The University of the State of New York

The State Education Department
State Review Officer
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No. 14-016

Application of the BOARD OF EDUCATION OF THE KINGSTON CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Lisa S. Rusk, Esq., of counsel

Sussman & Watkins, attorneys for respondents, Mary Jo Whateley, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to place the student at Chapel Haven for the 2014 calendar year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has received special education services since preschool (Dist. Ex. 7 at pp. 1-2). She attended a public school in the district until seventh grade, at which point her parents enrolled her in a day program at a nonpublic school as a result of the student's experiences with alleged bullying and abuse from other students while attending school in the district and the student's resulting symptoms of anxiety and phobia (Tr. pp. 257-58). The student continued attending the same nonpublic school up through and including the 2010-11 school year (see Tr. p. 274-75). During the 2011-12 school year, the student received home instruction at district expense and attended classes at a community college (see Tr. p. 275; Dist. Ex. 5 at p. 1; Parent Exs. R; T

at p. 1; Z at p. 1).[1, 2] In July 2012, the student began attending Chapel Haven, an out-of-state nonpublic residential school, pursuant to a settlement agreement with the district (see Dist. Ex. 5 at p. 1; Parent Ex. EE at pp. 1-3; GG at pp. 1-5; see also Tr. p. 258).[3]

On June 21, 2013, a CSE subcommittee convened to develop the student's IEP for the 2013-14 school year (Dist. Ex. 4 at p. 1).[4] Finding the student eligible for special education as a student with autism, the June 2013 CSE recommended a 12-month school year program in a Board of Cooperative Educational Services (BOCES) 8:1+1 special class placement with the following related services: one 40 minute session per week of small group (5:1) counseling, two 30-minute sessions per week of small group (5:1) speech/language therapy, and one 40 minute session per week of individual counseling (id. at pp. 1, 10-13).[5] The June 2013 IEP indicated that the IEP would be implemented in a particular BOCES program at a public school site (id. at pp. 1, 13-14). Additionally, the June 2013 IEP recommended two 30-minute sessions of individual transition services per year, one 30-minute session per month of parent counseling and training, assistive technology, a transition plan, program modifications and accommodations, and annual goals (id. at pp. 1, 6-13).

[1] The hearing record contains duplicative exhibits. For purposes of this decision, only Parent exhibits are cited. However, the version of the June 2013 Chapel Haven evaluation introduced by the parents includes additional pages not contained in the district version, which do not appear to be original to the evaluation (compare Parent Ex. SS, with Dist. Ex. 5). For purposes of this decision, the district's version of this evaluation is cited (see Dist. Ex. 5). The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] The August 2011 CSE recommended a Board of Cooperative Educational Services (BOCES) 8:1+1 special class placement for the student (Parent Ex. N at pp. 1, 7). The parents filed a due process complaint notice relating to the 2011-12 school year (see generally Parent Ex. S).

[3] The Commissioner of Education has not approved Chapel Haven as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; see also Dist. Ex. 3 at p. 3; Parent Ex. LL at p. 18). The evidence in the hearing record shows that the student's placement at Chapel Haven came about after an exhaustive search to find an appropriate school site for the student to attend for the 2012-13 school year (Tr. pp. 87-96). The district submitted 21 applications to other programs, all but one of which rejected the student (Parent Ex. II at pp. 3, 8-9). The one program that accepted the student was deemed inappropriate by the district (Tr. pp. 90-91, 269-70; Parent Ex. II at p. 3). The district subsequently requested approval on December 23, 2011 for an emergency interim placement (EIP) from the State Education Department in order to fund the student's attendance at Chapel Haven, but this request was denied (Parent Ex. II at pp. 2-3; see Tr. pp. 64-66). The parties thereafter reached a settlement agreement that related back to the parent's due process complaint notice that challenged the August 2011 IEP, whereby the student would attend at Chapel Haven for the 2012-13 school year at district expense (Parent Ex. GG at pp. 1-5).

[4] Although the IEP indicates that this CSE meeting was held on June 28, 2013, it appears from a review of the evidence in the hearing record that this meeting was held on June 21, 2013 (compare Dist. Ex. 4 at p. 1, with Parent Exs. KK at p. 1; LL at p. 1; MM; see also Tr. pp. 104-05, 209-10, 258-60, 262-63). According to the hearing record, on June 28, 2013 the parents, the district representative, a district guidance counselor, and another participant met to discuss the student's graduation requirements (Tr. pp. 262-63; Parent Ex. LL at p. 20).

[5] 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]).

By letter dated June 24, 2013, the parents notified the district that they were rejecting the "IEP placement at the [particular] BOCES . . . program" (Parent Ex. TT). Specifically, the parents indicated that the public school site that housed the BOCES program "provide[d] an overly restrictive environment not conductive to [the student's] learning needs," noting, in particular, that the classes at the school site were "in constant 'lock down' throughout the day," therefore requiring student "to be escorted to the nurse or bathroom" (id.). In addition, the parents informed the district that, in 2008, the student had a negative reaction upon visiting the assigned public school site, resulting in an anxiety attack, and that, subsequently, the student exhibited "severe panic attacks" when she was a passenger on a school bus that stopped at the assigned public school site (id.). The parents also referenced a December 23, 2011 communication from the district to the State Education Department, in which the district stated that the particular BOCES program would not be appropriate for the student (id.). Therefore, the parents notified the district of their intentions to place the student at Chapel Hill for the 2013-14 school year and to seek public funding for the costs of the student's tuition (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 22, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. OO at p. 2). The parents alleged that the June 2013 CSE failed to discuss or develop an appropriate program for the student "prior to recommending placement at . . . BOCES" and failed to "properly consider whether [the student] could be educated in a less[] restrictive environment with supports and services, prior to recommending a segregated out-of-district placement" (id.). The parents argued that the district also failed to evaluate the student in all areas of suspected disability and need (id.). Next, the parents alleged that the June 2013 CSE's recommendation for an 8:1+1 special class at the BOCES day program failed to adequately address the student's "academic, physical, social and emotional needs" (id.). Furthermore, the parents asserted that the June 2013 CSE made such a recommendation prior to the provision to the BOCES program of a current information "packet" about the student and the completion of an intake process (id.). Finally, the parents alleged that the June 2013 CSE failed to discuss or develop a transition plan for the student's reintroduction into a public school setting, despite her anxiety and phobias resulting from her previous experiences in a public school setting (id.).

As relief, the parents requested that the IHO order the district to pay for the costs of the student's tuition at Chapel Haven for the 2013-14 school year (Parent Ex. OO at p. 2). The parents also sought a determination that Chapel Haven constituted the student's pendency (stay-put) placement during the proceedings (id. at pp. 1-2).[6]

B. Impartial Hearing Officer Decision

On September 5, 2013, an impartial hearing convened and, following three non-consecutive days of proceedings, concluded on November 13, 2013 (Tr. pp. 1-289). By interim

[6] The hearing record reflects that a resolution session was held regarding the allegations in the complaint on August 2, 2013 (IHO Ex. 3; see Tr. p. 84). At this meeting, the district offered to "move up" the date of the district's completion of the student's triennial re-evaluation and to consider the results thereof (Tr. p. 84). This offer was rejected by the parents and the matter proceeded to an impartial hearing (id.).

order dated September 6, 2013, the IHO memorialized an agreement between the parties that the district would provide the student with two hours of daily home instruction during the course of the proceedings because the student was at home and not receiving educational instruction (Sept. 6, 2013 Interim IHO Decision at pp. 1-3; see also Tr. pp. 47-49). Subsequently, by interim order dated September 29, 2013, the IHO denied the parents' renewed request for an order identifying Chapel Haven as the student's pendency placement and identified a "middle school" IEP recommending a 15:1+1 special class with related services of counseling and speech-language therapy as the student's last agreed-upon placement (Sept. 29, 2013 Interim IHO Decision at p. 5). The IHO further noted that the district was ready and able to educate the student under this IEP in a district classroom (id. at p. 6).

By final decision dated December 23, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that Chapel Haven was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 17-26).

Regarding the parents' allegation that the district failed to evaluate the student in all areas of suspected disability, the IHO found that the student "was not due for a re-evaluation until the fall of 2013" (IHO Decision at p. 18). The IHO further found that the district offered to conduct an evaluation sooner, but that the parents rejected this offer (id. at pp. 18-19). Finally, the IHO noted that the parents did not introduce any evidence in support of this argument at the impartial hearing (id.). Accordingly. the IHO dismissed this claim (id.).[7]

Next, the IHO found that the June 2013 CSE failed to discuss several salient topics; namely; (1) "the BOCES program"; (2) whether the student's annual goals could be implemented at the BOCES placement; (3) "whether the student continued to require a residential placement and/or whether the student was prepared to attend a day program"; (4) whether the other students who attended the BOCES placement had similar needs to the student; (5) whether the student still suffered from phobia or anxiety related to her previous experiences in a public school; and (6) whether the student "could manage such a significant change in placement" (IHO Decision at pp. 17-18).

With respect to the appropriateness of the BOCES 8:1+1 special class, the IHO found that the district failed to establish that the recommendation was appropriate for the student, particularly because the BOCES program was the same placement recommended by the CSE for the 2011-12 school year, which the district admitted was inappropriate, and because no representative from the BOCES program testified at the impartial hearing (IHO Decision at p. 17). The IHO additionally found no evidence supporting the district's contention that, because the student could travel to a community college on her own, the student could attend the BOCES program, and noted that, in any event, this alone did not establish that the BOCES program was appropriate for the student (id. at p. 18). Similarly, the IHO found no evidence to support district's contention that student would start attending the BOCES 8:1+1 program at a "quieter" time in the summer, thus easing

[7] The parents did not assert a cross-appeal or otherwise address this issue in their answer; accordingly, this determination has become final and binding on the parties and will not be addressed on appeal (see 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]).

her transition into the program (id.). Finding insufficient evidence that the placement had changed since the 2011-12 school year, the IHO concluded that the BOCES program continued to be inappropriate for the student (id.). Finally, the IHO found that the district failed to issue prior written notice "with respect to the . . . change in placement for the 2013-14 school year," relative to the residential placement attended by the student and funded by the district during the 2012-13 school year (id.). Based on the foregoing, the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 school year (id. at p. 18).

After describing the student's program at Chapel Haven during the 2012-13 school year, the IHO found that it was appropriate to meet the student's needs (IHO Decision at pp. 20-23). The IHO determined that the student "handled the demands of the program very successfully" (id. at p. 21). The IHO found numerous instances of the student's progress at Chapel Haven, including: successful completion of assessments; mastery of, or progress toward, goals; and "further skill enhancement in many areas of . . . life" (id.). Further, the IHO noted the parents' testimony that the student's attendance at Chapel Haven coincided with "significant social/emotional growth" and that the student "regressed" after leaving this setting (id.).

The IHO next rejected the district's claim that Chapel Haven took a lackadaisical approach to the student's "credit acquisition" during the 2012-13 school year based on three findings: (1) the district "failed to provide Chapel Haven with the [s]tudent's transcript"; (2) the district "failed to advise Chapel Haven that [it] w[as] expected to prepare the [s]tudent for the English and math regent's [sic] exams during the 2012-13 school year"; and (3) at meetings held between the district and Chapel Haven, the district failed to initiate a "discussion regarding specialized instruction for academics" and "did not raise any objections with respect to the structure of Chapel Haven's program" (IHO Decision at p. 22). The IHO determined that, had the student attended Chapel Haven during the 2013-14 school year, "special education teachers" would have prepared the student for the English and mathematics regents examinations (id.). Further, the IHO noted that the student would have had "the opportunity to participate in an internship" at a hospital "for work experience and additional social skills training" (id.). For all of these reasons, the IHO found that Chapel Haven was an appropriate unilateral placement for the student (id. at pp. 22-23).[8]

The IHO next determined that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at p. 24). In support of this finding, the IHO noted that the parents were told, without discussion, that the BOCES program would constitute the student's placement for the 2013-14 school year (id.). Additionally, the IHO noted the parents' familiarity with the BOCES program and found that the parents worked "collaboratively" with the district, contacting over 20 possible schools in the State, to find a placement for the preceding 2012-13 school year (id.). Finally, the IHO found that the parents provided the district with appropriate notice of their intention to enroll the student at Chapel Haven (id.).

With respect to relief, the IHO rejected the district's contention that the parents were required to establish their financial inability to pay the student's tuition at Chapel Haven for the

[8] The IHO additionally found that the district "conceded" that the student had "unique" needs and that Chapel Haven was a "good fit" for the student "prior to the 2013-14 school year" (IHO Decision at p. 22). The IHO further suggested that the district's adoption of the goals proposed by Chapel Haven constituted an implicit endorsement of its educational programming (id.).

2013-14 school year and, in any event, declined to order the district to directly fund the student's tuition (IHO Decision at pp. 24-25). Instead, the IHO noted that the student had not yet attended Chapel Haven during the 2013-14 school year (id. at p. 25). Thus, the IHO ordered the district "to place the [s]tudent" at Chapel Haven for the "entire 2014 calendar year" at district expense (id.). The IHO further ordered the district "to communicate to Chapel Haven the [s]tudent's graduation requirements" and to "work with Chapel Haven on developing a program wherein the [s]tudent would take the New York English and math regents exams" (id. at pp. 25-26).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2013-14 school year, that Chapel Haven was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief.

With respect to the June 2013 CSE meeting, the district contends that the district representative at the CSE meeting possessed knowledge of the BOCES program and shared this information with the parents. Further, the district argues that a social worker from the particular BOCES program attended the CSE meeting and the parents failed to avail themselves of his knowledge by asking him about the BOCES program.

Turning to the appropriateness of the recommended BOCES 8:1+1 special class, the district points to documentary and testimonial evidence indicating that the particular BOCES 8:1+1 special class placement would have been able to implement the student's June 2013 IEP. The district asserts that the IHO erred in finding that a BOCES representative was required to testify about the program in order to establish its appropriateness for the student. The district urges that the particular BOCES program had changed since the parents formed their initial impressions of it, after the CSE recommended the program for the student for the 2011-12 school year. Further, the district argues that the CSE reviewed evidence that the student attended classes at two community colleges, and, based upon this information, the district reasonably concluded that the student could travel to the BOCES program. The district argues that the IHO erred by rejecting the district representative's undisputed testimony that the student could have more easily transitioned into the program in the summer.[9]

Next, the district alleges that Chapel Haven was not an appropriate unilateral placement for the student due to its focus on life skills, rather than the academic instruction the student required. In support of this contention, the district argues that evaluations conducted by Chapel Haven indicated that the student had few life skill needs. Further, the district asserts that Chapel Haven's lack of academic testing, failure to issue grades and diplomas, as well as the nonacademic

[9] The district also objects to findings by the IHO that the district did not provide the parents with a classroom profile of the proposed BOCES classroom at the assigned public school site and that the parents were not afforded an opportunity to visit the public school site. The district asserts that these findings were outside the scope of the parents' due process complaint notice and, in any event, the district was not legally obligated to provide a classroom profile or afford the parents an opportunity to visit the assigned public school site. Upon review of the hearing record, it does not appear that these findings were independent bases upon which the IHO found that the district failed to offer the student a FAPE (see IHO Decision at pp. 13, 14) and, as such, they will not be reviewed on appeal.

nature of its course offerings, constitute proof of the school's inability to meet the student's academic needs. The district argues that Chapel Haven was too restrictive for the student, in that the student did not require a residential placement. The district also observes that Chapel Haven was not approved by the Commissioner as a private school with which districts could contract to provide services to students with disabilities, additionally noting that it was denied by the State Education Department as an interim emergency placement for the student.

The district further contends that the IHO erred in finding that equitable considerations weighed in favor of the parents' request for relief. The district argues that the parents failed to ask pertinent questions at the CSE meeting and refused to consider any other placement besides Chapel Haven. Additionally, the district argues that the parents' rejection of its offer to conduct an evaluation of the student sooner than scheduled, as well as their refusal to accept home-based services during the pendency of the impartial hearing, provides evidence of the parents' refusal to cooperate with the district.

The district additionally objects to the IHO's award of prospective relief, as it was unaccompanied by evidence or a finding demonstrating the parents' inability to afford the costs of the student's education. Furthermore, the district asserts that the IHO erred in awarding relief beyond the 2013-14 school year. The district also takes exception to the IHO's determination that the district did not provide prior written notice with regard to the June 2013 CSE meeting because this allegation was not contained in the parents' due process complaint notice. Finally, the district objects to certain evidence introduced at the impartial hearing in contravention of the five-day deadline imposed by State regulations.

In an answer, the parents respond to the district's petition by admitting or denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year, that Chapel Haven was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parents the requested relief.

V. Applicable Standards

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

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

129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Parental Participation

The district contends that the IHO erred in finding that the June 2013 CSE did not sufficiently engage in discussions about the recommendation for a BOCES 8:1+1 special class placement in a public school during the meeting.[10] The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental

[10] The district also asserts that, if it is determined that the June 2013 CSE did not sufficiently discuss the proposed program, the proper remedy is remand to the CSE for further discussion.

disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 210 Fed. App'x 1, 3, 2006 WL 3697318 [D.C. Cir. Dec. 6, 2006]).

Attendees at the June 2013 CSE meeting included the district director of special education (who served as the district representative), a district school psychologist, a district special education teacher, a district regular education teacher, a district guidance counselor, a social worker from the BOCES program, the parents, the student, the parent's advocate, the parents' friend, and, by telephone, two representatives from Chapel Haven (see Tr. pp. 61-62; Dist. Ex. 4 at p. 1; Parent Ex. LL at p. 1).

At the impartial hearing, the parents introduced a written transcription of the June 2013 CSE meeting (see generally Parent Ex. LL). An independent review of its contents reveals, as the IHO observed, that the participants at the CSE meeting did not engage in a detailed discussion of the student's needs, annual goals, or the appropriateness of the BOCES placement (see Parent Ex. LL at pp. 1-25). The evidence in the hearing record indicates that the CSE primarily discussed the student's progress in the Chapel Haven program during the 2012-13 school year, the parents' expectation for the student to attend college, and progress the student had made toward obtaining a regular high school diploma (see Tr. pp. 63-64; Parent Ex. LL at pp. 3-18, 20-22). The hearing record shows that the parent communicated to the CSE her desire that the student attend Chapel Haven for the 2013-14 school year (see Tr. p. 64; Parent Ex. LL at p. 18).

The evidence in the hearing record also reveals that, although a representative from the BOCES program was present at the June 2013 CSE meeting, no member of the CSE solicited information from, or asked questions of, this representative (Tr. pp. 74, 268, 278; see Parent Ex. LL at p. 18). The transcript from the June 21, 2013 CSE meeting indicates that, when asked if the parent had any questions for the BOCES representative, the parent replied "that's not gonna happen" (Parent Ex. LL at p. 19). While the IDEA requires parental participation at CSE meetings, it does not specifically define "participation," specify a requisite level of participation, or prescribe a particular agenda of mandatory discussion topics or the manner in which a CSE must effectuate said parental participation (see 20 U.S.C. § 1414[e]; 34 CFR 300.501[b]; 8 NYCRR 200.5[d]). In any event, the failure to explore further discussion about the BOCES program cannot rest upon a single member of the CSE. As reflected in guidance from the State Education Department, the CSE is a "student-centered process" and "[a]ll members of the [CSE] share the responsibility to contribute meaningfully to the development of a student's IEP" ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. [Dec. 2010], at p. 14, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

While the June 2013 CSE's discussion about the recommended BOCES program may have fallen short of the parents' ideal, it cannot be overlooked the parent specifically declined to ask questions or identify concerns to the BOCES representative when specifically given an opportunity to do so. The district is not responsible for forcing the parent to participate. As described below, the June 2013 CSE nevertheless reviewed appropriate and relevant evaluative

data, ascertained the student's present levels of performance, developed appropriate annual goals for the student, and recommended a placement that could implement the mandates of the June 2013 IEP. Under these circumstances, the evidence in the hearing record does not support a conclusion that the CSE was required to further discuss other particular topics, and even if there was a procedural violation, it cannot be said that it "impeded the student's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process . . . or caused a deprivation of educational benefits" (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

B. June 2013 IEP—BOCES 8:1+1 Special Class Placement

The district asserts that the IHO erred in determining that the June 2013 CSE's recommendation of a BOCES 8:1+1 special class in a public school was not appropriate for the student.[11] Upon review, and as more fully described below, the hearing record demonstrates that the BOCES 8:1+1 special class placement recommended by the CSE for the student's 2013-14 school year was appropriate.

The evidence in the hearing record shows that the June 2013 IEP was developed based on evaluative information describing the student's needs, including an October 2010 neuropsychological evaluation, a June 2011 psychoeducational evaluation, a June 2011 speech-language evaluation, and a June 2013 Chapel Haven one year evaluation (see Dist. Ex. 4 at p. 26; see generally Dist. Exs. 5; 7; Parent Exs. F; G).[12]

The October 2010 psychological evaluation, a private evaluation obtained by the parents, described the student as exhibiting deficits in executive functioning, such as inhibition, attention, cognitive flexibility, and strategic planning (Dist. Ex. 7 at pp. 1, 6). At the time of the evaluation, the student was functioning at grade level in reading, but below grade level in math (id. at p. 2). The evaluator noted that the student displayed discrepancies between her abilities and her academic achievement in some areas (id. at p. 10). The areas of spelling, decoding, reading fluency and comprehension were strengths for the student (id.). Although the student was able to perform various math tasks, she fell below her grade level due to the speed at which she completed them (id.).

As part of a June 2011 speech-language evaluation, the student was administered the Test of Pragmatic Language – Second Edition and received a score of 88 (Parent Ex. F at pp. 1, 2; see Dist. Ex. 4 at p. 2). The evaluator noted that this score may have been influenced by tiredness occasioned by the student's refusal to take a break during the testing process (Parent Ex. F at p. 1). The evaluator observed that the student's voice, fluency, and articulation were all within "normal

[11] With regard to the IHO's finding that the district failed to provide prior written notice (see IHO Decision at p. 17), while the hearing record supports the district's assertion that the issue was not raised in the parent's due process complaint notice, had the district provided prior written notice, it may have offered further evidence to support the June 2013 CSE's recommendations. Therefore, although the issue of prior written notice could not stand as an independent basis for a finding that the district failed to offer the student a FAPE, the IHO did not rely on it as such and I decline to find that the IHO exceeded his jurisdiction in this respect.

[12] The June 2013 IEP mistakenly identifies the date of the June 2011 psychological evaluation as "May 5, 2011" (Dist. Ex. 4 at p. 2; see Parent Ex. G).

limits" (id.). The evaluator concluded that the student presented with receptive and expressive vocabulary and grammatical language skills normal for a student her age (id. at p. 2). The evaluator further concluded that the student's knowledge of pragmatic or social language fell one standard deviation below average (id.). While the student was able to successfully recognize facial expressions, gestures, and social norms of conversation, as well as answer questions relating to communication breakdowns, she expressed difficulty requesting information to negotiate or persuade, assessing the mood of a listener, understanding abstract information, and predicting how successful a message would be (id.). In sum, the evaluator concluded that the student "ha[d] the basic building blocks needed to carry on a conversation but . . . falter[ed] when language bec[a]me[ ] more complex or inferential" (id.). The evaluator recommended that the student continue to receive speech-language therapy once per week in a small group "to better understand social situations and how to negotiate in the world around her" (id.).

The June 2011 psychoeducational evaluation noted that the evaluation was conducted in the district administration building because, according to the parent, the student would not enter a school building (Parent Ex. G at p. 1). The examiner opined that the student was quiet, reserved, and seemed uncomfortable, but did not appear anxious about the testing process (id. at p. 2). The examiner reported that the student was cooperative and completed all tasks without any need for repetition (id.). The evaluator further noted that the student demonstrated poor communication and social skills (id.). The June 2011 psychoeducational evaluation reported results from the administration of the Wechsler Adult Intelligence Scale–IV (WAIS-IV) to the student, which revealed: general cognitive skills in the low average range; verbal comprehension, perceptual reasoning, and processing speed in the average range; and working memory in the borderline range (id. at pp. 2-4; see Dist. Ex. 4 at pp. 2-3); . According to the testing results, the student also displayed verbal reasoning skills in the average range with high average skills in the information subtest (Parent Ex. G at p. 3). The student further scored in the average range on the similarities subtest and in the low average range on the vocabulary subtest (id.). The student's nonverbal reasoning abilities fell in the average range (id.). Although the evaluator noted that the student exhibited significant difficulty with the block design subtest, she opined that the student's performance may have been influenced by her visual spatial perception, visual perception-fine motor coordination, and planning abilities (id. at p. 4).

A June 2013 one-year evaluation report from Chapel Haven detailed the student's academic and social progress in the Chapel Haven program during the 2012-13 school year (see generally Dist. Ex. 5). The report noted that the student was punctual and organized in the classroom, working on her spelling and writing skills and, at the time of the report, preparing to take New York State regents exams (id. at pp. 1, 11; see Dist. Ex. 4 at pp. 4-5). In addition, the student volunteered in an office assisting with administrative duties, independently navigated the community using public transportation, and attended classes at a local community college (Dist. Ex. 5 at pp. 1-2; see Dist. Ex. 4 at p. 4). The report indicated that the student exhibited strong task initiation skills, improved social interaction, and improved active listening skills (Dist. Ex. 5 at pp. 3-4; see Dist. Ex. 4 at p. 5). The student continued to demonstrate discomfort regarding some topics of conversation and difficulty understanding the perspectives of others (Dist. Ex. 5 at p. 4; see Dist. Ex. 4 at p. 5). Further, the student developed personal autonomy and self-advocacy skills, and exhibited competency in regard to independent living skills such as health maintenance, laundry, grooming, hygiene, apartment maintenance, meal preparation; and was progressing toward independence in budgeting and banking (Dist. Ex. 5 at pp. 8-11; see Dist. Ex. 4 at pp. 4-

5). The student demonstrated a need for adult support in communicating with and maintaining positive relationships with other students (Dist. Ex. 5 at p. 10; see Dist. Ex. 4 at p. 5).

In addition, regarding the student's academic functioning levels, the hearing record shows that the student attained A and B grades at her previous private school placement, passed both the earth science and global history regents exams, was planning to take the English regents exam with the expectation of passing, and took and completed college level classes online and at a local community college (Tr. pp. 68, 112, 260-64; Dist. Ex. 4 at p. 4; Dist. Ex. 5 at p. 2; Parent Exs. LL at pp. 4, 5-7, 8; RR at p. 1). According to the transcript of the June 2013 CSE meeting, the parent and the Chapel Haven supervisor reported to the CSE that the student did very well during the 2012-13 school year (Parent Ex. LL at pp. 3-4).

The hearing record reveals that the student's annual goals were derived largely, and almost verbatim, from the June 2013 Chapel Haven one year evaluation (compare Dist. Ex. 4 at pp. 7-10, with Dist. Ex. 5 at pp. 12-19). The district representative testified that the June 2013 CSE did so because the Chapel Haven staff knew the student's skills and abilities (Tr. pp. 68-69). The June 2013 IEP included 32 measurable annual goals to address the student's identified needs in the areas of study skills, writing, speech/language, social/emotional/behavioral, daily living skills, and career/vocational/transition (Dist. Ex. 4 at pp. 7-10). Additionally, the student's June 2013 IEP included postsecondary goals for the student to attend a four year college, secure competitive employment, and live independently (id. at p. 7). The IEP also included program modifications, accommodations and assistive technology recommendations to address the student's management needs including special seating arrangements, use of a word processor, use of a graphing calculator, extremely quiet environment, opportunities to move around, and refocusing and redirection (id. at p. 11). Consistent with these identified management needs, the June 2013 recommended an 8:1+1 special class, which State regulations define as designed for students "whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention" (Dist. Ex. 4 at pp. 1, 11, 14; see 8 NYCRR 200.6[h][4][ii][b]). Moreover, to further support the student in conjunction with the 8:1+1 special class placement, the evidence in the hearing record reflects that the June 2013 CSE recommended individual and group counseling to address the student's social/emotional needs, and group speech-language therapy to support the student's conversation and nonverbal communication skills (Dist. Ex. 4 at pp. 1, 10-11).

The CSE recommended a BOCES 8:1+1 special class in a district public school site (Dist. Ex. 4 at pp. 1, 14; see Tr. p. 105; Parent Ex. LL at pp. 18-19). Although a less restrictive placement was not discussed at the June 2013 CSE meeting (Tr. p. 268), it does not appear from the hearing record that either the district representatives at the CSE meeting or the parents believed or suggested that the student should attend a general education classroom. At the June 2013 CSE meeting, the parents suggested their preference that the student continue to attend Chapel Haven and the district noted its inability to recommend Chapel Haven because it was not a State-approved nonpublic school with which the district could contract to provide services to students with disabilities (Parent Ex. LL at p. 18).[13]

[13] Additionally, and contrary to the parents' assertion, the CSE had not previously recommended a residential placement for the student (Tr. p. 113, 265, see Parent Ex. N at p. 1).

Contrary to the IHO's finding, although testimony from a representative of the particular BOCES program may have further supported the district's position, sufficient evidence was presented to support the conclusion that the BOCES 8:1+1 special class was appropriate for the student. The parents and the IHO assigned great weight to the district's statement in its December 2011 application to the State Education Department that the "local BOCES program [would] not be successful for [the student] because she [was] too anxious to attend this type of environment" (see Parent Ex. II at p. 2; see also IHO Decision at p. 17). However, as indicated in the evaluative materials before the June 2013 CSE, described above, the student had made significant progress, undertaken college courses, and appeared to have conquered some of the social/emotional concerns she had previously experienced (see Dist. Ex. 5 at pp. 2-8). Notwithstanding the IHO's finding as to the relevance, the student's progress was also reflected by the student's ability to travel to and from the community college (see Tr. p. 84-85, 201-02, 235; Dist. Ex. 5 at p. 10; see also IHO Decision at p. 18). Furthermore, there was little mention in the more recent evaluative information regarding the student's anxiety or phobia, and the June 2011 psychoeducational evaluation simply stated information provided by the parents relating thereto (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 5 at pp. 2-8; Parent Ex. G at p. 1). Therefore, notwithstanding the student's negative experiences in the past, based on the evaluative information and the discussions that took place at the June 2013 CSE meeting, it was not unreasonable for the CSE to conclude that the student could succeed in a public school setting.

The hearing record also demonstrates that, according to the district representative, the June 2013 CSE recommended the BOCES 8:1+1 special class placement for the student because the program focused on coursework needed for student to attain a regular high school diploma and would provide the student with vocational opportunities and instruction in activities of daily living, social communication, and travel (Tr. p. 75). In addition, the hearing record shows that the BOCES 8:1+1 special class included social worker support and provided students with opportunities to work on their social skills (Tr. pp. 76-77).

The district representative testified that, at some point prior to the June 2013 CSE meeting, she discussed the possibility of the student's attendance at a BOCES 8:1+1 special class placement with the director of special education at the particular BOCES school site (Tr. p. 112-13). According to the district representative, the BOCES director of special education opined that the student's needs in the instant case were similar to the student's needs in the proposed 8:1+1 class, and that the students in the class were focused on the same goals, including attainment of regents diplomas (Tr. pp. 112-13). Moreover, the district representative testified that students who attended the particular BOCES program were typically provided opportunities to interact with regular education peers during a vocational component of the program (Tr. pp. 83-84). Furthermore, the district representative asserted that, because the student was able to attend a community college class independently, she hoped that the student could be successful in the BOCES program with the right support (Tr. p. 85). The district representative also opined that the student's needs could be met in a day placement (Tr. p. 86).

Based on the above and taking into consideration both the student's overall average cognitive and academic abilities, as well as her need for a special class environment focused on social skill development, the evidence supports a finding that the recommendation of the June 2013 CSE for an 8:1+1 special class placement at BOCES was appropriate. Therefore, based upon the evidence in the hearing record, the June 2013 CSE's recommendation of the BOCES 8:1+1

special class—together with related services and classroom management strategies and supports—addressed the student's needs and was reasonably calculated to enable her to receive educational benefits for the 2013-14 school year in the LRE.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2013-14 school year, it is unnecessary to address the appropriateness of Chapel Haven, whether equitable considerations weigh in favor of the parents' sought relief, or the appropriateness of the IHO's award of prospective relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein. In any event, they would not affect my ultimate determination.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated December 23, 2013, is modified to the extent indicated in the body of this decision.

Dated: **Albany, New York**
February 21, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER