 218, 270-71; see Dist. Exs. 3; 4).

On March 9, 2012, the CSE convened to develop an IEP to be implemented between March 12, 2012 and March 7, 2013 (Dist. Ex. 2 at pp. 1, 11). The March 2012 CSE again found the student eligible for special education as a student with an other health-impairment and recommended ICT services in a general education classroom for "all subjects" six times per day (id. at pp. 1, 8, 12). In addition, the March 2012 CSE recommended related services of two 30-minute sessions per week of group speech-language therapy in a separate location (id. at p. 8). The March 2012 CSE did not recommend counseling services because, as the IEP noted, the student's counselor determined that the student "met all of her past and current counseling goals and no longer require[d counseling] as a mandated support service" (id. at p. 13). The March 2012 IEP noted that the parent did not agree with the decision to terminate counseling services and, further, that the parent refused a proposal by the school counselor that the student receive indirect declassification support services once a month (id.).[2] The March 2012 IEP additionally noted that the parent requested additional academic support for the student in the form of special education teacher support services (SETSS) but that the CSE determined that the student was demonstrating academic progress with her current services (id.).

The student again attended a general education class in a district public school for the 2012-13 school year and received ICT, speech-language therapy, and counseling services (see Tr. pp. 72, 212-13; see Dist. Exs. 5; 9; 10; 12; 13). It appears from the hearing record that the student's counseling services were reinstated in June 2012 as a result of a resolution agreement (see Tr. pp. 19, 83; see also Parent Ex. A at p. 2; Pet. ¶ 20).[3]

---

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

[2] Declassification support services are services provided to a student or a teacher to assist the transition from special education to regular education of a student who has been found to be no longer eligible for special education (8 NYCRR 200.1[ooo]; 200.4[d][1][iii]). In this instance, declassification support services are not technically the appropriate terminology for the offered services because the student was not found ineligible for special education and related services.

[3] It is unclear from the hearing record whether the resolution session took place as a result of an earlier due process complaint notice filed by the parent (see 8 NYCRR 200.5[j][2][i]). A copy of the agreement resulting from the resolution session was not introduced into evidence at the impartial hearing.

A. Due Process Complaint Notice

In a due process complaint notice dated February 19, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11, 2011-12, and 2012-13 school years (Parent Ex. A). Specifically, the parent alleged that the CSEs failed to: (1) develop "meaningful and measurable" annual goals and short-term objectives; (2) consider a placement more restrictive than ICT services for the student; (3) design and offer a scientifically-based program based on peer-reviewed research; (4) recommend appropriate speech-language therapy services; (5) recommend appropriate counseling services; (6) recommend alternative behavior modification services, such as a 1:1 paraprofessional; (7) conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP); (8) address the student's difficulties with transitions; and (9) offer appropriate testing accommodations (id. at pp. 2-4). The parent also alleged that the March 2012 CSE in particular failed to recommend an appropriate assistive technology device; namely, an FM unit (id. at p. 2). The parent cited to a February 2012 psychoeducational evaluation, a February 2012 social history update, and/or a February 2012 speech and language evaluation in support of her allegations (see id. at pp. 2-4).

As relief, the parent sought annulment of the student's current IEP and development of an appropriate program designed to address the student's needs, including development of a BIP based on an FBA (Parent Ex. A at p. 4). The parent also sought "[p]rovision of an independent educational evaluation [(IEE)] for speech and language" and reimbursement for the costs relative to the student's evaluation at the Huntington Learning Center (HLC) (id. at pp. 4-5). As "compensatory hours for the failure by the [district] to offer [the student a] FAPE for at least the last two years," the parent requested 443 hours of tutoring at HLC, as well as any additional hours supported by the evidence, as well as the costs of the student's transportation to and from HLC (id. at p. 5).

B. Impartial Hearing Officer Decision

On April 4, 2013, the IHO conducted a prehearing conference (IHO Ex. i). On April 26, 2013, the parties proceeded to an impartial hearing, which concluded on June 27, 2013 after four days of proceedings (Tr. pp. 1-348). By decision dated September 9, 2013, the IHO concluded that the district offered the student a FAPE for the 2011-12 and 2012-13 school years (IHO Decision at pp. 10-11, 14-16). The IHO held that the parent's claims relative to the 2010-11 school year were "time-barred on their face," noting that the parent did not "put forth a legal argument" and failed to "offer[] documents or testimony" at the impartial hearing relating to the 2010-11 school year (id. at p. 2 n.1).[4]

With respect to the 2011-12 school year, based on evidence in the hearing record that the student made academic progress and "met all her counseling goals and developed a healthy self-esteem, among other accomplishments," the IHO concluded that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 14-15).

[4] At the prehearing conference, the district argued that the parent's challenge to the 2010-11 school year was barred by the IDEA's statute of limitations and the IHO informed the parent that "a legal argument would . . . be necessary in order for any claims re[garding] the 2010-11 school year to be considered" (IHO Ex. i).

Turning to the 2012-13 school year, the IHO again noted the student's academic progress (IHO Decision at p. 15). With respect to the March 2012 IEP, the IHO concluded that the student's behavior did not warrant a BIP (id. at pp. 15-16; see id. at pp. 10-11). As for the provision of counseling to the student during the 2012-13 school year, the IHO noted that the student received counseling as a result of the resolution agreement but that, in any event, while the student may have continued to exhibit aggressive behaviors at home, the record established that the student made social/emotional progress and did not exhibit aggressive behaviors at school and therefore did not require "school-based counseling" (id. at p. 15; see id. at pp. 8-10).

Based on the foregoing, the IHO concluded "that the IEPs developed at the June 2, 2011, and the March 9, 2012, CSE meetings were tailored to meet [the student's] unique needs for the 2011-12 and the 2012-13 school years," and that the district offered the student a FAPE (IHO Decision at p. 16).

Turning to parent's request for an IEE, the IHO held that, because the parent disagreed with the February 2012 psychoeducational evaluation "in that it did not show that [the student] was as far behind academically" as the parent believed, the district was ordered to pay for the costs of an IEE "that [went] beyond basic cognitive and academic testing and include[d] subtests in word attack and fluency in both math and reading" (IHO Decision at pp. 16-17). The IHO also ordered the district to perform an updated speech-language evaluation and an assistive technology evaluation of the student within 30 days of the date of the decision (id. at pp. 16-17). Next, the IHO denied the parent's request that the district be ordered to conduct an FBA and develop a BIP for the student (id. at p. 17). Finally, the IHO denied the parent's request for "additional services in the form of 1:1 tutoring at [HLC]," as well as the costs of the student's evaluation at HLC (id.).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determinations that the district offered the student a FAPE for the 2011-12 and 2012-13 school years and that the parent was not entitled to all of the relief requested. The parent also alleges that the IHO erred in not reaching all of the parent's claims as asserted in the due process complaint notice.

First, the parent appeals the IHO's refusal to consider her claims pertaining to "the latter part of the 2010-11 school year." The parent additionally contends that the IHO erred by failing to consider the adequacy of evaluations used to generate the June 2011 and March 2012 IEPs and that the district failed to test the student in all areas of suspected disability. With respect to both school years, the parent alleges that she was not afforded the opportunity to meaningfully participate in the development of the student's counseling goals. Next, with regard to matters not addressed by the IHO but asserted in the due process complaint notice, the parent argues that both the June 2011 and March 2012 IEPs should have recommended 1:1 paraprofessional

services, additional speech-language services, and assistive technology in the form of an FM unit, and that the annual goals developed for the student were not appropriate.[5]

Turning to the IHO's findings, the parent argues that the student made only trivial advancement during the 2011-12 and 2012-13 school years and that, in determining that the district offered the student a FAPE for the 2011-12 and 2012-13 school years, the IHO erred by considering retrospective evidence regarding the student's progress. Next, the parent asserts that the IHO erred in finding that the student's behaviors did not interfere with her education and that, therefore, the student did not require a BIP based upon an appropriate FBA. The parent also appeals the IHO's finding that the district offered the student appropriate counseling services, arguing that the CSE erroneously chose to terminate counseling services for the student and, instead, should have deferred to a private psychologist's recommendation that counseling be continued. The parent also argues that the IHO erred in determining that test results from HLC were not relevant to her determination of whether the district offered the student a FAPE. The parent finally asserts that the IHO erred by mischaracterizing testimony of the center director from HLC.

Consequently, the parent seeks an order reversing the IHO's decision to the extent indicated and: (1) declaring that the district denied the student a FAPE for the school years in question; (2) awarding all relief requested in the due process complaint notice, particularly the "requested tutoring services at the [HLC]" and costs of transportation to and from HLC; and (3) remanding the matter to the CSE for development of a new IEP following completion of the evaluations ordered by the IHO.

In an answer, the district responds to the parent's petition by denying the allegations raised therein and asserting that the IHO correctly determined that the district offered the student a FAPE for the 2011-12 and 2012-13 school years. The district also asserts that the IHO correctly declined to consider the parent's claims pertaining to the 2010-11 school year. The district asserts that the CSEs had sufficient evaluative information in order to make appropriate recommendations for the student. With respect to claims unaddressed by the IHO, the district asserts that the student did not require a 1:1 paraprofessional or assistive technology in the form of an FM unit. The district also asserts that, contrary to the parent's assertions, the student's counseling goals included on the June 2011 IEP were appropriate and the parent was afforded a meaningful opportunity to participate relative to the March 2012 CSE's decision to terminate the student's counseling services.

The district asserts that, consistent with the IHO's decision, the student made progress during the 2011-12 and 2012-13 school years and, therefore, did not require 1:1 tutoring at HLC.

---

[5] The parent does not further pursue in her petition several other claims that were contained in her due process complaint notice but not addressed by the IHO, including that one or more of the relevant CSEs failed to: (1) consider "a more restrictive placement" than ICT services for the student; (2) offer a scientifically-based program based on peer-reviewed research; (3) address the student's difficulties with transitions; and (4) recommend appropriate testing accommodations. Under these circumstances, the parent has abandoned these claims by not seeking review of the IHO's failure to address these issues and it would be improper for an SRO to review them as they have not been properly raised on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]; see also 8 NYCRR 279.4[a]).

Furthermore, in response to the parent's allegations that the evidence of the student's progress relied upon by the IHO constituted retrospective testimony, the district counters that the evidence and testimony referred back to the IEPs. The district alleges that the IHO properly held that the student's behaviors did not interfere with her instruction and that, consequently, the June 2011 and March 2012 CSEs appropriately declined to conduct an FBA or develop a BIP. The district also avers that the IHO correctly held that the March 2012 CSE properly terminated the student's counseling services. Moreover, the district indicates that even if counseling services were warranted, an award of additional counseling services, rather than tutoring services, would be the appropriate relief. The district also requests that the April 2013 evaluation cited in the parent's petition in support of her position with respect to the March 2012 CSE's failure to recommend counseling services be disregarded since it post-dates the March 2012 CSE. Finally, the district asserts that the IHO correctly determined that test results from HLC were not relevant. Based on the foregoing, the district requests that the IHO's decision be upheld in its entirety.[6]

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

[6] The district states that it does not appeal that portion of the IHO's decision which ordered the district to pay for the costs of an IEE and conduct speech-language and assistive technology evaluations of the student and, as such, the orders are final and binding and will not be addressed (see IHO Decision at pp. 16-17; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly addressed on appeal. The parent presents several new claims on appeal that were not contained in her due process complaint notice, including that: (1) the evaluations used to generate the student's IEPs for the 2011-12 and 2012-13 school years were not adequate; (2) the district failed to test the student in all areas of suspected disability; and (3) the parent was not afforded meaningful participation in the development of the student's counseling goals.

With respect to the parent's claims raised for the first time on appeal, 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][i][b]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F.Supp.2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *3, *6 [2d Cir. July 24, 2013]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include challenges to the sufficiency of the evaluations, the district's testing of the student, or the parent's ability to participate in the development of the student's counseling goals as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. A). A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice to include these issues. Accordingly, the allegations in the parent's petition raised for the first time on appeal are outside the scope of review and will not be considered (see, e.g., M.P.G., 2010 WL 3398256, at *8).[7]

B. June 2010 IEP

The parent appeals the IHO's refusal to consider her claims pertaining to "the latter part of the 2010-11 school year." Although the IHO held that the parent waived her claims relative to the 2010-11 school year and that the claims "appeared to be time-barred on their face" (IHO Decision at p. 3 n.1), the parent's petition does not appear to contest this particular finding of the IHO. Rather, by specifying "the latter part of the 2010-11 school year" and by declining to identify the IHO's particular finding or offer any elaboration relative to her claims in her February 2013 due process complaint associated with the June 2010 IEP, it appears that the parent's allegation refers to the period of time during the 2010-11 school year after June 3, 2011, the date on which the district was obligated to implement the June 2011 IEP.

Even if the parent intended to appeal the IHO's limited finding regarding the 2010-11 school year, I find that the hearing record supports the IHO's determination that the parent waived her claims arising from the June 2010 IEP. On April 4, 2013, the IHO conducted a prehearing conference (see IHO Ex. i). Consistent with the objective of a prehearing conference—to simplify and clarify issues (see 8 NYCRR 200.5[j][3][xi][a])—and in response to an argument raised by the district, the IHO invited the parent to explain why her claims relating to the 2010-11 school year were not barred by the statute of limitations, and the parent did not respond to this request (see IHO Ex. i).[8] During the impartial hearing, neither the parent nor the district admitted any

---

[7] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, at *9; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), the additional issues raised in the petition were not initially elicited by the district and, therefore, the district did not "open the door" to this issue under the holding of M.H. (see A.M., 2013 WL 4056216, at *10-*11; c.f., Y.S. v. New York City Dep't of Educ., 2013 WL 5722793, at *6 [S.D.N.Y. Sept. 24, 2013]; P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at *14 [S.D.N.Y. July 22, 2013]).

[8] The IDEA and New York State law require that a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; R.B., 2011 W.L. 4375694, at * 6).

evidence relating to the June 2010 IEP.[9] Further, the parent did not even mention the June 2010 IEP in her closing brief (see Parent Ex. E). Therefore, the weight of the evidence submitted in the hearing record indicates that, despite the IHO's efforts to clarify the specific nature of the parent's claims, the parent nevertheless abandoned these claims during the course of the impartial hearing and they cannot now be considered on appeal. The IHO was not required to guess at the nature of the parent's claims relating to the 2010-11 school year, and it was not unreasonable for the IHO to read them as challenges to the June 2010 IEP for which dismissal was warranted.

C. June 2011 IEP

Turning to the parent's challenge to the next school year, with respect to the student's June 2011 IEP, the paucity of information in the hearing record prohibits an informed analysis of the student's needs at the time of the June 2011 CSE meeting. There is no indication in the hearing record regarding what evaluative information was relied upon by the June 2011 CSE. While the district's presentation of testimony or documentary evidence relating to the information available to the June 2011 CSE could have explained the student's functioning and needs, such that conclusions about the ability of the recommended program and services to address those needs could be reached, with the hearing record as developed, the June 2011 IEP itself offers only general, unsubstantiated information about the student (see Dist. Ex. 1 at pp. 1-2).

For example, with regard to academics, the June 2011 IEP reflected that the student displayed understanding of basic concepts in reading and math but required additional supports to solidify her knowledge of more complex concepts (Dist. Ex. 1 at p. 1). However, the June 2011 IEP specified neither the particular reading and math concepts that the student had mastered nor those in which she demonstrated continued need; it only reflected that the student's instructional/functional level in reading and math were at a first grade level (id. at p. 14). Additionally, the section of the June 2011 IEP that is delineated to reflect the student's academic, developmental and functional needs, which should also have included the student's needs that were of concern to the parent, was left blank (id. at p. 2). Furthermore, with regard to the student's speech-language needs, the IEP reflected only that the student presented with "some language delays" that interfered with her performance and did not reflect any details or specifics describing the student's particular deficits in the area of speech and language development (id. at p. 1). As such, even the present levels of performance in the IEP offered little by way of information about the student, which is necessary in order to examine the appropriateness of the special education program and services recommended by the June 2011 CSE.

Moreover, in determining that the district offered the student a FAPE for the 2011-12 school year, the IHO relied exclusively on information post-dating the June 2011 CSE meeting indicating that the student made progress in the district placement (see IHO Decision at pp. 14-15). In R.E., the Second Circuit held that "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision" (694 F.3d at 187). The only exception is that testimony may be considered that "explains or justifies the services listed in the IEP" (id. at 186). Thus, although the Second Circuit did not adopt an unconditional "four corners"

[9] Indeed, the district only referred to the 2011-12 and 2012-13 school years in its opening statement (Tr. pp. 18-19).

rule, it substantially restricted the relevance of evidence post-dating CSE meetings when a party challenges the design of an IEP (see id. at p. 187 [noting that "[p]arents who end up placing their children in public school cannot later use evidence that their child did not make progress under the IEP in order to show that it was deficient from the outset"]). The information relied on by the IHO—to wit, testimony from the student's teacher and counselor who implemented the June 2011 IEP and counseling reports from March 2012 and March 2013—could not have been "reasonably known to the parties at the time of the placement decision" as of June 2011 (see IHO Decision at pp. 14-15; see also R.E., 694 F.3d at p. 187). Thus, the IHO improperly considered these materials in determining whether the June 2011 CSE designed an appropriate IEP and those portions of the IHO's decision must be reversed.

Accordingly, because the district failed to offer sufficient evidence that it offered the student an appropriate educational program, I conclude that the district failed to offer the student a FAPE for the 2011-12 school year (see Educ. Law. 4404[c]).

D. March 2012 IEP

1. Annual Goals

Turning to the planning for the following school year, the parent asserts that the IHO erred in failing to consider the adequacy of the annual goals contained in the March 2012 IEP. 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]).

For purposes of background, the March 2012 IEP reflected a significant amount of detailed information related to the student's functioning and needs. Based on the information provided to the March 2012 CSE, the IEP reflected that, at the time of the March 2012 meeting, the student's cognitive abilities fell in the low average range of functioning (27th percentile) on the Composite Intelligence Index of the Reynolds Intellectual Assessment Scales (RIAS) with performance in the low average range on the Verbal Intelligence Index (16th percentile) and the Composite Memory Index (10th percentile) and performance in the average range (55th percentile) on the Nonverbal Intelligence Index (Dist. Ex. 2 at pp. 1-2; see Dist. Ex. 4 at p. 2). With regard to language and memory skills, the March 2012 IEP noted the student's needs related to her fund of knowledge, word recall, and retention of verbal information (Dist. Ex. 2 at p. 1; see Dist. Ex. 4 at pp. 2-3). Academic achievement testing using the Kaufman Test of Educational Achievement-Second Edition (KTEA-2) reflected that the student demonstrated performance in the average range in reading overall (47th percentile), as well as in letter and word recognition (42nd percentile) and in reading comprehension (58th percentile) (Dist. Ex. 2 at p. 2; see Dist. Ex. 4 at p. 3). The March 2012 IEP reported that the student's overall performance in math was also in the average range (32nd percentile) with computation skills demonstrated in the average range (42nd percentile), while performance in math concepts and application fell in the low average range (25th percentile)

(Dist Ex. 2 at p. 2). With regard to overall written language, the student scored in the average range (39th percentile) with performance in spelling in the average range (63rd percentile) and performance in written expression in the low average range (23rd percentile) (id.). The IEP also reflected specific skills that the student was able to perform in each academic area during the testing as well as specific needs such as applying decoding skills consistently when presented with unfamiliar words, difficulty with language related to identifying important facts needed to solve word problems, and inconsistent use of punctuation in writing sentences (id. at pp. 1-2). The IEP reflected that the student's social/emotional functioning was appropriate overall based on information provided in the February 2012 psychoeducational reevaluation report, the March 9, 2012 counseling progress report, and the current February 2012 teacher report (id. at p. 3; see also Dist. Exs. 4; 11).

With regard to the disputed issue and consistent with this description of the student's needs, a review of the student's March 2012 IEP shows that it included eight annual goals in the areas of academics and speech-language skills, which targeted: (1) increasing the student's reading skills in decoding and sight word recognition; (2) math skills related to mastering addition facts and improving the student's math reasoning skills with respect to key words used in word problems; and (3) written expression skills related to including two or more details associated with the topic, using correct grammar, capitalization, and punctuation, as well as using the writing process to review, edit and finalize her work (Dist. Ex. 2 at pp. 5-6). The IEP also included speech-language goals which aimed to improve the student's overall expressive language skills related to her ability to explain relationships between words, formulate appropriate questions to gain information, formulate grammatically sound and age appropriate sentences to describe a picture, and tell a cohesive, sequential narrative of six sentences or more on a given topic (id. at p. 7). These goals were targeted to improve the student's overall core language and language structure skills including following multi-step directions involving spatial, locative, and temporal concepts, recalling sentences of varying lengths and complexities, responding to questions related to a verbally presented passage, and extrapolating the main idea and details of an orally presented passage (id.). With regard to the parent's contention that the IEP improperly lacked counseling goals, as described in detail below, the hearing record reflects that the student no longer required counseling services and therefore, no counseling goals were required or included in the March 2012 IEP.

The parent cites the testimony of the student's second grade teacher to support her contention that the annual goals in the March 2012 IEP were not appropriate. The student's teacher testified that the March 2012 IEP included annual goals that were carried over from the June 2011 IEP that the student had already met or would meet by the end of the 2011-12 school year (Tr. pp. 55-56); however, the teacher also clarified that the March 2012 IEP was intended to be implemented during the end of the 2011-12 school year and, while she expected some of the annual goals to be achieved before the end of the 2011-12 school year, some new goals had been added that would not likely be achieved until the 2012-13 school year (Tr. pp. 56-57). Consistent with the teacher's testimony, the March 2012 IEP included annual goals addressing, for example, the student's math reasoning and written expression, which were not included on the June 2011 IEP (compare Dist. Ex. 1 at pp. 3-10, with Dist. Ex 2 at pp. 6-7). Furthermore, upon comparison with the student's June 2011 IEP, many of the annual goals that were carried over into the March 2012 IEP were adjusted to be more challenging. For example, whereas the June 2011 IEP called for the student to read 100 out of 135 sight words correctly with 80 percent accuracy in two different

trials, the March 2012 IEP called for the student to read 125 out of 150 sight words with 80 percent accuracy (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 2 at p. 5).

Moreover, contrary to the parent's contentions, and in accordance with federal and State regulations, each annual goal contained a level of detail and sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision. Specifically, the annual goals contained adequate evaluative information including specific evaluation criterion, evaluation procedure, and an evaluation schedule (Dist. Ex. 2 at pp. 5-7; see 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]).). For example, a math goal specified that the student would underline math terms within word problems (i.e., altogether, more, fewer, less) and the numbers related to the question, prior to setting up the number sentence and solving it, with 80% accuracy, in four out of five opportunities, and indicated that progress would be measured two times per quarter using teacher made materials, class activities, teacher/provider observation, and performance assessment tasks (Dist. Ex. 2 at p. 6). Finally, because the March 2012 CSE recommended that the student particulate in standard assessments, it was not required to develop short-term objectives for the student (see id. at p. 10; see also 8 NYCRR 200.4[d][2][iv]).

In conclusion, the hearing record shows that the annual goals in the March 2012 IEP appropriately targeted the student's areas of need, contained sufficient specificity by which to direct instruction and intervention, and contained sufficient specificity by which to evaluate the student's progress or gauge the need for continuation or revision.

2. Related Services

a. Speech-Language Therapy

The IHO did not address the parent's claim regarding speech-language therapy; however, the parent asserts that the March 2012 CSE failed to recommend an appropriate amount of speech-language services for the student. Contrary to the parent's contentions, the hearing record does not reflect that, at the time of the March 2012 CSE meeting, the student required additional speech-language services. Testimony by the speech-language therapist who provided services to the student from kindergarten through second grade indicated that she saw the student twice per week for 30-minute sessions in a group of three throughout these years and that, during that time, the student made "remarkable" progress (Tr. pp. 203-04, 206-07). Her testimony indicated that the student made significant progress transitioning to her speech-language therapy sessions, in articulation, vocabulary, auditory memory, following directions, and in comprehension of verbal information both read and heard (Tr. pp. 203-04). The student's speech-language therapist testified that, although she did not conduct the student's updated speech-language testing as it was completed by an outside evaluator, she shared information regarding the student's progress with the March 2012 CSE and indicated that the March 2012 CSE likely had a progress note that she had prepared on the student (Tr. pp. 209-10).[10] She further testified that she recommended that the student receive the same level of speech-language services each year because "it has worked for her" (Tr. p. 211). Furthermore, none of the information in the hearing record that was available

[10] The hearing record does not contain either the updated speech-language testing or the progress report created by the student's then-current speech-language therapist.

at the time of the March 2012 CSE meeting indicated that the student had a need for an increase in speech-language services (see Dist. Exs. 2; 3; 4).

Based on the above, the evidence in the hearing record reflects that the March 2012 CSE recommended appropriate speech-language therapy for the student as a related service that adequately addressed the student's needs.

b. Counseling/1:1 Paraprofessional

The parent also appeals the IHO's finding that it was appropriate for the March 2012 CSE to terminate counseling services for the student. Also, although not addressed by the IHO, the parent asserts that the March 2012 CSE should have recommended an alternative behavior modification service, such as a 1:1 paraprofessional.[11]

The hearing record reflects that the March 2012 CSE appropriately terminated the student's counseling services because the student no longer demonstrated needs in this area. The March 2012 IEP documented that the February 2012 teacher report reflected no concerns related to social emotional functioning and that the February 2012 psychoeducational reevaluation indicated that "[p]rojectives, observation and interview captured a student who is well related and social" (Dist. Ex. 2 at p. 3; 4 at p. 3). Consistent with information in the psychoeducational reevaluation, the IEP noted that the student was aware of her academic limitations but did not avoid completing tasks in the areas of weakness, was able to ask for support by asking questions related to directions or asking for clarification of expectations, and that once she received support and understood, was able to move forward and work independently (Dist. Exs. 2 at p. 3; 4 at pp. 3-4). The March 2012 IEP further reflected that the student mentioned that conflicts with peers occurred at times but that she appeared to be working on developing coping skills as well as positive conflict resolutions to solve social issues (Dist. Exs. 2 at p. 3; 4 at p. 4).

The IEP further documented information from the March 2012 counseling progress report including that the student had made tremendous progress in school counseling (Dist. Exs. 2 at p. 3; 11 at p. 1). The student was reported to demonstrate a positive self-image and healthy self-esteem, was able to identify positive qualities that she possessed, transitioned easily, had gained a greater tolerance for frustration, was able to maintain self-control when faced with disappointment, and was able to seek help from school staff when necessary (id.). Consistent with information in the counseling progress report, the IEP also noted that the student had met all of her counseling goals and currently seemed to take greater social risks, engaged appropriately with peers in all areas, interacted with peers until activities were complete, communicated with peers and school staff on specified topics, and was able to participate in conversational dialogue (id.). The IHO properly accorded significant weight to the testimony of the student's counselor and the information included in her March 2012 counseling progress report, as she had been the student's counselor since kindergarten and had first-hand knowledge of the student's social-emotional

[11] Although the district continues to argue that the student no longer required counseling, it appears from the hearing record that, as a result of a resolution session that took place in June 2012, the district agreed to provide the student with counseling services (Tr. pp. 19, 83). The parent asserts in her petition that a CSE convened in March 2013, after the commencement of this proceeding, and again recommended termination of the student's counseling services. However, the district's assertions and any of the parent's allegations relative to the March 2013 IEP are outside the scope of review of this proceeding (see, e.g., M.P.G., 2010 WL 3398256, at *8).

growth at school (IHO Decision at p. 9; Tr. pp. 72-73, 77). Additionally, testimony by the district school psychologist who attended the March 2012 CSE meeting indicated that, based on the information reviewed at the March 2012 CSE meeting including information from the student's school counselor and the classroom teacher's documentation of how the student was performing within the classroom, the student's functional level regarding her social-emotional behavior was within normal limits (Tr. p. 224). The district school psychologist indicated that this was why the school counselor terminated counseling services (id.). Furthermore, the student's second grade teacher testified that the student did not require a 1:1 paraprofessional for the purposes of managing her behavior (Tr. p. 40).

Moreover, as noted above and notwithstanding the student's progress in counseling, the counselor suggested that the student receive transitional support as she moved on to third grade in the form of declassification support services (indirect) once per month; however, the parent refused this service (Dist. Ex. 2 at p. 13).

With regard to the behaviors that the parent described which took place outside of school, the hearing record shows that the district did not have reason to know about the extent of such behaviors (compare Dist. Exs. 2 at p. 3, and 3 at pp. 1-2, with Dist. Ex. 12 at p. 2, and Parent Ex. C at p. 1). Although the parent alleges that the student's private social worker contacted the district and spoke to the school quite frequently to discuss the student's behaviors and various incidents that had occurred, she did not indicate who the social worker spoke to, what the discussions included, or when the conversations took place (Tr. pp. 269-70). To the contrary, the student's counselor at school testified that at no point in time did she hear from anyone who worked with the student that the student may have been experiencing psychiatric or psychological issues such as school phobia, bullying, or aggressive behaviors (Tr. pp. 86-87). Specifically, the counselor testified that she had never discussed suicidal ideations with the student (Tr. pp. 79, 86-87).

Notably, the hearing record shows that in the parent's allegation that the March 2012 CSE erred in terminating the student's counseling services, she references an April 24, 2013 private psychological evaluation. However, this evaluation was completed one year after the March 2012 CSE meeting was held (see Dist. Ex. 12; Parent Ex. C). As such, it was not available to the CSE to consider at the time of the March 2012 CSE meeting and cannot be relied upon as a basis for challenging the IEP (see R.E., 694 F.3d at 187).

Based on the above, the hearing record shows that the March 2012 had permissible reasons to decline to recommend a 1:1 paraprofessional and terminate the student's counseling services. To be clear, however, nothing in this decision should be interpreted as dismissing the seriousness of the parent's concerns relating to the student's behaviors, particularly to the extent that there is evidence in the hearing record (but not before the CSE) that the student has heard voices and expressed suicidal ideation (see Parent Ex. C at p. 1). While the hearing record indicates that the March 2012 CSE had no reason to be aware of this information, in light of the private evaluation procured by the parent, as well as the parent's expressed concerns, I will order that when the CSE next convenes to conduct an annual review of the student's program, the district shall consider whether the related service of counseling is required to enable the student to benefit from instruction and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend counseling on the student's IEP together with an

explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b]; see 8 NYCRR 200.5[a]).

3. Special Factors

a. Interfering Behaviors

The parent asserts that the IHO erred in finding that the March 2012 CSE's failure to conduct an FBA or develop a BIP did not result in a failure to offer the student a FAPE. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [2008]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]," ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], at p. 22, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, the "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be

developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234, at *4). The Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address[es] the student's problem behaviors" (id.).

Information about the student's behaviors, which was available to the March 2012 CSE, is detailed above with regard to the counseling services. As previously noted, the evidence in the hearing record does not support a finding that the district knew or had any reason to be aware of the behaviors the parent complains of on appeal (see Tr. pp. 79-80, 85-86). The district school psychologist who attended the March 2012 CSE meeting testified that the CSE did not develop a BIP for the student because, at the time, she was "doing well in terms of her social-emotional development" (Tr. p. 222). But even assuming that the student exhibited emotional and behavioral issues at school, there is no evidence in the hearing record indicating that the student's behavior seriously interfered with class instruction. The student's second grade teacher and the student's counselor, as well as the district school psychologist who attended the March 2012 CSE meeting, unanimously testified that she was a well-behaved student who did not exhibit behavioral issues in the classroom or in related services sessions (Tr. pp. 37-40, 49-52, 76-77, 79, 84, 222-25). Accordingly, the hearing record supports the IHO's conclusion that the district did not fail to offer the student a FAPE as a consequence of the CSE's determination not to conduct an FBA or develop a BIP for the student.

b. Assistive Technology

The parent argues that the March 2012 CSE did not address the student's need for assistive technology in the form of an FM unit.[12] Another special factor that a CSE must consider in developing a student's IEP is whether the student "needs assistive technology devices and services" (20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see 8 NYCRR 200.4[d][3][v]).

In her due process complaint notice, the parent referred to a February 19, 2012 speech and language evaluation, which in turn referred to a hearing evaluation (Parent Ex. A at p. 3). Neither a speech and language evaluation nor a hearing evaluation was submitted at the impartial hearing by either party. The parent testified that an audiologist recommended that the student utilize an FM unit in order to address her delays in decoding and "ward off any distractions she may have, in the classroom," as well as "any noise that . . . would probably not allow her to focus on what [was] being said or what [was] going on in the classroom" (Tr. pp. 265-66).

[12] It appears from the hearing record that, after the parent filed her due process complaint, the district agreed to provide the student with an FM unit (Tr. pp. 223, 229-30).

The March 2012 IEP reflected that the parent would be following up on a central auditory processing evaluation and the student's possible need for an FM unit (Dist. Ex. 2 at p. 3). Thus, if the parent procured an independent evaluation that recommended the student receive an FM unit, it appears that it was not provided to the district prior to the March 2012 CSE meeting. Moreover, while the March 2012 CSE did not recommend an FM unit for the student, the IEP included various strategies to address her management needs, many of which appropriately addressed the parent's expressed concerns about the student's attention deficits, including: daily review of skills and concepts previously introduced; use of a multi-sensory approach; visual cues, visual aids, and prompts; repetition of verbal information, modeling, small group instruction, and individualized attention whenever possible; preferential seating whenever possible; instruction broken down to single steps and provision of something to which to refer in order to know what was next; and praise, encouragement, and positive reinforcement (id. at p. 4). The student's counselor testified that, prior to the March 2012 CSE meeting, the student learned strategies to help her minimize distractions, including graphic organizers, checklists, and visual cues (Tr. p. 85). The counselor testified that after implementing these strategies, the student no longer struggled with distractibility or focus (Tr. p. 76, 85).

On appeal, the parent again relies upon the April 24, 2013 private psychological evaluation of the student, which post-dated the March 2012 CSE meeting, as well as the testimony of that evaluator (see Parent Ex. C). As noted above, the private psychological evaluation was not available to the CSE to consider at the time of the March 2012 CSE meeting (see R.E., 694 F.3d at 187; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [holding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Moreover, the April 24, 2013 private psychological evaluation recommended that the student receive an assistive technology evaluation "to determine if she would benefit from a laptop or iPad that could assist her with voice-to-text or reading along" (Parent Ex. C at p. 3). Not only does the private evaluation recommend an evaluation and not a particular type of assistive technology device, but the evaluator opined that the student might benefit from the use of a laptop or iPad, not an FM unit as requested by the parent (id.).

In light of the foregoing, the evidence in the hearing record does not suggest that the information available to the March 2012 CSE required the CSE to conclude that the student's deficits in auditory processing, attention, or distractibility required the provision of an FM unit for the student to receive a FAPE.

E. Compensatory Education

Having found that the district failed to establish at the impartial hearing that it offered the student a FAPE for the 2011-12 school year, the next inquiry is what relief, if any, is warranted. For the reasons detailed below, the hearing record does not support a conclusion that the student is entitled to relief in the form of compensatory additional services.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case and education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]; see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student

with a disability may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]) or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078).

Compensatory relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that the "IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 108 LRP 49659 [S.D.N.Y. March 6, 2008], adopted at 50 IDELR 225 [July 7, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible under the IDEA and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for services under the IDEA reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see, e.g., Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been

in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address (the student's) educational problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

Here, as detailed more fully below, the hearing record does not support a conclusion that the district grossly failed to meet its obligations under the IDEA. The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). Although in this instance the district denied the student a FAPE for the 2011-12 school year, the hearing record demonstrates that the student made progress while attending the district's program during the 2011-12 school year and, therefore, the hearing record supports the IHO's denial of the parent's request for an award of additional services.

The parent testified that she did not feel that the student was "progressing the way she should" during the 2011-12 school year (Tr. p. 254). With regard to academics, the student's teacher for the 2011-12 school year testified that the student made meaningful progress in her class in reading, writing, and math (Tr. pp. 36-37). Specifically, in reading, the teacher testified that the student progressed from a level G to a level J by the end of the year, which the teacher characterized as "a pretty huge jump" because level G focused on reading basics, whereas level J focused on decoding and comprehension skills (Tr. p. 37). She also indicated, and the evidence in the hearing record shows, that the student met all of her annual goals included in the June 2011 IEP (id.; Dist. Ex. 1 at pp. 5-8). The March 2012 IEP also reflected that a February 2012 teacher report indicated the student had progressed in her academics (Dist. Ex. 2 at p. 3). The hearing record contains the reports cards pertaining to the student's performance as of November 2011, March 2012, and June 2012, which reflect ratings of 2s and 3s—ratings which, as of the February 2012 social history update, the parent characterized as "good" (Dist. Exs. 6; 7; 8; see Dist. Ex. 3 at p. 2). However, I note that the report cards do not contain a rubric explaining the performance standard required to earn a rating of 2 or 3 (see Dist. Exs. 6; 7; 8).

The student's speech-language therapist since kindergarten, including the 2011-12 school year, testified that the student's progress over the three years was "remarkable" (Tr. p. 203). Specifically, the speech-language therapist indicated that the student made progress with her articulation, vocabulary, auditory memory, ability to follow directions, and comprehension of verbal information (Tr. p. 204).

In terms of the student's social/emotional and behavioral needs, the March 9, 2012 counseling progress report indicated also that the student exhibited "tremendous progress" in counseling during the 2011-12 school year and that she met all of her counseling goals (Dist. Ex. 11 at p. 1; see Tr. p. 73). As discussed in more detail above, the counseling progress report detailed the student's improvement with respect to her positive self-image, healthy self-esteem, ability to transition easily, tolerance for frustration, self-control, ability to seek help from school staff, and

indicated that the student seemed to take greater social risks and made improvements in her communications and interactions with peers and school staff (Dist. Ex. 11 at p. 1).

Although in this instance the district did not establish that it offered the student a FAPE for the 2011-12 school year, based on the record of the student's demonstrable progress while in the district's program as discussed above, there is no reason in the hearing record to conclude that the student does not already occupy "the same position [he] would have occupied but for the school district's violations of IDEA" (Reid, 401 F.3d at 518), nor is there any other reasonable basis appearing in the hearing record upon which to premise an award of additional services. Accordingly, the IHO's decision denying the parent's request for compensatory additional services need not be disturbed.

VII. Conclusion

In summary, the IHO's determination that the district offered the student a FAPE for the 2011-12 school year must be reversed for the reasons described above. However, notwithstanding this error and after reviewing the entire hearing record, in light of the evidence there is an insufficient basis upon which to base an award of additional services as an equitable remedy; thus, the IHO's determination to deny relief remains undisturbed. Upon further review of the hearing record, the evidence reveals that the district offered the student a FAPE for the 2012-13 school year.

In addition, I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 9, 2013, is modified by reversing the portion of the IHO's decision finding that the district offered the student a FAPE for the 2011-12 school year; and

IT IS FURTHER ORDERED that at the student's next annual review regarding the student's special education programming, the district shall consider whether the student would benefit from counseling in order to address her social/emotional and behavioral needs and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision.

Dated: **Albany, New York**
January 3, 2014

____
JUSTYN P. BATES
STATE REVIEW OFFICER