



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-053

**Application of the BOARD OF EDUCATION OF THE
PITTSFORD CENTRAL 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:

Harris Beach PLLC, attorneys for petitioner, David W. Oakes, Esq., of counsel

WNY Advocacy for the Developmentally Disabled, Inc., attorneys for respondents, Roger G. Nellist, 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 pay for the costs of the student's tuition at the School of the Holy Childhood (Holy Childhood) for the 2012-13 and 2013-14 school years. For the reasons set forth below, the matter must be remanded to the IHO for further administrative proceedings.

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 diagnoses including a global developmental delay and partial agenesis of the corpus collosum (Parent Ex. 21 at p. 3).¹ According to an October 2010 psychological evaluation, the student received services since before reaching one year of age and

¹ Both parties submitted exhibits designated by duplicative numerals at the impartial hearing. The IHO is encouraged in the future to have one of the parties label their exhibits alphabetically, as this practice tends to work very well in impartial hearings across the State and minimizes confusion.

began receiving special education services through the Early Intervention Program (id.). After transitioning to the committee on preschool special education (CPSE), the student attended an integrated preschool and a 6:1+1 special class in a board of cooperative educational services (BOCES) program for kindergarten, at which time she was classified as a student with multiple disabilities (Parent Exs. 1 at p 1; 21 at pp. 3, 9). The student attended the 6:1+1 BOCES program from kindergarten through the 2011-12 school year (Tr. pp. 105).

In a letter to the district dated May 1, 2012, the parents informed the district that the student had been accepted at Holy Childhood and requested the district's "cooperation and approval for her to attend" the school (Parent Ex. 31 at p. 1).²

On May 1, 2012, the CSE met to develop the student's program for the 2012-13 school year (Dist. Ex. 14 at p. 1). The CSE met a second time to complete development of the IEP on May 31, 2012 (id. at pp. 1-3; see Dist. Ex. 13). Finding that the student remained eligible for special education and related services as a student with multiple disabilities, the May 2013 CSE recommended a 12:1+4 special class placement in a district high school, in conjunction with the services of a 1:1 aide, related services, and supports for school personnel (Dist. Ex. 13 at pp. 1, 12-13).³ The May 2012 CSE also recommended that the student receive services on a 12-month basis, with a 6:1+1 placement for July and August 2012 with similar supports and related services (id. at pp. 1, 14).

The hearing record contains an IEP amendment form, dated July 5, 2012, that reflected the parents' decision to unilaterally place the student at Holy Childhood, and the parties' agreement to modify the student's IEP to provide only related services and transportation for summer 2012 (Dist. Ex. 15). However, the hearing record contains an IEP dated July 5, 2012 that does not reflect the agreed-upon amendment (Dist. Ex. 16 at pp. 1, 12-15).

According to the district inclusion coordinator, the district wished to hold an additional CSE meeting during summer 2012, because the parents were not in agreement with the recommendation that the student attend a district high school after the summer portion of the program ended (Tr. pp. 100, 142-45). The CSE met again on September 6, 2012 to continue developing the student's IEP (Dist. Ex. 8 at p. 1). The student's providers from Holy Childhood participated in the meeting (Tr. pp. 146-48; Dist. Ex. 9 at pp. 1-4). The resultant IEP maintained the recommendation that the student attend a 12:1+4 special class in the district public school with essentially the same related services, supports, and accommodations that had been previously recommended (Tr. pp. 152-53; compare Dist. Ex. 8 at pp. 1, 13-16, with Dist. Ex. 16 at pp. 1, 12-15). The parents disagreed with this recommendation and the student attended Holy Childhood for the remainder of the 2012-13 school year (Tr. pp. 153-54).

Near the conclusion of the 2012-13 school year, on June 13, 2013, the CSE met to develop an individualized education services program (IESP) for the student for the 2013-14 school year

² Holy Childhood has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. p. 496; see 8 NYCRR 200.1[d], 200.7).

³ The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

(Tr. pp. 155-57; Dist. Exs. 17 at p. 1, 11-13; 19 at pp. 1-2). The parents agreed with the recommended summer program in the June 2013 IESP and the student attended Holy Childhood in July and August 2013 and received related services from the district pursuant to the June 2013 IESP (Tr. pp. 159-65; Dist. Ex. 19 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated July 19, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years (see Dist. Ex. 1 at pp. 1-5).⁴ In particular, the parents asserted that the recommended placement in a 12:1+4 special class was not appropriate for the student because significantly older students would be present in classroom (*id.* at p. 4). The parents further asserted that a general education school setting was not appropriate for the student due to "safety, wandering, and bolting issues" and further that a general education school setting was not appropriate due to the student's inability to handle typical peer relationships, which would risk emotional harm and regression (*id.*). The parents also asserted that the student could not be appropriately placed in large group settings, where she would become overstimulated, leading to anxiety and inappropriate behaviors (*id.*). The parents further contended that the student's sensory needs and inability "to handle the noise" precluded her from being placed in a "typical high school setting" (*id.*). The parents also contended that the student required a small school setting, that she would be unable to manage transitions within a high school setting, and that a high school with "over 1200 students" would not be appropriate (*id.*).

Regarding their unilateral placement at Holy Childhood, the parents contended that the school was appropriate because the more restrictive setting allowed the student to participate in school activities and development of peer relationships with students of similar age with similar academic needs, management needs, and social functioning (Dist. Ex. 1 at pp. 4-5). The parents asserted that the school provided a needed highly structured educational environment and addressed the student's education needs by providing individual and group music therapy, weekly aquatic activities in a therapeutic and accessible pool, on-site counseling and crisis intervention and transition planning (*id.*). Lastly, the parents asserted that the student made social progress and participated in out-of-school activities with friends (*id.* at p. 5).

The parents requested tuition reimbursement for the cost of the student's attendance at Holy Childhood during the 2012-13 school year, and for the district to place the student at Holy Childhood for the 2013-14 school year (Dist. Ex. 1 at p. 2).

In a response to the due process complaint notice dated July 26, 2013, the district asserted, among other things, that the CSE recommended appropriate programs for the student for the 2012-13 and 2013-14 school years (Dist. Ex. 3).

⁴ The first three pages of this exhibit are numbered "2" through "4" and the last two pages are numbered "1" and "2"; for the purposes of referencing the exhibit herein the pages are referred to as though paginated consecutively, rather than as they are (see Dist. Ex. 1).

B. Events Post-Dating the Complaint

On August 12, 2013, the CSE met to develop an IEP for the remainder of the 2013-14 school year (Dist. Exs. 19 at pp. 2-4; 20 at p. 1). Finding that the student remained eligible for special education and related services as a student with multiple disabilities, the August 2013 CSE recommended a 12:1+4 special class placement at a district high school, in conjunction with the services of a 1:1 aide, related services, and supports for school personnel (Dist. Ex. 20 at pp. 1, 15-17).

At the time of the impartial hearing, the student remained unilaterally placed at Holy Childhood during the 2013-14 school year (Tr. p. 453).

C. Impartial Hearing Officer Decision

On October 16, 2013, the parties proceeded to an impartial hearing, which concluded on October 18, 2013 after three days of proceedings (see Tr. pp. 1-622). In a decision dated March 17, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years, that Holy Childhood was an appropriate unilateral placement for the student, and that no equitable considerations warranted a reduction of tuition reimbursement (see IHO Decision at pp. 9-16). In his decision, the IHO did not make specific findings on each of the parents' contentions why the recommended programs failed to offer the student a FAPE; rather, the decision described the arguments made by the parties and summarized the testimony and documentary evidence in the hearing record, then found that, based on "the student is likely to have difficulty in a busy public school environment" (id. at pp. 7-14).

Similarly, in determining that the unilateral placement at Holy Childhood was appropriate, the IHO again did not make specific findings; rather, he again described the arguments made by the parties and summarized the testimony and documentary evidence in the hearing record that demonstrated the "many positive aspects to the private school," including its understanding of the student's safety, counseling, social, transition, and educational needs and then found that "[p]arents have satisfied the Prong II analysis" (IHO Decision at pp. 14-16).

Lastly, and again in conclusory fashion without specific findings, the IHO determined that there were no equitable considerations that would warrant a reduction of tuition reimbursement and ordered the district to pay for the costs of the student's tuition and associated costs at Holy Childhood during the 2012-13 and 2013-14 school years (IHO Decision at pp. 16-17).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years, that Holy Childhood was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' requested relief. Initially, the district raises two arguments about the IHO's decision. First, that the IHO misapplied the Burlington/Carter standard by comparing the recommended IEPs with the unilateral placement, rather than analyzing the appropriateness of the IEPs only before addressing the unilateral placement. The district asserts that the IHO found that the district presented a case showing the challenged IEPs offered the student a FAPE, which should have ended the inquiry and led to a finding in favor of the district. Second, the district asserts that the

IHO improperly based his conclusions on the parents' preference for Holy Childhood, rather than the evidence in the hearing record concerning the recommended programs. Next, the district makes 23 assertions of error with regard to individual factual findings of the IHO, addressing each of the specific arguments raised in the parents' due process complaint notice. In particular, the district contends that although there was a 20 year-old student in the proposed classroom at the district's high school, the ages of the students in the class were within statutory requirements. The district next asserts that the challenged IEPs and the recommended school site addressed the student's safety needs, in that a 1:1 paraprofessional or another provider would be with the student at all times. The district further asserts that the 12:1+4 placement in the district's high school appropriately provided opportunities for interaction with non-disabled peers and was therefore the least restrictive environment (LRE) for the student. The district also argues that the student's behavioral and sensory needs were adequately addressed by the recommended program, which included behavioral intervention consultation among other supports.

Regarding the unilateral placement at Holy Childhood, the district contends that the parents did not satisfy their burden to show that the unilateral placement provided instruction or services specially designed to meet the student's individual needs. Regarding equitable considerations, the district contends tuition reimbursement should be denied for the 2012-13 school year because of the parents' failure to provide timely notice of their unilateral placement of the student for that year. Lastly, the district asserts that the IHO erred in ordering the district to prospectively fund the student's tuition for the remainder of the 2013-14 school because the parents did not establish their inability to pay the costs of the student's tuition at Holy Childhood.

In an answer, the parents generally respond to the district's allegations with admissions, denials, or various combinations of the same and argue in favor of the IHO's determinations that the district failed to offer the student a FAPE, Holy Childhood was appropriate, and equitable considerations weighed in favor of the parents' requested relief. Initially, the parents argue that the IHO did not misapply the Burlington/Carter test and assert that although progress in the unilateral placement is not a reason to determine that the district's recommendation was not appropriate, the IHO provided other appropriate reasons for the finding that the district failed to offer a FAPE. Regarding the appropriateness of the recommended programs, the parents contend that the IEPs recommended by the CSE for the 2012-13 and 2013-14 school years were inappropriate in that they failed to address the student's needs in the following areas: (1) sensory and attentional needs; (2) anxiety; (3) safety, bolting, and wandering; (4) being grouped with students with a similarity of needs; (5) participation with nondisabled peers; (6) extracurricular and nonacademic activities; and (7) participation in water activities. With respect to the district's allegations pertaining to issues in the parent's due process complaint notice that the IHO did not address, the parents deny the particular assertions and/or assert that different conclusion should be drawn from them (compare Pet. ¶¶ 26, 31-32, 41-44, 49, 52, 55-57, 60, 66, 78(d-g, k, s-t), with Answer ¶¶ 13, 16-17, 24-26, 29, 32, 36, 39, 44, 57-60, 64, 72, 73).

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][iii]; 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—Unaddressed Issues

The district contends, albeit implicitly, that particular issues alleged by the parents in the due process complaint notice but not addressed by the IHO would not alternatively result in a finding that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school

years. The parents deny the particular assertions and/or assert that different conclusions should be drawn from them in the answer. A review of the hearing record reveals that the IHO not only failed to address numerous issues alleged by the parent in the July 19, 2013 due process complaint notice, but also failed to make findings regarding six specific issues that the IHO took the care to identify for resolution within the IHO decision itself (compare IHO Decision at pp. 8-14, with Dist. Ex. 1 at pp. 1-5).

Accordingly, and notwithstanding the district's appeal of the IHO's decision, the matter should be remanded to the IHO for a determination on the merits of the specific claims alleging that the district failed to offer the student a FAPE set forth in the parent's due process complaint notice—and as set forth above—which have yet to be addressed by the IHO (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). It is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to each of the unaddressed issues. Furthermore, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the remaining issues (see 8 NYCRR 200.5[j][3][xi][a]). Based on the foregoing, I decline to review the merits of IHO's decision at this time. However, if either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf., D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

Upon remand, the IHO must make findings of fact and conclusions of law for each of the unaddressed claims and identify the school year(s) to which the fact findings apply. Furthermore, the district correctly argues on appeal that the IHO applied an incorrect legal standard in measuring the validity of the district's proposed program by comparison to the unilateral placement in determining whether the district offered the student a FAPE. In particular, the language in the IHO decision appears to directly compare the appropriateness of the unilateral placement with that of the CSE's recommended program in finding that, "[o]n balance, . . . the Parents' case overcame that of the District. The Parents successfully argued that the Private School would be an appropriate placement for the Student. More importantly, they convinced me that the program offered by the district was not appropriate" (IHO Decision at p. 14). Such comparisons of the unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE;⁵ rather, an IHO must determine whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07;

⁵ Some reference to a student's performance at a nonpublic school may be necessary if preparing a new or revised IEP while the student is attending the nonpublic school.

R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).

VII. Conclusion

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the claims set forth in the parents' July 19, 2013 due process complaint notice and identified herein, which have yet to be addressed. At this time, it is therefore unnecessary to address the parties' remaining contentions in light of the determinations above.

IT IS ORDERED that the March 17, 2014 decision is vacated and the matter is remanded to the same IHO who issued the March 17, 2014 decision to determine the merits of the unaddressed issues set forth in the parents' July 19, 2013 due process complaint notice; and

IT IS FURTHER ORDERED that, if the IHO who issued the March 17, 2014 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: Albany, New York
May 22, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER