



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-102

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Theresa Crotty, Esq., of counsel

Law Offices of Regina Skyer & Associates, attorneys for respondents, Sonia Mendez-Castro, 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') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School for the 2012-13 school 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 hearing record shows that, for kindergarten through second grade, the student attended the "NEST program" in general education classrooms at a district public school and received

integrated co-teaching (ICT) and related services (Tr. pp. 472-76).<sup>1</sup> The public school site where the student attended kindergarten through second grade only offered classes for students attending grades up to and including second, thereby necessitating the student's eventual transfer to a new public school site (Tr. pp. 99-100, 473).

For the student's third grade year, the CSE convened on June 25, 2012 to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 2 at pp. 1, 12). The CSE determined that the student was eligible for special education as a student with autism (id. at p. 12). For the 10-month school year, the CSE recommended a general education classroom placement with ICT services for mathematics, English language arts (ELA), social studies, and sciences, as well as related services consisting of: one 30-minute individual session and three 45-minute group sessions of speech-language therapy per week, one 45-minute group session of physical therapy (PT) per week, and two 30-minute group sessions of occupational therapy (OT) per week (id. at pp. 8-9). The June 2012 IEP also included supports for the student's management needs (e.g., a sensory diet including frequent movements breaks, chewing gum, modeling, declarative language, highlighting, positive reinforcement, preferred seating, use of a visual schedule, use of a quiet area, clearly stated and explained directions and statements of rules) and 12 annual goals (id. at pp. 2-8). The CSE recommended that the student receive the foregoing in the district's NEST program at a district community school (see id. at pp. 12, 13). Along with the 10-month school year starting in September 2012, the CSE recommended that the student receive his related services at the summer Nest program (id. at pp. 9-10).<sup>2</sup>

In a final notice of recommendation (FNR), dated June 25, 2012, the district summarized the ICT and related services recommended in the June 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 3).

During the summer 2012, the student attended the NEST transition program at the new assigned public school site (Tr. p. 145). The student also attended the recommended program in the district public school until December 2012 (Tr. p. 397). The hearing record shows that, during the time period of September through December 2012, the parents and school staff communicated extensively via email, expressing concerns, explaining strategies, and exchanging information concerning the student (see generally Dist. Exs. 4-25; Parent Exs. D; F-P; S; T; V; W; Y).

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<sup>1</sup> The NEST program is described in the hearing record as consisting of an ICT setting attended by up to 16 students, 4 of whom had received diagnoses on the autism spectrum, were high functioning (average intelligence and speech-language abilities, without academic delays), were able to handle the curriculum of a general education program, but had delays in the areas of social communication and pragmatic skills (Tr. pp. 49-51, 145-46, 474-75; see Parent Ex. E at p. 3). The NEST program addressed the specific areas of socialization and social interactions, as well as social communication (Tr. p. 50; see Parent Ex. E at p. 3).

<sup>2</sup> According to the hearing record, the NEST program provided for a summer transition session to assist the student's integration to the new school (Tr. pp. 74, 147-50). The transition program consisted of a four week session, wherein the student attended the new school building in the morning four days per week (Tr. pp. 150-51). This program, although designated as a summer program, was not a program designed to prevent substantial regression (see 8 NYCRR 200.4[d][2][x]). Only students with IEPs attended the four week transition program (Tr. p. 499).

By letter dated December 21, 2012, the parents informed the district of their disagreement with the recommendations contained in the June 2012 IEP, as well as with the educational program, as implemented, at the assigned public school site and, as a result, notified the district of their intent to unilaterally place the student at Aaron for the remainder of the 2012-13 school year (Parent Ex. A at pp. 1-3).<sup>3</sup> Also on December 21, 2012, the parents signed an enrollment contract with Aaron for the student's attendance from January through June 2013 (see Parent Ex. NN at pp. 1-3).

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

In a due process complaint, dated September 11, 2013, the parents alleged that the district failed to provide the student with a free appropriate public education (FAPE) for the 2012-13 school year and requested reimbursement of the costs of the student's tuition at Aaron for the period of January to June 2013 (see Parent Ex. B at p. 1). Specifically, the parents asserted that the June 2012 CSE: failed to consider other placement options, including more structured and therapeutic settings; chose a program and placement based on availability rather than the student's needs; and failed to address the parents' concerns related to the student's transition from a smaller school to a larger school (id. at pp. 2, 3, 6-7). In addition, the parents asserted that: the annual goals included in the June 2012 IEP were inappropriate, vague, and/or deficient; the June 2012 CSE failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student; the June 2012 IEP included insufficient related services, transitional support services to aid the student's adjustment to the new public school site, and testing accommodations (id. at pp. 3-7). The parents also asserted that the June 2012 IEP failed to properly address the student's anxiety (id. at p. 6). With respect to the placement, the parents asserted that the general education class with ICT services recommended in the June 2012 IEP was insufficiently supportive to address the student's educational and social/emotional needs (id. at p. 2). The parent described that, upon attending the recommended educational program, the student experienced an increased level of anxiety and behaviors as a result of the new school environment (id. at pp. 2, 5). The parents alleged that the CSE failed to reconvene after it became apparent that the student was not progressing (id. at p. 3).

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

An impartial hearing convened on December 2, 2013 and concluded on March 11, 2014 after four days of proceedings (Tr. pp. 1-611). In a decision dated June 6, 2014, the IHO determined that the district failed to provide the student with a FAPE for the 2012-13 school year, that Aaron was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 18, 21, 22).

Initially, the IHO found that any procedural defects in the development of the June 2012 IEP, "whether considered individually or in the aggregate," did not lead to a denial of FAPE (IHO Decision at p. 10). The IHO found that the June 2012 CSE did not err by not considering other placement options for the student, noting that the NEST program was agreed upon by all the CSE

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<sup>3</sup> The Commissioner of Education has not approved Aaron as a school with which school districts may contract to instruct students with disabilities (see 8NYCRR 200.1 [d], 200.7).

participants, as well as the private evaluators (id. at p. 11). The IHO also found that the June 2012 CSE considered and addressed the student's needs related to anxiety and transitions to the extent such needs were known at the time of the meeting (id. at p. 12).

Next, the IHO found that any deficiencies in the annual goals did not equate to a denial of FAPE and, specifically, that the IEP contained goals and strategies to address the student's social/emotional needs and that the parents' claim that the IEP lacked PT goals was without merit, as the input from the physical therapist who participated in the CSE meeting was reflected in the IEP (IHO Decision at pp. 12-13). In addition, the IHO determined that the June 2012 CSE did not have information before it indicating that the student demonstrated behaviors that impeded his or other students' learning and, therefore, the CSE was not required to conduct an FBA or develop a BIP (id. at p. 10). Moreover, the IHO noted that, in any event, the June 2012 IEP and the staff at the district public school site addressed the student's behaviors (id. at p. 11).

With respect to the district's recommended placement, the IHO found that the June 2012 CSE appropriately recommended the ICT setting in the NEST program, given the student's prior experience in the program, as well as the recommendations of the private evaluators and the agreement of all of the CSE members (IHO Decision at p. 13). The IHO also found that the parent's claim that the June 2012 IEP should have included a counseling mandate, "even if established" did not invalidate the IEP (id.). Finally, the IHO found that the parents had abandoned their claim that the IEP should have included testing accommodations but, regardless, noted that the information before the June 2012 CSE did not indicate that student required testing accommodations (id. at p. 13 n.2).

Although the IHO found no procedural or substantive defects in the CSE process or the resulting June 2012 IEP that rose to the level of a denial of a FAPE, she found that "the persistence and escalation of [the student's] behaviors," observed during the time the student attended the recommended program from September through December 2012, evidenced that the district failed to provide the student with a public school site that could properly implement the June 2012 IEP (IHO Decision at pp. 18).<sup>4</sup> The IHO noted the communications between the parents, staff at the student's previous and then-current public schools, and private therapists about the student's challenges and acknowledged that the district "undertook a variety of measures in response to parentally expressed concerns and staff's observations" (id. at pp. 14, 15-16). The IHO noted the disparity between the student's progress observed at school and the increase in anxiety related to school exhibited in the home but set forth various examples of "the escalating impact of the student's anxiety related to school" about which the school staff were aware (id. at p. 16-17). In addition, the IHO noted the testimony of the student's private therapist regarding the student's regression in therapy resulting from his experiences at school (id. at p. 18). Based on these findings, the IHO concluded that "the student could not make meaningful gains at the placement provided" (id. at p. 18). Thus, the IHO concluded that the district did not provide the student with a FAPE for the 2012-13 school year (id.).

The IHO also determined that Aaron was an appropriate unilateral placement and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp.

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<sup>4</sup> The IHO found that the student did well in the summer transition program (IHO Decision at p. 15).

19-22). Consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Aaron for the period of January to June 2013 (*id.* at p. 22).

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

The district appeals, seeking to overturn the IHO's determination that the district failed to properly implement the student's June 2012 IEP, thus depriving the student of a FAPE. Specifically, the district asserts that the IHO's statement of the legal standard for implementation was incorrect and that there was no material failure to implement the June 2012 IEP as required in order to find a deprivation of FAPE. The district also asserts that, in addition to implementing the provisions of the June 2012 IEP, the district put into place additional strategies and supports to address the student's needs and the parents' concerns. The district argues that those strategies implemented to assist the student were in line with the annual goals contained in the June 2012 IEP. Finally, the district avers that, the student made progress in the educational program at the district public school but that, in any event, a lack of progress by a student with an otherwise valid IEP does not equate to improper implementation of the IEP.

In an answer, the parents respond to the district's petition by asserting general admissions and denials. Although the parents do not cross-appeal any of the IHO's adverse determinations regarding the appropriate June 2012 CSE process and resulting IEP, they do re-iterate certain claims found in their due process complaint notice, including claims unaddressed by the IHO that the district failed to reconvene the CSE during period between September and December 2012, when it was on notice that the student was experiencing anxiety.

#### **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

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

## **VI. Discussion**

### **A. Scope of Review**

Neither party has appealed from the IHO's determinations that the June 2012 CSE process and the resulting IEP were appropriate, that Aaron was an appropriate unilateral placement for the student, or that equitable considerations weighed in favor of the parents' request relief (IHO Decision at p. 21).<sup>5</sup> Therefore, those aspects of the IHO's decision have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Thus, the remaining issues to be resolved on appeal include whether the IHO erred in determining that the district failed to provide the student a FAPE for the 2012-13 school year and whether the district was obligated to reconvene the CSE after the beginning of the 2012-13 school year.

### **B. Implementation**

As noted above, the IHO determined that the district failed to provide the student with a FAPE primarily because the student did not progress or manifested increasing or changing needs during the time period that the district was implementing the student's IEP (see IHO Decision at pp. 10, 13, 18). The implementation of services called for by an IEP, however, does not provide

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<sup>5</sup> However, review of the hearing record indicates that the IHO's conclusions with regard to the appropriateness of the June 2012 CSE process and the resulting IEP are supported by the hearing record (see IHO Decision at pp. 10-13).



a guarantee to a parent that a specific level of progress will be achieved and, therefore, the IHO neither identified nor applied the correct legal implementation standard in this case (see Turner v D.C., 952 F. Supp. 2d 31, 41 [D. D.C. 2013] ["[I]t is the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement"]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, \*14 [E.D.N.Y. Mar. 30, 2012]; D.D.-S. v. Southold Union Free. Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). In order to show a denial of a FAPE based upon a district's failure to implement an IEP, a party must establish more than a de minimis failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524-25, 2008 WL 3523992 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; T.M. v District of Columbia, 2014 WL 6845495, at \*6 [D. D.C. Dec. 3, 2014]; V.M. v N. Colonie Cent. School Dist., 954 F. Supp. 2d 102, 118-19 [N.D.N.Y. 2013]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [holding that "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled [student] and the services required by the [student's] IEP"]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D. D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]). State regulations also provide that the district must provide special education and related services to the student in accordance with the student's IEP and must make a good faith effort to assist the student to achieve the annual goals in the IEP (8 NYCRR 200.4[e][7]).

On the other hand, progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ., 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated on other grounds, Schaffer, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive

educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). However, an implementation claim is a narrow inquiry that such a claim must be closely examined to ensure that it involves nothing more than implementation of services already spelled out in an IEP, rather than the appropriateness of the program and services recommended in an IEP or the student's progress thereunder (see Polera v. Bd. of Educ., 288 F.3d 478, 489 [2d Cir. 2002] [reviewing the relevant claim and noting that the district's alleged failure to provide services was "inextricably tied to the content of the IEPs and therefore . . . much more than a failure of implementation"]; Donus v. Garden City Union Free Sch. Dist., 987 F. Supp. 2d 218, 231 [E.D.N.Y. 2013]; see also Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 682 [S.D.N.Y. 2011]).

Here, the hearing record shows that the district provided the student with the program, supports, and services mandated in the student's June 2012 IEP, in that the student attended the ICT setting in the NEST program and received his related services and the supports identified in the June 2012 IEP (see, e.g., Tr. pp. 216-17, 220-21), as well as additional strategies employed by the district staff in response to particular behaviors or concerns that materialized or intensified after the school year began (see generally Tr. pp. 153-57, 165-81, 194-95, 278-80, 299-301; Dist. Exs. 4; 5; 8; 9; 11; 13-15; 18; Parent Ex. S).<sup>6</sup> Although erroneously finding a "failure to implement" violation, the IHO essentially engaged in a "Monday morning quarterbacking" analysis of the student's performance under the IEP, which approach has been rejected by the courts for some time (see J.M. v. New York City Dep't of Educ., 2013 WL 5951436, at \*19 n.13 [S.D.N.Y. Nov. 7, 2013]). Moreover, even assuming for the sake of argument that Monday morning quarterbacking was permissible and one takes into account the behaviors described by the IHO (see IHO Decision at pp. 16-17), the evidence shows that the student nevertheless made progress in the while attending the district's educational program, a point that undermines the IHO's evidentiary analysis (see, e.g., Tr. pp. 186-90, 210-12; Parent Ex. Z). Based on the standard articulated above, IHO's determination that the district failed to implement the student's June 2012 IEP must be reversed.

### **C. District's Obligation to Reconvene the CSE**

While not addressed by the IHO, on appeal, the parents continue to argue in their answer that the CSE should have reconvened, as early as October, when the district became aware that the student was exhibiting significant anxiety.

In addition to a district's obligation to review the IEP of a student with a disability at least annually, federal and State regulations also require a CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State

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<sup>6</sup> The parent cites the number of student's in the student's class during the 2012-13 school year as evidence of the district's failure to implement the June 2012 IEP (see Ans. ¶ 40). The hearing record indicates that the student's class for the 2012-13 school year consisted of 18 students, 5 of whom were students with IEPs (Tr. pp. 220-21). The June 2012 IEP does not specify the maximum number of students allowed in the recommended ICT setting (see Dist. Ex. 2 at pp. 8-9). However, even if the CSE had unambiguously indicated that the recommended ICT setting was to be capped at 16 students (see Tr. pp. 81-82), I do not find that the addition of two students to the classroom would amount to a material deviation from the student's IEP in this instance (see A.P., 370 Fed. App'x at 205; see also Van Duyn, 502 F.3d at 822).

regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Here, the parent testified that she did not request a reconvene of the CSE (Tr. pp. 603-04) and, further, the hearing record supports the conclusion that a CSE meeting was not necessary to address the student's needs (see, e.g., Tr. pp. 231-32, 278-80). The hearing record shows that the parents and the district staff—including the student's NEST coach, school principal, social worker, occupational therapist, and speech-language pathologist—communicated many times during the September to December 2012 time period (see generally Dist. Exs. 4-25; Parent Exs. D; F-T; V-Y). The NEST coach testified that the student demonstrated behaviors from September to December 2012 that were "very manageable" in school and that the student made meaningful progress (Tr. pp. 207-10; see also Tr. pp. 167-68, 183, 211-12). Specifically, she further testified that, even when the student was described by the parents as melting down, he did not demonstrate aggressive or unsafe behaviors but rather would "quietly go to the break area" and accept support (Tr. pp. 209-10). Furthermore, the communications between the parents and school staff reveal that, while the student's anxiety manifested itself at school on occasion, the student was responsive to interventions, often within minutes, and was able to receive educational benefit (see, e.g., Tr. pp. 152-53, 162-63; Parent Ex. I at p. 1). Thus, the hearing record reveals, overall, that the behaviors observed by the parents were not apparent to the school staff to the same degree and, therefore, did not trigger any obligation for the district to reconvene the CSE, as several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

In any event, the hearing record reveals a relationship between the parents and the district school staff that embodied cooperation, in which the student's struggles at home and in school were identified and the school staff responded by suggesting and implementing strategies and supports to address such needs (see generally Dist. Exs. 4-25; Parent Exs. D; F-T; V-Y). For example, between September and December 2012, the parents and school staff communicated about the student's needs with respect to: an increasing anxiety related to homework; trouble transitioning to the school building in the morning; anxiety in the lunchroom; difficulty in movement class because of the music; anxiety regarding getting out of bed and into the car to go to school; and the student's laying or crawling on the rug during classroom lessons (Dist. Exs. 5 at

pp. 1-3; 9 at p. 2; 14 at p. 2; 18 at p. 1; Parent Ex. P at p. 1). In response to the foregoing, as well as to the student's needs in general, school staff implemented strategies and supports identified in the student's June 2012 IEP and also: convened meetings with the parents to discuss their concerns; visited the student's home; suggested additional support during an extended school day; suggested strategies to assist the student with homework, such as working in intervals; suggested approaches to the morning transition, such as use of transition object, a relaxation routine in the OT room, and the creation of social stories; suggested strategies for the lunchroom and transitions generally, such as use of headphones and earplugs, priming the student, and using the student's individual schedule; developed a special playlist of music so that the student could attend movement class; suggested using timers, drawing as a motivation, and movement breaks to increase the student's time on-task; provided the student with a "book bag pack up list" to support the student in bringing home the appropriate materials each day; used a "choice board" at lunch time as a visual approach to priming the student; prepared a new "morning drop off" transition plan; added movement breaks and a movement break schedule to address the student's sensory needs; developed a lunchtime plan, including pick-up from the classroom, a new lunch location, after-lunch activities, as well as a transition plan to eventually move back to typical lunchtime activities; arranged for the student to meet the art teacher in order to support the student with the transition to a new art class; and provided the student with "at-risk" counseling (Tr. pp. 154-57, 166, 168-72, 174, 178, 195, 279-80, 299-300; Dist. Exs. 2 at pp. 2-8; 4 at p. 1-2; 5 at pp. 2-3; 8 at pp. 1-2; 9 at p. 1; 11 at p. 1; 13 at p. 1; 14 at p. 1; 15 at pp. 1-2; 18 at p. 1; Parent Ex. S at p. 1). The parents and school staff further discussed the student's responses to these strategies and otherwise shared information, and the parents expressed gratitude for the school's efforts and information (Dist. Exs. 4 at p. 2; 5 at pp. 1-2; 6 at p. 1; 7 at pp. 1-2; 8 at pp. 1-2; 11 at pp. 1-3; 12 at p. 1; 15 at p. 1; 17 at p. 1; Parent Exs. I at p. 1; P at p. 1; S at p. 2; see Tr. pp. 157, 180-81, 207-10, 233).

At the height of the student's anxiety as reported by the parents, in a series of emails to the NEST team, dated from November 12 to November 30, 2012, the parents indicated that the student refused to go to school, and the student did not attend school between November 8 and November 15, 2012 (Dist. Exs. 20 at pp. 1-3; 21 at p. 1; 22 at p. 1; Parent Exs. S at p. 3; T at pp. 1-3; W at p. 1). In the emails, the parents requested to meet with school staff to address the student's heightened anxiety associated with the school environment, asked that the social worker "touch base" with the student's private therapist, and requested permission to have the student observed blindly by a consultant with whom the family was working (Dist. Ex. 20 at p. 1; Parent Exs. T at pp. 1, 3; W at p. 1; see Tr. p. 194). In these communications, the parents also informed the team that they were looking into schools that provided a more "therapeutic environment," and acknowledged the team's efforts to assist the student and expressed thanks to school staff for consulting with the student's cognitive behavior therapist (Dist. Exs. 19 at p. 1; 20 at p. 1; 21 at p. 1; Parent Exs. T at p. 1; W at p. 1). In response to the parents' requests, the NEST team developed a "support plan" and visual schedule to assist the student with transitioning back into school, set up a parent teacher conference and a meeting to discuss reintroducing the student into school, arranged the consultant's blind observation, and continued to provide ongoing updates of the student's school performance (Dist. Exs. 20 at pp. 1-2; 22 at p. 1; Parent Exs. T at pp. 2-3; U at p. 1; V at pp. 1-3). Subsequently, in a series of emails dated December 2 to December 18, 2012, the parents communicated that, even with the team's efforts, the student's anxiety about homework and lunchtime continued to escalate and his difficulty adjusting to the medication resulted in its discontinuation, that they believed that the student could not return to the district's school, and that, instead, he needed placement in a "small therapeutic school" (Dist. Exs. 23; 24; 25 at pp. 1-2; Parent Ex. Y at p. 1). In response, the

school staff provided updates about the student's school performance, his use of movement breaks and quiet space to self-regulate and return to the group, strategies for homework issues, and his positive adjustments to lunchtime changes (Dist. Exs. 23; 25 at pp. 1-3).

Based upon the foregoing, the hearing record does not indicate, as the parents assert, that the CSE needed to reconvene a CSE meeting. The school staff utilized various strategies and supports that were not inconsistent with the student's IEP but which targeted the student's needs as they presented themselves (see generally Dist. Ex. 2). Further, there is no indication in the hearing record that the student was unable to progress towards his IEP annual goals as a result of the anxiety and other struggles reported during the beginning of the school year (see id. at pp. 4-6). Based on the foregoing, far from depriving the student of educational benefit, the parents and school district in this case addressed the student's needs with the spirit of cooperation and collaboration for the benefit of the student contemplated by the IDEA (Schaffer v. Weast, 546 U.S. 49, 53 [2005]; Cerra, 427 F.3d at 192-93). Therefore, even were I to find that the district was obligated to reconvene the CSE, the hearing record does not support a finding that the failure to do so in this instance (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 (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the conclusion that the district did not fail to implement the student's June 2012 IEP and did not otherwise deprive the student of a FAPE by failing to reconvene the CSE, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my decision herein.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated June 6, 2014, is modified by reversing those portions which found that the district failed to provide the student with a FAPE for the 2012-13 school year and ordered the district to reimburse the parents for the costs of the student's tuition at Aaron for January 2013 to June 2013.

**Dated:**           **Albany, New York**  
                          **February 24, 2014**

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