



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-217

**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 Kenmore-Town of Tonawanda Union Free School District**

### **Appearances:**

Harris Beach PLLC, attorneys for respondent, Jeffrey J. Weiss, 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 determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for their son for the 2013-14 school year were appropriate. The district cross-appeals the relief ordered by the IHO. The appeal must be sustained in part. The cross-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 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**

On April 24, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Joint Ex. 4A at p. 1).<sup>1</sup> Finding that the student remained eligible for special education and related services as a student with autism, the April 2013 CSE recommended a 12-month school year program in a 6:1+3 special class placement at a State-

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<sup>1</sup> Initially, a March 2013 CSE convened to conduct the student's annual review for the 2013-14 school year, however, the CSE tabled that meeting in order for the parents to more fully review a recently submitted March 2013 PT progress summary, which recommended terminating the student's PT services for the 2013-14 school year (see Joint Ex. 38; see also Tr. pp. 46-52). The March 2013 CSE did not generate an IEP as a result of this meeting (see Tr. p. 52).

approved nonpublic school with the following related services: five 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of individual physical therapy (PT) (id. at pp. 1, 10-11, 14).<sup>2, 3</sup> The April 2013 CSE also recommended that the student participate in "specially designed" or adapted physical education, and receive one 30-minute session per month of PT consultation services (id. at pp. 11, 13).<sup>4</sup>

Disagreeing with the April 2013 CSE's recommendation of one 30-minute session per week of individual PT services for the student for the 2013-14 school year, the parents requested an independent educational evaluation (IEE), which was completed on June 11, 2013 (June 2013 IEE) and shared with the district by letter dated June 24, 2013 (see Joint Exs. 4D; 12-13; 15 at pp. 1-2; 25; 28-29; 32-34; see also Tr. pp. 55-59).<sup>5</sup>

On July 31, 2013, the CSE reconvened to review and consider the June 2013 IEE (see Joint Exs. 4F at pp. 1; 10-11; 36-37). As a result, the July 2013 CSE continued to recommend one 30-minute session per week of individual PT services, but modified the April 2013 IEP to allow the student an additional 15 minutes in order to transition to his related services sessions (compare Joint Ex. 4A at pp. 1, 10-11, 13, with Joint Ex. 4F at pp. 1, 10-11, 13).<sup>6, 7</sup>

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

In a due process complaint notice dated August 9, 2013, the parents requested an impartial hearing regarding the reduction of the student's recommended PT services (see Joint Ex. 1). The parents enclosed a copy of a letter from the student's pediatrician, which recommended two 30-minute sessions per week of individual PT, in support of their assertion (id.; see Joint Ex. 8). As

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>3</sup> It appears that the district had recommended that the student receive three 30-minute sessions per week of individual PT services for the 2006-07 through the 2010-11 school years; for the 2011-12 and 2012-13 school years, it appears that the district reduced the recommended frequency to two 30-minute sessions per week of individual PT services (see Tr. pp. 42-44; Joint Exs. 18-22; compare Joint Ex. 40 at pp. 3-8, with Joint Ex. 40 at pp. 1-2).

<sup>4</sup> Consistent with State and federal regulations, the district provided the parents with prior written notice, dated April 24, 2013, regarding the proposed continuation of special education services for the student (see Joint Ex. 4C at pp. 1-2).

<sup>5</sup> By letter dated June 14, 2013, the parents submitted a May 22, 2013 "excuse from school/gym note" from the student's pediatrician, which requested the provision of PT services to the student due to his "global developmental delays, including gross motor skills" (Joint Exs. 4D; 25; see Joint Exs. 12-13).

<sup>6</sup> Consistent with State and federal regulations, the district provided the parents with prior written notice, dated July 31, 2013, regarding the proposed continuation of special education services for the student (see Joint Ex. 35 at pp. 1-2; see also Joint Ex. 31).

<sup>7</sup> On August 12, 2013, the district received an August 7, 2013 letter from the student's pediatrician, which indicated that the pediatrician recommended the student receive two 30-minute sessions per week of individual PT services (see Joint Ex. 8).

relief, the parents sought to restore the student's PT services to the previously recommended frequency of two 30-minute sessions per week of individual PT (id.).

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

On September 12, 2013, the IHO conducted a prehearing conference, and on October 7, 2013, the parties proceeded to an impartial hearing (see Tr. pp. 1-284; Joint Ex. 4 at p. 1). In a decision dated November 12, 2013, the IHO found that the evidence in the hearing record supported the July 2013 CSE's decision to recommend one 30-minute session per week of individual PT services for the student during the 2013-14 school year (see IHO Decision at pp. 4-12). Notwithstanding this determination, however, the IHO ordered the district to reevaluate the student in the area of PT as an additional IEE—allowing the parents to select the IEE evaluator—and to reconvene a CSE meeting upon the completion of the additional IEE in order to consider the results of the IEE, as well as to consider other strategies, such as a sensory diet, additional PT services, or "targeted behavior interventions" to further support the student; and to conduct an updated functional behavioral assessment (FBA) of the student to identify interfering behaviors that occurred during his participation in PT (id. at pp. 7-8, 12-13). In addition, the IHO annulled the interim pendency decision, dated September 13, 2013, and ordered that the July 2013 IEP was "in full force and effect" (id. at p. 13).

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

The parents appeal, and assert that the IHO erred in finding that the July 2013 CSE appropriately recommended one 30-minute session per week of individual PT for the student for the 2013-14 school year and in ordering relief that exceeded the basis for the impartial hearing. The parents argue that the IHO disregarded evidence in reaching the determination regarding the recommended PT services. In addition, the parents seek to overrule or annul the IHO's decision, and request a new impartial hearing as a result of their inability to properly represent the student at the impartial hearing. The parents also assert that the IHO erred in annulling the interim order on pendency issued on September 13, 2013, and seek to reinstate the pendency services until the conclusion of these proceedings. Finally, the parents assert that all of the relief ordered by the IHO must be annulled or overruled.

In an answer, the district responds to the allegations in the petition, and asserts that the parents' petition must be dismissed for failing to comply with the regulatory timelines for service of their notice of intention to seek review and petition. As a cross-appeal, the district alleges that the IHO erred in ordering the district to conduct an updated FBA, to reevaluate the student in the area of PT as an additional IEE, and to reconvene a CSE meeting to review the results of the IEE and FBA, and requests that this relief must be reversed or annulled.<sup>8</sup>

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<sup>8</sup> On September 13, 2013, the IHO issued an interim decision on pendency, which ordered the district to provide the student with two 30-minute sessions per week of PT services during the instant due process proceedings (Interim IHO Decision at pp. 1-4; see IHO Decision at p. 4). As neither party has appealed the IHO's interim order on pendency, that determination is final and binding, and thus, the underlying merits of that decision will not be addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

## 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).

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. PT Services**

The parent argues that the IHO erred in concluding that the July 2013 CSE appropriately recommended one 30-minute session per week of individual PT services, and the IHO ignored evidence from the student's pediatrician, which directly supported their assertion that the student required two 30-minute sessions per week of individual PT services. The district asserts that the IHO properly considered and weighed the evidence, and reached a proper conclusion based upon the evidence.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for

enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). In this case, the hearing record demonstrates that in reaching the decision to recommend one 30-minute session per week of individual PT services for the 2013-14 school year, the April 2013 and July 2013 CSEs reviewed and considered a March 2013 PT progress summary (March 2013 PT report) and a June 2013 IEE report (see Joint Exs. 4A at pp. 1, 5-6, 10-11; 4F at p. 1; 10-11; 15 at pp. 1-2; 17 at pp. 1-3; 36-37). Based upon an independent review of the hearing record, there is no reason to disturb the IHO's determination regarding the recommended PT services, and the parents' arguments must be dismissed.

According to the March 2013 PT report, the student received two 30-minute sessions per week of individual PT services during the 2012-13 school year, as well as OT, speech-language therapy, and adapted physical education (see Joint Ex. 17 at p. 1). The report indicated that the student often refused activities by exhibiting aggressive behaviors, such as biting or ripping therapy equipment, and lunging at therapists or staff in order to grab, scratch, pull hair or attempt to bite them, and required intervention by staff (*id.*). With respect to the student's present levels of range of motion and strength, the March 2013 PT report noted that he presented with "good functional strength," and could complete sit ups with his feet held and arms extended, bridges with adequate hip extension and control, and "prone walk outs" over a therapy ball on extended elbows (*id.*). However, the student did not tolerate the completion of a therapy exercise routine and he required "constant redirection to task" and "staff intervention" (*id.*). With regard to the student's present levels of balance and coordination, the March 2013 PT report indicated that the student displayed good balance reactions and coordination while riding a two-wheeled bicycle independently; he enjoyed pushing a cart through the hallways and around obstacles with "good independent negotiation;" he could sit on a therapy ball and cross midline with trunk rotation; he enjoyed spinning and swinging on a platform swing; and occasionally, he tolerated deep pressure and vibration for sensory input (*id.*).

With respect to the student's gross motor skills, the March 2013 PT report indicated that he could walk, run, and jump; he independently transitioned to and from a variety of positions; he could accurately throw bean bags at a target; he could throw playground balls with "good direction" and catch "via body trapping;" and he could kick a playground ball with toe contact (Joint Ex. 17 at p. 2). The student could also sit and kneel on a scooter board and propel himself using both feet and upper extremities (*id.*). With regard to the student's present levels of functional mobility, the March 2013 PT report described the student's ability to navigate the school environment with close supervision using an appropriate functional pace in a heel-toe gait pattern, and further noted his ability to go up and down stairs—with or without the assistance of the handrail—and with improved safety awareness (*id.*). In addition, the March 2013 PT report indicated that the student did not have difficulty "navigating the community safely," including the use of stairs, ramps, uneven terrain, or during "classroom outings" (*id.*).<sup>9</sup> Ultimately, the March 2013 PT report noted that due to the student's improved safety awareness negotiating stairs and his

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<sup>9</sup> The March 2013 PT report also included the results of "functional outcome measurements;" however, the physical therapist testified that although the student demonstrated decreased speed on these tests, his skills remained "functional," and the scores were "not that far off from what [was considered to be] the norm" (Tr. pp. 117-20, 130-32; see Joint Ex. 17 at pp. 2-3).

ability to negotiate the school environment and participate in activities with his classmates, the student no longer required PT services during the 2013-14 school year (id. at p. 3). The March 2013 PT report further noted that while the student "may continue to benefit from gross motor input" he received during "physical education class, creative movement, and sensory breaks," these interventions did not require the "skilled intervention of a physical therapy staff member" (id.).

In the June 2013 IEE, the evaluator described the student as "very self-directed" and "highly distracted" during the evaluation, and noted that he exhibited difficulty staying on task even with the provision of multiple verbal cues, prompts, and demonstrations of the activity (see Joint Ex. 15 at p. 1). According to the June 2013 IEE, the student exhibited normal range of motion for all four extremities, a mild decrease in muscle tone of his trunk, and a normal posture while sitting and standing (id.). With regard to the student's "gait analysis," the June 2013 IEE revealed a "great deal of instability and balance when walking on flat and uneven surfaces" (id.). The June 2013 IEE further indicated that while the student could go up and down stairs, he did lose his balance twice during the evaluation, and required the use of the hand rail and "stand by assistance" for safety (id.). The student's running pattern could not be assessed during the evaluation; similarly, the student's muscle strength was not assessed because he would not attempt activities even after demonstrations by the evaluator (id. at pp. 1-2). With respect to balance, the June 2013 IEE revealed deficits in both static and dynamic balance, noting that the student could not maintain balance without support "while standing on a four inch balance beam or on a vestibular/rockerboard" (id. at p. 2). However, the student could maintain a single limb balance on the floor for one to two seconds, and maintain a single limb balance on a four inch balance beam for one second (id.).<sup>10</sup>

In summary, the June 2013 IEE indicated that the student exhibited delays in "balance and safe mobility" and that he responded well to sensory motor activities, such as a ceiling mounted swing and a body swing (Joint Ex. 15 at p. 2). In the June 2013 IEE, the evaluator recommended direct PT services in order to "increase [the student's] balance and mobility skills and increase functional safety in the school setting" (id.). Although the June 2013 IEE did not include a specific recommendation as to the level or frequency of the recommended PT services, the evaluator testified at the impartial hearing that one 30-minute session per week of PT would be appropriate (compare Joint Ex. 15 at pp. 1-2, with Tr. pp. 211-14, 216, 225-28).

Therefore, as noted above, the hearing record reflects that the evaluative information considered by the April and July 2013 CSEs provided the CSEs with sufficient functional and developmental information about the student and his individual PT needs at that time, and supported the decision to recommend one 30-minute session per week of individual PT services to address the student's special education needs in this area during the 2013-14 school year (34 CFR 300.34[a], [c][9], 300.39[a][1][i]; 8 NYCRR 200.6[e]). Moreover, under the circumstances, a review of the July 2013 IEP reveals that the April and July 2013 CSEs designed the IEP with services in mind—such as adapted physical education, one 30-minute per month PT consultation services, and additional time to transition to his related services' sessions—to further address the student's PT needs and any such deficiency attributed to the CSE's failure to recommend one

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<sup>10</sup> The IEE evaluator attempted to administer a formal assessment to measure the student's gross motor skills, however, the student's self-directed behaviors prevented him from performing the required tasks (see Joint Ex. 15 at p. 2).



additional 30-minute session per week of individual PT, alone, in light of the array of other services provided on the July 2013 IEP, is not sufficient to conclude that the IEP as a whole was not reasonably calculated to enable the student to receive educational benefits (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]).<sup>11</sup>

Next, to the extent that the parents contend that the IHO erred by ignoring a September 18, 2013 letter from the student's pediatrician in reaching his determination regarding the recommended level of PT services, the parents' assertion is misplaced. Here, the parents admit in the petition that the September 18, 2013 letter was not reviewed by any CSE in reaching the decision to recommend one 30-minute session per week of PT services for the 2013-14 school year. However, neither an IHO nor an SRO may consider information presented subsequent to the date of a CSE meeting convened to develop a student's IEP as a basis upon which to declare the IEP substantively inadequate (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y., Dec. 23, 2013]; D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at \*13 & n.15 [S.D.N.Y. Sept. 16, 2013]).

## **B. Relief Ordered**

In this case, both the parents and the district seek to annul or vacate the IHO's order directing the district to reevaluate the student in the area of PT as an additional IEE—allowing the parents to select the IEE evaluator—and to reconvene a CSE meeting upon the completion of the additional IEE in order to consider the results of the IEE, as well as to consider other strategies, such as a sensory diet, additional PT services, or "targeted behavior interventions" to further support the student; and to conduct an updated FBA of the student to identify interfering behaviors that occurred during his participation in PT (IHO Decision at pp. 7-8, 12-13). In the absence of circumstances in which the district is relying on the parental consent override provisions, and noting that parental consent would be highly desirable in circumstances such as these, consequently, I will not require the evaluation to proceed at this juncture contrary to the agreement and wishes of both parties, and therefore, the parties' requests will be granted and I will vacate this directive by the IHO.

However, as the parties move forward in the spirit of continued cooperation evidenced throughout the hearing record, it is strongly suggested that in the development of the student's IEP for the 2014-15 schoolyear—if not already done so—that the parties cooperatively consider the IHO's thoughtful recommendations with respect to identifying any interfering behaviors that occur

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<sup>11</sup> State regulations define adapted physical education as a "specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitation of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program" (8 NYCRR 200.1[b]; see 34 CFR 300.108). Adapted physical education is also included within the State regulatory definition of "special education" (8 NYCRR 200.1[ww][2]). A December 2010 guidance document provides further information regarding recommendations for adapted physical education in the development of an IEP (see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 41-43, 49, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

during the student's PT services in order to allow the student to more fully participate and receive the full benefits of the recommended services.

### **C. Interim Decision**

The parents assert that the IHO erred in annulling the interim decision related to pendency that was issued on September 13, 2013, as part of the relief ordered in the final IHO decision, and seek to reinstate the student's pendency services until the conclusion of these proceedings. Both the IDEA and New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

As a matter of law, the requirements of pendency during an appeal obligates the district to continue to provide and fund the student's pendency placement through the conclusion of any administrative and/or judicial proceedings (see 20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]).

In this case, the IHO's unappealed interim decision dated September 13, 2013 established the student's pendency services and directed the district to provide the student with two 30-minute sessions per week of individual PT services "until further order in this matter" (IHO Interim Decision at p. 4). There is no indication by the parties or in the hearing record that the IHO's pendency determination was incorrect. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents

and the district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; see 34 CFR 300.518; 8 NYCRR 200.5[m]). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). Furthermore, in order to comply with State and federal law pendency provisions, a district's responsibility to maintain a student's pendency placement includes funding that placement (see Murphy v. Arlington Cent Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 CFR 300.518; Educ. Law § 4404[4][a]; 8 NYCRR 200.5[m]). As such, the IHO had no need or authority to annul the student's pendency services set forth in the September 13, 2013 interim order on pendency, as a pendency placement either automatically continues or lapses by operation of law, and not by the discretionary determination of an administrative hearing officer. Thus, to the extent that the district complied with the IHO's decision and terminated the provision of the student's pendency services, the district is required by operation of law to provide the student with additional educational services of one 30-minute session per week of individual PT services for the time period between the IHO's decision annulling the student's pendency services—November 12, 2013—and the date of this decision.

## **VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the July 2013 appropriately recommended one 30-minute session per week of individual PT services for the student for the 2013-14 school year, the necessary inquiry is at an end.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated November 12, 2013 is modified by vacating that portion which directed the district to reevaluate the student in the area of PT as an additional IEE as described in the body of this decision; and,

**IT IS FURTHER ORDERED** that, unless the parties shall otherwise agree and to the extent it has not already done so, the district shall provide the student with one 30-minute session per week of individual PT services, from November 12, 2013 through the date of this decision.

**Dated:** Albany, New York  
December 31, 2013

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**