The University of the State of New York

The State Education Department
State Review Officer
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No. 14-119

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, Ilana A. Eck, 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 respondent's (the parent's) son and ordered it to reimburse the parent for tuition costs at the Summit School for the 2013-14 school year, as well as for the "reasonable cost" of transportation to that school. The parent cross-appeals from so much of the IHO's decision as determined that the student did not require certain services and did not award "tuition funding." The appeal must be sustained in part. The cross-appeal must be dismissed.

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 reflects that the student has attended a general education classroom in a charter school located within the district since kindergarten (Parent Ex. F. at pp. 2-3). In the third grade, the student began exhibiting difficulties with regard to attention, classwork completion, behavior, organization, and academics (Tr. p. 491; Parent Ex. A).[1] As a result, the parent notified the district in October 2011 of her concerns regarding the student's ability to focus and requested that the district evaluate the student for a possible learning disability (Parent Ex. A

[1] Additionally, the parent indicated that the student had difficulties with homework completion during the third and fourth grades (Tr. pp. 509, 551-52).

at pp. 1-2).[2] Subsequent to the parent's request, the student received diagnoses of an attention deficit hyperactivity disorder (ADHD), combined type, and an anxiety disorder not otherwise specified (NOS) (Parent Exs. F. at p. 13; X at p. 9). While the student's overall cognitive functioning is intact, the student exhibits academic, attention, behavioral, sensory, visual, and fine motor deficits (Dist. Exs. 11; 12; 15; 21; Parent Exs. C; E; F; J; N; O; X; AA; FF).[3]

Pursuant to an IHO Order dated August 1, 2013, a CSE convened on August 29, 2013, to develop an appropriate educational program for the student (Parent Ex. K). The August 2013 CSE determined that the student was eligible for special education services as a student with an other health impairment, and recommended a 10 month school year in a general education classroom in a charter school with special education teacher support services (SETSS) in a group, five times per week for English language arts (ELA) and two times per week for math (Parent Ex. AA at pp. 10, 14, 17-18).[4] In addition, the August 2013 CSE recommended that the student receive the related service of individual counseling, one session per week for 30 minutes (Parent Ex. AA at p. 14). At the August 2013 CSE meeting, the parent noted her objection to the recommended program (id. at p. 19), and by letters dated August 29, 2013, "reasserted" her intention to unilaterally enroll the student at the Summit School,[5] and requested deferment to the district's central-based support team (CBST) for a non-public school placement (Dist. Ex. 22; Parent Ex. T at p. 4). In a response dated September 17, 2013, the district denied the parent's request (Dist. Ex. 23).

A. Due Process Complaint Notice

By due process complaint notice dated September 3, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Parent Ex. I). Specifically, the parent alleged that the CSE team: (1) was not properly composed; (2) failed to consider all of the evaluative information; (3) failed to conduct or consider

[2] After not receiving a response from the district regarding an initial evaluation, the parent requested an impartial hearing (Parent Ex. G). In a decision dated April 2, 2012, an IHO ordered that the district evaluate the student in all areas of suspected disability (id.). As per the IHO order, evaluations were conducted and a CSE convened and determined that the student was not eligible for special education services (Parent Ex. H). The parent then requested a second impartial hearing, this time on the grounds that the district failed to consider all of the evaluative information (id.). On August 8, 2012, another IHO ordered the district to conduct a central auditory processing evaluation of the student and reimburse the parents for privately obtained neuropsychological and occupational therapy evaluations (id.). In addition, the IHO ordered that the CSE reconvene to determine the student's eligibility for special education services (id.). Accordingly, a CSE reconvened on August 31, 2012, and determined that the student was not eligible for special educations services (Parent Ex. K). The hearing record indicates that the parent then filed a third request for an impartial hearing (id.). In a decision dated August 1, 2013, a third IHO ordered that the August 2012 CSE meeting be stricken as "null and void for failure to comply with the IDEA and NYS Education laws" and found "that the student qualified as a 'special education student' entitled to 'special education services' for the 2012-13 school year" (id. at p. 26). In addition, the IHO directed that a subsequent CSE meeting be held (id. at 25), which is the CSE meeting (and resulting IEP) at issue herein.

[3] The hearing record contains several duplicate exhibits; for clarity, this decision will cite to the parent's exhibits.

[4] The hearing record reflects that SETSS refers to "a smaller classroom for instruction [that] consists of eight students and one teacher" (Tr. p. 154). Because the student was recommended for seven sessions per week of SETSS, the remainder of his time in school would be spent in a general education classroom (Tr. p. 155).

[5] During the pendency of the third impartial hearing, the parent had notified the district of her intention to enroll the student at the Summit School for the 2013-14 school year and seek tuition reimbursement therefor by letter dated July 25, 2013 (Parent Ex. S at p. 2).

a current classroom evaluation; (4) considered information from a prior CSE meeting determined to be invalid; (5) failed to conduct a current social history; (6) failed to draft goals at the August 2013 CSE meeting, opting instead to develop goals after the meeting and thereby denying the parent meaningful participation in the IEP meeting; (7) failed to discuss assistive technology; (8) failed to discuss vision therapy or provide a team specialist in vision therapy; (9) failed to discuss occupational therapy (OT) or include a team specialist in OT; (10) failed to discuss an appropriate class setting despite recommendations by evaluators that a smaller class setting was necessary; (11) failed to consider deferral to the district's CBST; and (12) failed to provide OT as a related service despite an IHO decision ordering it (id.).

With regard to the unilateral placement, the parent alleged that the Summit school constituted an appropriate placement for the student for the 2013-14 school year because the school addressed the student's unique academic and social needs and its program was reasonably calculated to enable the student to receive educational benefits (Parent Ex. I at pp. 2-3). Moreover, the parent argued that there were no equitable considerations that would bar her request for tuition reimbursement as she cooperated with the CSE and notified the district of her intent to unilaterally place the student (id.). For relief, the parent sought an order directing the following: (1) transportation to the unilateral placement; (2) a new IEP developed with a proper team; (3) deferral to the CBST for a State-approved nonpublic school; (4) tuition funding and reimbursement; (5) a "P-3 letter for compensatory tutoring at the [district's] expense at the enhanced rate"; (6) compensatory services for vision therapy and OT, and (7) annulment of the August 2013 CSE meeting for failure to comply with federal and State statutes (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 21, 2014, and after five nonconsecutive days of hearing, the IHO determined that the district denied the student a FAPE, the Summit school was an appropriate placement for the student and equitable considerations favored the parent (IHO Decision). Specifically, the IHO found that the hearing record established that the student "is a very bright youngster who has mostly age and grade appropriate academic skills which he can display in a one-to-one testing setting, but, that he cannot function in a large general education classroom environment" (id. at p. 9). The IHO credited the testimony of the parent, the private school director, and the student's teacher which indicated that the student had significant attentional deficits that required a small classroom environment with constant refocusing (id. at p. 10). Accordingly, the IHO determined that the district "did not show that its recommended placement was appropriate" (id.), though she found with regard to the parent's request for OT services that the "credible evidence submitted overwhelmingly supports the [district]'s position that the student does not require occupational therapy to benefit from education" (id. at p. 11). Moreover, the IHO found that the unilateral placement was appropriate as it met the student's needs and abilities (id.). Finally, the IHO held that there were no equitable considerations which would bar reimbursement to the parent since she provided the district with the requisite notice of the unilateral placement (id. at pp. 10-11). For relief, the IHO ordered that the district reimburse the parent for the student's tuition and transportation costs for the 2013-14 school year (id. at p. 11).

IV. Appeal for State-Level Review

The district appeals the IHO decision and contends that the IHO erred in determining that the student was denied a FAPE. Specifically, the district argues that the recommended program and the related service of counseling offered to the student appropriately address the student's

unique needs. The district also argues that, even if it did not offer the student a FAPE, the IHO erred in awarding reimbursement for the costs of transporting the student to and from his unilateral placement. The parent answers and contends that the IHO correctly determined that the district denied the student a FAPE. In addition, the parent cross-appeals the IHO's finding that the student did not require OT services, as well as the IHO's alleged failure to "issue an award on [the parent's] request for the funding of [the student's] tuition at the Summit School." In response, the district argues that the IHO correctly determined that OT is not necessary for the student. Furthermore, the district argues that direct tuition funding (which it felt the parent appeared to be seeking) is inappropriate as the parent did not prove her inability to pay the costs of the student's tuition at the Summit School.

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. August 2013 IEP

On appeal, the district argues that the IHO erred in determining that "the [district] did not show that its recommended placement was appropriate" (IHO Decision at p. 10). Specifically, the district contends that the recommended program would have provided the student with adequate support to receive meaningful educational benefit in the LRE. The parent responds and contends that the August 2013 CSE failed to consider the evaluative data submitted by the parent and as a result, the August 2013 IEP does not reflect the student's areas of disability and individual needs. As discussed below, I find that the district has not set forth a persuasive basis for overturning the IHO's determination.

The August 2013 IEP recommended that the student attend a general education classroom with SETSS for five periods per week of ELA and two periods per week of math, and individual counseling once per week for 30 minutes (Parent Ex. AA at pp. 10, 14-15).[6] To address the student's management needs the August 2013 IEP recommended: encouragement; verbal direction or signaling to refocus; short breaks when needed; keep directions clear and simple; well organized, logically-sequenced material presented in a clearly paced manner; teacher proximity when giving instructions; preferential seating; graphic organizers; visual aids to improve comprehension and focus; visual, verbal, and tactile prompts as needed; and movement breaks as needed (id. at p. 10). The August 2013 IEP also recommended testing accommodations of extended time (1.5), separate location in a group of no more than eight students, test directions read and reread, on task focusing prompts as needed, breaks as needed, and questions read aloud except on tests of reading (id. at p. 15). Finally, the August 2013 IEP provided six annual goals to address the student's academic needs in reading, writing and mathematics, as well as two annual goals to address the student's anxiety and social skills (Parent Ex. AA at pp. 11-13).

I initially note that the district argues that the program and services in the August 2013 IEP are appropriate because the student made progress the year before (i.e., during the 2012-13 school year) "without any special education services" (Pet. at ¶¶ 30-31 [emphasis in original]). However, the evidence in the hearing record is conflicting regarding the student's academic progress over the course of the 2012-13 school year. The student's progress in reading during small group instruction notwithstanding, for example, the student's 2012-13 report card indicated that his overall reading grade for the fall term was a 2, which decreased to a 1 for the winter term and remained a 1 for the

[6] The hearing record does not indicate the length of a class period.

spring term (Parent Ex. C at p. 11).[7] For his overall mathematics grade the student received a 1 during the fall, winter, and spring terms (id.). According to a letter dated December 10, 2012, interim assessments were used to assess if the students were "on track" to meet the end-of-year goals (Parent Ex. D at p. 5). Specifically, in reading comprehension, the student's interim assessment score in September 2012 was 71%, and his score in November 2012 was 46% (Parent Ex. D at p. 5). In mathematics, the student scored 44% in September 2012, 38% in November 2012, 28% on the third interim assessment, and 35% on the fourth interim assessment (Parent Ex. D at pp. 5-6). Different scores on the September 2012 interim assessment were reported to the parents in a letter dated October 14, 2012, showing an ELA score of 56% and math score of 49% (Parent Ex. D at p. 1).[8] The letter also indicated that the student was not on track to pass the New York State tests in these areas (Parent Ex. D at p. 1). Furthermore, according to the hearing record the student attained a score of 2 on the 2013 New York State ELA exam and a score of 2 on the 2013 New York State math exam (Dist. Ex. 7).

In addition, while the student may not have received formal special education services during the 2012-13 school year, the hearing record shows that he did receive small group instruction in reading beginning in February 2013, as well as a variety of management strategies and testing accommodations during spring 2013 (Parent Ex. Z; Dist. Ex. 21-2[9]). The hearing record also establishes that the charter school provided the student with similar accommodations and modifications to address his management needs to those provided for by the August 2013 IEP (Dist. Ex. 21-2). Accordingly, the hearing record indicates that the student struggled academically during the 2012-13 school year even with certain services and interventions similar to those recommended by the August 2013 CSE.

Further, and perhaps most importantly, I am unable to find on the record before me that the August 2013 CSE adequately assessed each of the student's sensory, emotional, and behavioral needs such that I could find that the above-described program and services were sufficient to offer the student a FAPE. In this regard, I note that the hearing record reflects that the August 2013 CSE based its above-described recommendations on an August 2013 teacher report and the student's then-current literature teacher's input regarding the student's main deficits and his need

[7] According to a letter, the interim assessment scores were aligned with the new Common Core standards, with a score of 1 considered remedial (0-54%) and a score of two considered below proficient (55%-68%) (Parent Ex. C at p. 5, but see Parent Ex. C at p. 1).

[8] However, a letter dated October 15, 2012 reflected the scores of 71% and 44% (Parent Ex. D at p. 4).

[9] Included in the hearing record are three audio files from the August 2013 CSE meeting submitted jointly as District Exhibit 21. For ease of reference, the files are cited here with a suffix corresponding to the first digit of the file name, which corresponds to the order of the recordings.

for academic assistance (Tr. pp. 66, 71-72, 88, 91, 154; Dist. Exs. 15; 21-3).[10] However, the August 2013 CSE was also in possession of additional evaluative information regarding the student, including a May 2012 private neuropsychological evaluation, a June 2012 private OT evaluation, a July 2012 auditory processing evaluation, a September 2012 evaluation of visual and perceptual development, and an August 2013 private psychoeducational evaluation, (Tr. pp. 48-49; Dist. Exs. 11, 21; Parent Exs. F, J, N, X). A careful review of these documents indicates that they contain significant information about the student's needs that was not reflected in the August 2013 IEP (compare Parent Ex. AA at pp. 7-10, with Parent Ex. F at pp. 12-13, Parent Ex. N, and Parent Ex. X at pp. 10-11).[11]

Initially, and most significantly in light of the student's academic struggles, the record reflects that the student had sensory needs that the August 2013 IEP does not address, and which evaluations indicated were linked to the student's interfering behaviors and deficits. According to the June 2012 OT evaluation available to and reviewed by the CSE, for example, the student exhibited sensory processing and modulation difficulties (Parent Ex. N).[12] Furthermore, the June 2012 OT evaluation described how these limitations may impact the student's abilities to filter out auditory stimuli in order to process verbal directives; to complete tasks independently; to focus on what the teacher was saying; and to process stressful events (or events he perceived as stressful) (id. at pp. 1-3).[13] The June 2012 OT evaluation also indicated that the student's behavior could be affected in part by his difficulty processing and modulating stimuli in his environment, and the occupational therapist testified that difficulties in sensory processing could affect the student's functional performance (Tr. pp. 381-82; Parent Ex. N at p. 4). Additionally, the occupational therapist testified that the student's difficulties with sensory processing could impact his ability to provide appropriate emotional responses in response to sensory input (Tr. p. 385-89). The June 2012 OT evaluation also indicated that the parent reported the student was sensory-seeking and under responsive to environmental stimuli, which the occupational therapist indicated was corroborated by clinical observation (Tr. pp. 390-91; Parent Ex. N at p. 4). Finally, the June 2012 OT evaluation, indicating that the student's difficulties increased along with increased

[10] Specifically, I note that the August 2013 CSE recommended SETSS based on "the school's reports and teachers' reports, verbal feedback as well as report card grades" (Dist. Ex. 21-3). Additionally, the staff from the charter school agreed with the recommendation of SETSS based on the student's progress in his Fountas and Pinnell reading levels over the course of the 2012-13 school year (Dist. Ex. 21-3). The student's literature teacher indicated that he made progress in reading based on his reading level, progressing from level N in September 2012 to a level R in June 2013, which placed him at a mid-fourth grade reading level (Dist. Ex. 21-1). She further indicated that SETSS would be appropriate because the progress he made in reading was due to receiving response to intervention services in the form of small group literacy instruction (Dist. Ex. 21-1; 21-3; Parent Ex. Z). With respect to the latter, the hearing record indicates that the student received tier II response to intervention in reading in the form of small group instruction for 30 minutes per day, four days per week, for at least seven weeks beginning in February 2013 (Parent Ex. Z).

[11] The August 2013 IEP does, however, contain the scores from the assessments and subtests administered by the private evaluators (compare Parent Ex. AA at pp. 2-6, with Dist. Ex. 11, Parent Ex. F, Parent Ex. J, Parent Ex. N, and Parent Ex. X).

[12] Notably, the May 2012 neuropsychological evaluation recommended an OT evaluation to assess the impact and severity of the student's sensory integration issues and self-regulation deficits (Parent Ex. F at p. 15).

[13] Additionally, the occupational therapist who administered the evaluation testified that the weaknesses in the student's upper extremities and trunk would impact the student's posture and could reduce the student's efficiency and quality of work, as well as his timely completion of classroom work (Tr. pp. 374-75).

"environmental demands," recommended that the student receive OT to improve his visual motor skills and that OT should incorporate sensory processing and modulation to assist with attention, quality of performance, and success "in all settings" (Parent Ex. N at p. 4).

While a recording of the August 2013 CSE meeting indicates that the CSE read and discussed the June 2012 OT evaluation (as does the August 2013 IEP itself [Parent Ex. AA at p. 9]), it is also clear from that recording that the CSE based its decision not to recommend OT on the information provided by the charter school teacher who reported age-appropriate handwriting that was neat and meticulous (Tr. p. 89-90, 174; Dist. Exs. 21-1; 21-3). However, the information in the OT evaluation regarding the student's sensory needs noted above (which indicates that the student exhibited sensory processing difficulties that could impact on his educational performance)[14] is not reflected in the August 2013 IEP, and the student's sensory needs are not otherwise addressed in the IEP (compare Parent Ex. AA at pp. 1-10, with Parent Ex. N). Thus, although the August 2013 IEP acknowledged the student's difficulties with work completion, attention, and stress, it does not address the connection of these difficulties to the student's sensory needs (see Parent Ex. AA at pp. 7-10).[15]

Compounding this failure, the May 2012 private neuropsychological evaluation indicated that the student's ability to accomplish higher level tasks that "require more independent work, processing more complex sequential material, increased levels of focus and organization and management of information in a more sensory-stimulating environment will continue to be challenging" for the student (id. at p. 13). Further, and consistent with the results of the May 2012 neuropsychological evaluation, the August 2013 private psychoeducational evaluation indicated that while the student's reading, writing and math problem solving skills fell within the low average to superior ranges, these areas were compromised by his visual and auditory processing skills, academic fluency, and severe difficulties with attention, inattention, cognitive flexibility, initiation, and monitoring (Parent Ex. X at p. 10-11). Moreover, the August 2013 psychoeducational evaluation indicated that the student was very easily distracted and exhibited marked difficulty with initiation and monitoring even within a one-to-one quiet testing environment (id. at p. 11). Accordingly, although the IEP appropriately noted the student's difficulties with organization and focus, by failing to reflect that these difficulties increased in response to sensory stimuli, I am unable to find that the CSE appropriately addressed these areas of need.

In sum, since the record reflects that the student, in the 2012-13 school year, struggled academically even while receiving management strategies and testing accommodations similar to those recommended by the August 2013 CSE, and further since the August 2013 IEP does not reflect certain information provided by the private evaluations including that the student exhibited sensory processing difficulties that could impact on his academic performance, I am unable to find that the hearing record supports the district's contention that the August 2013 IEP adequately addressed the student's needs. Accordingly, I find no basis in the hearing record to reverse the

[14] Notably, the August 2013 teacher report and the input provided by the charter school teacher during the August 2013 CSE meeting described behaviors that impacted the student's performance similar to those described in the June 2012 OT evaluation (compare Dist. Ex. 15 at pp. 2-3, and Dist. Ex. 21-2, with Parent Ex. N).

[15] In this regard, I note that the district school psychologist testified that she could not recall whether the August 2013 CSE discussed the student's needs relating to sensory integration (Tr. p. 125). However, the director of Summit also testified that she was "not aware of specific sensory issues" the student had (Tr. p. 319).

IHO's determination that the district did not show that its "recommended placement" was appropriate.

B. Remaining Issues

Having concurred with the IHO's determination that the district failed to establish that the program offered in the August 2013 IEP offered the student a FAPE, I need not address the parties' remaining contentions pertaining to the provision of a FAPE, including the parent's cross-appeal with regard to the IHO's finding that the student did not require occupational therapy to receive educational benefits. However, two additional issues must be addressed: (1) whether the IHO erroneously awarded reimbursement for transportation as the district suggests, and (2) whether the IHO "failed to issue an award on the parent's request for the funding of the student's tuition" as asserted by the parent in a cross appeal.[16]

1. Reimbursement for Transportation

With regard to the issue of transportation, the IHO found, without explanation, that the student was entitled to transportation to the Summit School in her decision (IHO Decision at p. 11). However, as the district correctly contends, the hearing record is devoid of any indication that the student has any need for special education transportation. In this regard I note that the earliest evidence in the hearing record regarding transportation is the July 2013 notice of unilateral placement, which indicates that the parent would be seeking "busing" from the district (Parent Ex. S at p. 2), as did an August 2013 letter from the parent (Parent Ex. T at p. 4). However, the parent's due process complaint notice did not assert any special education transportation needs (it simply requested an order to the district to provide busing and "[p]arental reimbursement for transportation to and from the Summit School for the 2013-2014 school year" [Parent Ex. I at p. 3]), and even after filing the due process complaint notice the parent, by e-mail to the district dated September 4, 2013, requested "busing to and from the Summit School" without explaining why it was required (Parent Ex. V at p. 3).[17] Moreover, the only testimony at the impartial hearing on this issue was provided by the district school psychologist who attended the August 2013 CSE meeting, who stated that the student had "the cognitive skills to be able to either really not receive bus" (Tr. p. 97) before being interrupted, and the issue was not raised again. Nor does the parent explain in her answer why transportation is being sought, and a thorough review of the evaluative information in the hearing record provides no basis to conclude that the student required special education transportation in order to receive educational benefits. Accordingly, to the extent the

[16] The district does not appeal the IHO's findings that the Summit School was appropriate for the student or that equitable considerations support the awarding of tuition reimbursement, so these issues need not be considered here. Likewise, while the district raises an argument in its petition concerning the entitlement to compensatory education which the parent requested in her due process complaint notice, the IHO explicitly denied this request (IHO Decision at p. 11) and the parent does not appeal this finding or request compensatory education in her answer (Answer at ¶ 47). Accordingly, this issue need not be addressed, as well (see, e.g., M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, ___, 2013 WL 7819319, at *11 [E.D.N.Y. 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9-*11 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]).

[17] By responsive e-mail dated September 13, 2013, the district informed the parent that "[the student] was not recommended for special education transportation as per his IEP, as a result busing will not be provided" (id. at p. 1). The parent responded by e-mail that same date, indicating that transportation "was never discussed by the Team at the IEP meeting" (id.).

IHO concluded otherwise, I am unable to find that the record supports such a finding, and her decision must be reversed.[18]

2. Direct Funding

Finally, in her cross appeal the parent argues that "the IHO failed to issue a determination as relates to the parent's request for tuition funding" (Answer ¶ 46). I note, however, that the IHO decision ordered the district to reimburse the parent for the student's tuition for the 2013-14 school year within 30 days of submission of proof of payment and attendance (IHO Decision at p. 12). Further, to the extent that the parent may be requesting direct funding of the student's tuition at the Summit School, I note that the parent did not submit any evidence, either at the impartial hearing or on appeal, with regard to her financial inability to make tuition payments, nor does she argue that her financial resources have no bearing on the form her relief may permissibly take. Accordingly, as the hearing record contains no evidence regarding the parent's ability to make tuition payments, I am unable to order the district to directly fund the costs of the student's attendance at the Summit School for the 2013-14 school year (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 428 [S.D.N.Y. 2011] [indicating that parents "have a right to retroactive direct tuition payment relief" only if, in addition to satisfying the requirements for tuition reimbursement, they "lack the financial resources to 'front' the costs of private school tuition"]; see, e.g., E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451-54 [2d Cir. 2014] [discussing whether a parent with "limited financial means" has standing to seek a "direct-payment" remedy]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 360 [S.D.N.Y. 2009] [declining to decide whether direct, retrospective payment of tuition is an authorized remedy under the IDEA, but indicating that such a remedy may be available to a "needy parent")]. However, the district remains obligated to reimburse the parent for the costs of the student's attendance at the Summit School upon satisfactory proof of payment.

VII. Conclusion

Based on the above, I find that the IHO properly concluded that the district failed to sustain its burden of establishing that the program recommendation contained in the August 2013 IEP was reasonably calculated to provide the student with educational benefits, but improperly found that the student was entitled to special education transportation to the Summit School.

THE APPEAL IS SUSTAINED IN PART.

THE CROSS APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision dated June 23, 2014, is modified, by reversing so much as ordered the district to reimburse the parent for the costs of transporting the student to and from his unilateral placement for the 2013-14 school year; and

[18] The above finding is limited to whether the student required special education transportation for purposes of the IDEA in order to receive an educational benefit. Nothing herein should be read as a finding that the district is not required to provide the student with transportation pursuant to any other federal, State, or local law outside of the IDEA, including Education Law § 3635.

IT IS FURTHER ORDERED that the district shall, upon submission by the parent of satisfactory proof of payment, reimburse the parent for the costs of the student's attendance at the Summit School for the 2013-14 school year.

Dated: **Albany, New York**
October 14, 2014

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HOWARD BEYER
STATE REVIEW OFFICER