The University of the State of New York

The State Education Department
State Review Officer
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No. 16-070

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Thivierge & Rothberg, PC, attorneys for petitioner, Christina D. Thivierge, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's home-based special education program and related services for the 2015-16 school year. For reasons explained more fully below, this matter must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student demonstrates a history of deficits in the areas of behavior (self-injurious), sensory processing, academics, cognition, activities of daily living (ADL) skills, articulation, motor skills, and social/emotional development, as well as expressive, receptive, and pragmatic language (see generally Dist. Exs. 5; 7; 10-11; Parent Exs. B; M-Q). Specifically, the hearing record indicates that, on testing conducted in May 2015, the student's intellectual functioning fell within the moderately delayed range, she performed within the "[n]egligible" range on subtests testing the student's proficiency in brief reading, brief math, letter-word identification, calculation, passage comprehension, and applied problems, and her overall level of adaptive functioning fell within the low range across all domains (Parent Exs. M at pp. 3, 10; N at pp. 6-7). The student's self-injurious behaviors included ear pulling, face and neck pinching, ear and head punching, throwing herself on the floor, hair pulling, and biting herself (see Dist. Exs. 18 at pp. 3-4; 20 at p.

1). As reported by the parent, the student had received diagnoses of an autism spectrum disorder and verbal apraxia (see Tr. p. 408; Dist. Ex. 5 at p. 2).

With respect to the student's educational history, the student attended preschool with an individual paraprofessional and then "transitioned into a Department-approved" nonpublic school from kindergarten through second grade (see Parent Ex. B at p. 11). After second grade, the student received her special education program through a clinic-based and home-based program for approximately two years (id.). From September 2006 through April 2007, the student transitioned into a nonpublic school while continuing to receive clinic-based services (id.). The student began attending the nonpublic school full time in the 2007-08 school year (id.). During the 2008-09 school year, the student remained at the nonpublic school and attended a classroom with "three other students," a special education teacher, and an individual paraprofessional for each student (id. at pp. 4, 7-8).[1] The student remained at the same nonpublic school through the conclusion of eighth grade (id. at p. 7; see Tr. pp. 196, 291).[2] Beginning in July 2011 and as a result of her "increasingly intense" self-injurious behaviors, the student did not attend a school-based program during the 2011-12, 2012-13, and 2013-14 school years, but instead received a home-based special education program (Parent Exs. C at p. 1; G at p. 2; F at p. 1; see Dist. Ex. 19 at p. 1).[3, 4] The student's home-based program consisted of individual applied behavior analysis (ABA) instruction, ABA supervision, speech-language therapy, and occupational therapy (OT) (see generally Dist. Exs. 15-16; Parent Exs. C; G). Beginning in July 2014 and continuing for the remainder of the 2014-15 school year, the student received approximately six hours per week of clinic-based ABA services—including speech-language therapy and OT in the same clinic-based setting—in addition to the home-based program described above (see Dist. Ex. 7 at p. 1; see also Dist. Exs. 5 at p. 1; 10-11).

By letter dated June 17, 2015, the parent notified the district that, while she looked forward to the "IEP meeting" scheduled for June 22, 2015 to discuss the student's "educational programming for the 2015-16 school year," she intended to provide the student with "her home and clinic based instruction" unless the district offered the student an appropriate placement

[1] For the 2008-09 school year, the district recommended a 6:1+1 special class placement for the student, which the parent disputed, and which an IHO found inappropriate after an impartial hearing (see generally Parent Ex. B).

[2] Based upon the student's chronological age, it appears that she would have attended eighth grade during the 2010-11 school year (see Parent Ex. B at pp. 1, 4, 11). The evidence in the hearing record indicates that the student aged out of the nonpublic school, as it did not offer services for students beyond eighth grade (see Tr. p. 196; see also Parent Ex. B at p. 7).

[3] The hearing record does not contain evidence regarding the special education program recommended by the district for the student for the 2011-12 school year (see generally Tr. pp. 1-466; Dist. Exs. 2; 5; 7-8; 10-11; 13-20; Parent Exs. A-V). While the supervisor of the student's home-based ABA program testified at the impartial hearing that the student attended a nonpublic school during the 2011-12 school year, other evidence in the hearing record indicates that the student did not attend a school-based program during that school year (compare Tr. p. 195, with Parent Ex. C at p. 1).

[4] For the 2012-13, 2013-14, and 2014-15 school years, the district recommended that the student attend a State-approved nonpublic school (see Parent Exs. C at pp. 1, 15, 19, 21; F at pp. 1, 18, 22, 24; G at pp. 1, 14, 18, 20). However, the State-approved nonpublic schools to which the district applied did not admit the student due to either the intensity of her behaviors or because the nonpublic schools did not have a seat available for that particular school year (see Tr. pp. 223-24, 236-37, 408-10; Parent Ex. L. at p. 2).

(Parent Ex. U at p. 1). The parent indicated that the student's home-based program consisted of ABA instruction, ABA supervision with a Board Certified Behavior Analyst (BCBA), speech-language therapy, and OT services on a "7 day, 52 week basis, including weekends and holidays" (id.). The parent further indicated that she would seek reimbursement or funding for the costs of the student's home-based program from the district (id.).

On June 22, 2015, a CSE convened to conduct the student's annual review and to develop an IEP for the 2015-16 school year (see Parent Ex. E at pp. 1, 19). Finding that the student remained eligible to receive special education and related services as a student with autism, the June 2015 CSE recommended the following school-based program: a 12-month school year program in a 6:1+1 special class placement with a full-time, 1:1 crisis management paraprofessional; five 30-minute sessions per week of individual OT; three 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of speech-language therapy in a small group; one 60-minute session per month of parent counseling and training services; and special transportation services (id. at pp. 1, 15-16, 19).[5] In addition, the June 2015 CSE recommended the following home-based program for the student: five 60-minute sessions per week of individual speech-language therapy and 18 hours per week of "discrete trial learning" (id. at pp. 15-16). The June 2015 CSE also determined that the student required strategies—including "positive behavioral interventions, supports and other strategies"—to address behaviors that "impede[d] the student's learning or that of others," and further, that the student required a behavioral intervention plan (BIP), specifically noting the student's "self-injury and distractibility" (id. at p. 4). Finally, the June 2015 CSE created annual goals with corresponding short-term objectives to address the student's needs, recommended that the student participate in alternate assessments, and included a coordinated set of transition activities with postsecondary goals for the student (id. at pp. 5-14, 17-18).

In a school location letter to the parent dated June 23, 2015, the district identified the public school site to which the district assigned the student to attend for the 2015-16 school year (see Dist. Ex. 2).

In a letter dated July 1, 2015, the parent acknowledged receipt of the school location letter (see Parent Ex. T at p. 1). In addition, the parent indicated that, although she could not reach school personnel to schedule a visit, she planned to visit the assigned public school site when school resumed (id.). The parent also reminded the district that, if the assigned public school site was not appropriate for the student, she would continue to provide the student with the home-based program identified in her previous letter to the district (compare Parent Ex. T at p. 1, with Parent Ex. U at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16 school year (see Parent Ex. A at pp. 1-2). In addition, the parent asserted that, pursuant to the applicable pendency (stay-put) provisions, the student was entitled to the following services: 20 hours per week of 1:1 ABA services and ABA supervision through the issuance of a related services

[5] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[a]; 8 NYCR 200.1[zz][1]).

authorization (RSA) at a rate of $90.00 per hour; five 60-minute sessions per week of individual speech-language therapy through the issuance of an RSA; five 30-minute sessions per week of individual speech-language therapy; five 30-minute sessions per week of individual OT; and one 60-minute session per month of parent counseling and training (id. at p. 2).

With respect to the district's alleged failure to offer the student a FAPE, the parent asserted that the June 2015 CSE decided to recommend a 6:1+1 special class placement for the student because "no other options" were available (Parent Ex. A at p. 4). The parent also asserted that the 6:1+1 special class placement was not appropriate for the student and the CSE had "no support for this recommendation," noting further that the CSE "[h]istorically" deferred the student's placement to the Central Based Support Team (CBST) to locate an "approved nonpublic school" for the student (id. at pp. 4-5). Moreover, the parent contended that "[n]othing in [the student's] profile changed to warrant a recommendation" of a 6:1+1 special class placement (id. at p. 5). In addition, the parent alleged that the CSE "failed to consider the full continuum of placements" for the student, the CSE failed to consider "any programs with less than 6 students" or any "home-based instruction," and the CSE failed to consider "any 1:1 ABA programs" despite the student's "success with such programming" and the student's "continued need for 1:1 ABA-based instruction" (id. at pp. 4, 6). The parent further alleged that, although the June 2015 CSE indicated that the student required a "'very structured therapeutic one to one setting,'" the CSE failed to recommend such a program (id. at p. 4). Additionally, the parent asserted that the June 2015 CSE "discontinued" the student's "home and clinic based programming" despite noting the student's improvements in that setting (id.).

The parent also alleged that the CSE impermissibly engaged in predetermination, arguing specifically that the June 2015 CSE's decision to recommend a 6:1+1 special class placement in a specialized school reflected a "stock recommendation" for students with autism and was not tailored to the student's needs (Parent Ex. A at pp. 4-6). In addition, the parent asserted that the district members of the June 2015 CSE "lacked sufficient familiarity" with the student, and therefore, could not make "recommendations for her placement and programming" (id. at p. 4). The parent also asserted that the CSE failed to "treat [the parent] and [the student's] therapists as full and equal IEP team members," and the CSE also failed to consider the recommendations made by the student's therapists and providers when making a program recommendation (id. at p. 6). Upon information and belief, the parent alleged that "portions" of the June 2015 IEP were developed "outside of the IEP meeting" (id.).

Next, the parent alleged that the June 2015 CSE failed to conduct an assistive technology evaluation of the student, and consequently, the CSE failed to recommend any assistive technology for the student (see Parent Ex. A at p. 5). The parent also alleged that the June 2015 CSE failed to "completely and accurately" describe the student's present levels of performance, noting in particular the failure to report the student's "behavioral issues which impact[ed] her educational performance greatly" (id. at p. 4).

Turning to the annual goals, the parent asserted that the June 2015 CSE failed to discuss or review the annual goals and short-term objectives at the meeting (see Parent Ex. A at p. 5). The parent alleged that the "measurement criteria, methods, and schedules" for the annual goals and short-term objections were not appropriate (id.). Moreover, the parent asserted that the annual goals—which had been designed for implementation in the student's home-based program in a "1:1 ABA setting"—could not be implemented in a school-based program (id.).

With regard to the student's behavior needs, the parent contended that the June 2015 CSE failed to conduct a functional behavioral assessment (FBA) and develop a BIP for the student (see Parent Ex. A at p. 5). In addition, the parent asserted that the June 2015 IEP failed to include "any strategies, interventions, or supports to reduce behaviors" (id.). Furthermore, the parent alleged that the recommendation of a 1:1 crisis management paraprofessional was not sufficient to "manage" the student's behaviors (id. at p. 6).

As for related services, the parent asserted that, although the June 2015 CSE copied the annual goals and short-term objectives from the student's service providers, the CSE did not "consider their recommendations" for the student's program (Parent Ex. A at p. 5). The parent also asserted that the June 2015 CSE failed to recommend PROMPT speech-language therapy and failed to recommend "individualized" parent counseling and training services (id. at pp. 5-6).[6]

Finally, the parent alleged that the June 2015 CSE failed to conduct any "age-appropriate transition assessments" of the student, the coordinated set of transition activities were "vague and insufficient," and the CSE failed to recommend measurable postsecondary goals (Parent Ex. A at pp. 5-6).

As relief for the district's alleged failure to offer the student a FAPE for the 2015-16 school year, the parent requested an order directing the district to directly fund the costs of the following services: 40 hours per week of home-based and clinic-based ABA instruction; four hours per week of ABA program supervision by a BCBA; five 60-minute sessions per week of home-based, individual speech-language therapy; and five 60-minute sessions per week of home-based, individual OT services (see Parent Ex. A at p. 7).

B. Events and Facts Post-Dating the Due Process Complaint Notice

On July 8, 2015, the parent visited the assigned public school site, and in a letter of the same date, she notified the district that it was not appropriate to meet the student's needs (see Parent Ex. S at p. 1). In particular, the parent noted that, based upon her visit, she learned that the assigned public school site did not provide "any" ABA or "discrete trial instruction" (id.). The parent also noted that, when she asked the individual providing the tour of the assigned public school site whether staffing at the school included a BCBA, the individual "did not know what a BCBA was" (id.). Upon observing a specific classroom identified for the student, the parent noted that the classroom teacher had no information about the student and that the other students observed in the classroom functioned at a "level much higher than [the student]" (id.). For example, the parent indicated that the other students in the classroom were "reading and writing," and the student did not "have these skills" (id.). Next, the parent indicated that the other students "appeared to be focused" and worked "independently on academic tasks" (id.). According to the parent, the student required "fulltime 1:1 instruction" and thus, the student could not "keep up with the work in the class" (id.). The parent further indicated that, even if a paraprofessional worked individually with the student, paraprofessionals did not have the "appropriate training to work with a child like [the student] with significant needs" (id.). The parent also expressed concerns about whether the assigned public school site could "handle [the student's] behaviors," noting that the district did not conduct a FBA or develop a BIP for the student (id. at pp. 1-2). During her visit, the parent learned

[6] Although not defined in the hearing record, "PROMPT" is generally used as an acronym for "Prompts for Restructuring Oral Muscular Phonetic Targets," a specific method of treatment for motor speech disorders.

that the assigned public school site did not conduct "formal FBAs on site," and she did not believe that the staff could "develop and properly implement an effective BIP" for the student, especially because the "staff lack[ed] experience with serious self-injurious behaviors" and staffing did not include BCBAs (id. at p. 2). Next, the parent indicated that the assigned public school site did not provide "any PROMPT speech and language therapy," and she observed that "[m]ost of the students presented with medical issues and physical disabilities (i.e. wheelchairs)" (id.). Considering the foregoing, the parent declined the assigned public school site, but noted her continued willingness to consider other schools recommended by the district, and reiterated that she would continue to provide the student with the home-based program previously described at district expense (id.).

On July 29, 2015, the BCBA who supervised the student's home-based ABA program and who had attended the June 2015 CSE meeting created an updated BIP for the student and provided it to the district (see Dist. Ex. 18 at p. 1; see also Tr. pp. 186-88, 195-95, 205-07, 235-39).

C. Impartial Hearing Officer Decision

On September 1, 2015, the parties proceeded to an impartial hearing, which concluded on June 8, 2016 after five days of proceedings (see Tr. pp. 1-466).[7, 8] In a decision dated September 19, 2016, the IHO concluded that the district offered the student a FAPE for the 2015-16 school year (see IHO Decision at pp. 13-18). Initially, the IHO noted that, even if district committed any procedural violations, "those violations [were] de minim[i]s and d[id] not rise to the level of a denial of [a] FAPE" (id. at p. 14). More specifically, the IHO rejected the parent's contention that she was "denied meaningful participation" in the development of the student's IEP because the June 2015 CSE "predetermined the outcome of the IEP" (id.). The IHO found that the June 2015 CSE meeting "with the parent and the home service providers" lasted two hours, and the CSE "crafted a program that clearly met the unique needs of the student," including recommendations for 18 hours of home-based "discrete trial learning," which was "rarely recommended on an IEP" (id.). In addition, the IHO noted that the June 2015 CSE incorporated the parent's "wishes that the student be given a school placement which was unavailable to the student for many years" (id.).

Next, the IHO found that, although the district failed to conduct an FBA or develop a BIP for the student, the parent's assertion—while "technically true"—was "misleading because the

[7] In an interim order dated September 4, 2015, the IHO ordered the district to provide the following services as the student's pendency placement: 20 hours per week of home-based 1:1 ABA services and ABA supervision through an RSA at a rate of $90.00 per hour; five 60-minute sessions per week of individual speech-language therapy through an RSA; five 30-minute sessions per week of individual speech-language therapy through an RSA; five 30-minute sessions per week of individual OT through an RSA; the services of a full-time, 1:1 crisis management paraprofessional; and door-to-door transportation services (see Interim IHO Decision at p. 3). Notwithstanding the IHO's interim order on pendency, the evidence in the hearing record indicates that the student received the following services during the 2015-16 school year: 20 hours per week of home-based 1:1 ABA services; two hours per week of ABA supervision services; five 60-minute sessions per week of home-based, individual speech-language therapy; five 60-minute sessions per week of home-based, individual OT services; and approximately three hours per week of clinic-based ABA services together with clinic-based speech-language therapy and OT services (see Tr. pp. 329, 374, 418-19, 421, 427, 441-42). As indicated below, in her appeal, the parent requests reimbursement for the same frequency and duration of services received by the student (see Pet. at p. 20).

[8] For reasons unexplained in the hearing record or by the IHO, a delay of nearly six months occurred between the fourth and fifth dates of the impartial hearing (compare Tr. p. 132, with Tr. p. 322).

student had an FBA and a BIP "created in 2013" by an outside agency, "which had been updated as needed" by the student's BCBA (IHO Decision at pp. 14-15). The IHO also found that the June 2015 CSE did not need to "duplicate the efforts of others who had been seeing the [student] on a regular basis for years by creating a new BIP" (id. at p. 15). Consequently, the IHO concluded that, contrary to the parent's assertion, the failure to conduct an FBA or develop a BIP did not constitute a failure to offer the student a FAPE (id.).

With regard to the recommended related services, the IHO found that, although the June 2015 CSE did not adopt the same duration of OT services as recommended by the student's home-based OT provider, the CSE's decision would not result in a failure to offer the student a FAPE if the "recommended program would offer the student an opportunity to acquire an educational benefit" (see IHO Decision at p. 15). Here, the IHO noted that the student's OT provider testified that the skills she worked on with the student at times "overlapped" with the work the student performed with her ABA providers and that, although the OT skills the student worked on "could be learned at school," the student would not have the same opportunity to "learn generalization" of those skills (id.). The IHO observed, however, that the IDEA does not require districts to "design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly whereas here, it [was] determined that the student [was] otherwise likely to make progress in the classroom" (id.). As a result, the IHO concluded that, since the evidence in the hearing record indicated that the assigned public school site offered OT services and would address the student's ADL skills, "it [was] pure speculation to conclude as the parent argue[d] that the [student] would [n]ot have benefitted from the OT offered at [the assigned public school site]"; therefore, the IHO found that June 2015 CSE's decision to recommend school-based OT services did not result in a finding that the district failed to offer the student a FAPE (id.).

Next, the IHO rejected the parent's argument that the recommended 18 hours per week of discrete trial learning was not sufficient to "supplement its school program recommendation" (IHO Decision at p. 16). The IHO found that, at the time of the impartial hearing, the student was receiving 20 hours per week of home-based ABA services, and the decision to recommend 18 hours per week of home-based ABA services was "appropriate and a reas[ona]ble accommodation to ensure the student's continuation of ABA services" (id.). Additionally, the IHO found that "it [was] pure speculation to assume that the 18 hours of ABA at home coupled with other at home services and a full day school program would not have offered the student an educational benefit" (id.). The IHO also found that there was no basis upon which to conclude that the June 2015 CSE's failure to recommend two hours per week of ABA supervision constituted a failure to offer the student a FAPE (id.).

With regard to the parent's argument that the June 2015 CSE "improperly indicated on its proposed IEP that the student did not require an assistive technology device" or service, the IHO found that, while the parent's allegation was "technically correct," the evidence in the hearing record established that the "parent never submitted a request for assistive technology as she was asked to do" (IHO Decision at pp. 16-17). Based upon the evidence, the IHO found that: the student had an iPad "available . . . at home for years"; the student used the iPad to augment her speech; and the student also used the iPad in "ABA, speech, and OT sessions to follow visual icons to complete steps in her programs" (id. at p. 17). The IHO also indicated that the evidence revealed that the assigned public school site had iPads available "in the classroom to which the student was

assigned" (id.). Therefore, considering the foregoing, the IHO concluded that the June 2015 CSE's "failure to check the correct box on the IEP [was] de minim[i]s and not a denial of FAPE" (id.).

Finally, the IHO addressed the parent's assertions concerning the assigned public school site (see IHO Decision at pp. 17-18). Here, the IHO found that the parent's claims were "unfounded" or "speculative" because the special education teacher from the assigned public school site "offered explanations of just how the IEP could have been implemented," and the evidence in the hearing record did not support the parent's assertions that the assigned public school site could not address the student's behavioral needs or that the student would not be functionally grouped in her classroom (id.).

Accordingly, having concluded that the district offered the student a FAPE for the 2015-16 school year, the IHO denied all of the parent's requested relief (see IHO Decision at p. 18).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2015-16 school year. Initially, the parent argues that, due to the student's behavioral needs, she would not make progress in the recommended 6:1+1 special class placement and thus, the 6:1+1 special class placement was not appropriate. The parent further argues that the evidence in the hearing record demonstrated that the student could not "learn in a group setting without ABA intervention," and that, at the time of the June 2015 CSE meeting, the student was only capable of working in a 1:1 setting and could not participate in group instruction or in a school setting. In addition, the parent asserts that the IHO improperly relied upon retrospective testimony, inaccurate facts, and improper legal conclusions to find that the district offered the student a FAPE.

Next, the parent asserts that the June 2015 CSE impermissibly engaged in predetermination when it recommended a 6:1+1 special class placement for the student, thereby denying the parent the opportunity to meaningfully participate in the decision-making process in the development of the student's IEP. More particularly, the parent argues that the June 2015 CSE failed to consider more restrictive placement options for the student, including home-based programming or a nonpublic school setting, "despite finding public school options insufficient for several years prior." The parent further argues that, while the June 2015 IEP indicated that the CSE considered a 12:1+1 special class placement, the evidence in the hearing record also revealed that the June 2015 CSE did not consider "more intensive programs."

Additionally, the parent argues that the June 2015 CSE failed to conduct an FBA and failed to develop a BIP or have a BIP in place at the start of the school year for the student. With regard to the FBA, the parent asserts that the June 2015 CSE failed to collect its own baseline data or directly observe the student and, further, the CSE did not have "access to (nor did it seek) data derived" from a previously conducted analogue functional analysis of the student. As for the BIP, the parent contends that the June 2015 CSE did not develop its own BIP for the student but instead relied upon a BIP created on July 29, 2015 outside of the CSE process—and after the start of the student's 12-month school year program—that could not be implemented within a school-based setting. In addition, the parent alleges that, although the IHO acknowledged the CSE's failures pertaining to both the lack of an FBA and a BIP, the IHO improperly concluded that these failures did not result in a failure to offer the student a FAPE.

Next, the parent argues that the June 2015 CSE failed to recommend assistive technology for the student. The parent alleges that the student used an iPad as an augmentative communication device to support her severely delayed communication skills and speech intelligibility to unfamiliar listeners. In addition, the parent asserts that the IHO, while acknowledging the CSE's error, excused such failure to recommend assistive technology for the student because the parent failed to submit a request for an assistive technology. With respect to related services, the parent argues that the June 2015 CSE failed to recommend a sufficient duration of OT services for the student. The parent alleges that the June 2015 CSE failed to evaluate the student's OT needs and failed to include the student's OT provider at the CSE meeting. In addition, the parent asserted that the IHO improperly speculated that the June 2015 CSE's decision to recommend five 30-minute sessions per week of school-based OT was sufficient to meet the student's needs because the hearing record failed to include evidence that such recommendation was appropriate. Next, the parent asserts that the June 2015 CSE failed to recommend sufficient home-based ABA services for the student and failed to recommend any ABA program supervision in the IEP.

Finally, the parent argues that the IHO improperly concluded that the student would have attended the assigned public school site in the specific classroom which the district defended at the impartial hearing, as opposed to the classroom the district identified as the student's classroom during the parent's visit to the assigned public school site. The parent further argues that the IHO erred in finding that the student would have been placed with students with similar behaviors and academic skills levels at the assigned public school site.

The parent also asserts that, although the IHO did not make a determination regarding whether the parent's unilateral placement—here, the home-based and clinic-based program provided to the student—was appropriate, the evidence supports a conclusion that the program was individualized to the student's needs and that she made progress. The parent further argues that the ABA supervision, as well as the home-based and clinic-based speech-language therapy and OT services, were necessary and appropriate for the student. The parent also claims that equitable considerations support her request for relief. As relief, the parent requests reimbursement for the "actual rates and costs" of the following services: 20 hours per week of ABA services at a rate of $90.00 per hour, three hours per week of clinic-based ABA services at a rate of $175.00 per hour, five 60-minute sessions per week of speech language therapy at a rate of $150.00 per hour, five 60-minute sessions per week of OT services at a rate of $167.00 per hour, and two hours per week of ABA supervision services at a rate of $190.00 per hour.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

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, 180-83, 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]). 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).

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]). 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]).

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]), 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]).

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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

VI. Discussion—Unaddressed Issues

A review of the evidence in the hearing record reveals that, although the IHO made findings on some of the issues raised in the parent's due process complaint notice—including predetermination and parental participation in the development of the June 2015 IEP, the June 2015 CSE's failure to conduct an FBA and develop a BIP, the CSE's failure to recommend an assistive technology device or service, the CSE's failure to recommend sufficient OT services, the CSE's failure to recommend sufficient home-based services (18 hours of discrete trial learning) and ABA supervision services, and the appropriateness of the assigned public school site—as the basis to conclude that the district offered the student a FAPE for the 2015-16 school year, the IHO failed to make a finding regarding whether the June 2015 CSE's recommendation of a 6:1+1 special class placement with the services of a full-time, 1:1 crisis paraprofessional was appropriate to meet the student's needs. The IHO also did not make determinations with respect to the parent's claims set forth in her due process complaint notice pertaining to: the drafting of portions of the student's June 2015 IEP outside of the CSE process; the district's failure to conduct an assistive technology evaluation or age-appropriate transition assessments; the June 2015 CSE's failure to consider the recommendations of the student's service providers; the CSE's failure to adequately describe the student's present levels of performance in the June 2015 IEP, particularly her behavioral needs; the appropriateness of the annual goals in the June 2015 IEP, including the ability for such goals to be implemented outside of a 1:1 ABA setting and the appropriateness of the included criteria, methods, and schedules; the June 2015 CSE's failure to recommend PROMPT speech-language therapy; the ability of the strategies and interventions included in the June 2015 to be implemented in a non-ABA public school setting; the appropriateness of the transition plan included in the June 2015 IEP, including the post-secondary goals, the transition activities, and the identified individuals responsible for implementation; and the June 2015 CSE's failure to recommend individualized parent counseling and training (see Parent Ex. A at pp. 5-6).

On appeal, the parent challenges not only those issues addressed by the IHO as a basis upon which to conclude that the district failed to offer the student a FAPE, but also continues to

press the allegation that the June 2015 CSE's recommendation of a 6:1+1 special class placement with a full-time, 1:1 crisis paraprofessional was not appropriate for the student and, thus, resulted in the district's failure to offer the student a FAPE for the 2015-16 school year. Given that this claim pertains to a major substantive component of the student's special education program recommended in the June 2015 IEP, the IHO should be the first adjudicator to reach the merits of the appropriateness of this recommendation in determining whether the district offered the student a FAPE for the 2015-16 school year. Accordingly, this matter is remanded to the IHO for a determination with respect to the appropriateness of the June 2015 CSE's recommendation of a 6:1+1 special class placement with a full-time 1:1 crisis management paraprofessional as set forth in the parent's due process complaint notice (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). As to the remaining issues unaddressed by the IHO, the IHO may find it appropriate to schedule a prehearing conference to, among other things, solicit the positions of the parties as to which of the other unaddressed claims remain at issue, if any, and to further simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

Furthermore, on remand, the IHO should clarify her determinations with respect to the parent's claims that the IHO reached in her September 19, 2016 decision. In particular, although the IHO found that "if any procedural violations did occur," they were "de minim[i]s and d[id] not rise to the level of a denial of FAPE" (IHO Decision at p. 14), she did not specify which procedural violations, if any, were supported by the evidence in the hearing record (cf. F.L. v New York City Dep't of Educ., 2016 WL 3211969, at *8 [S.D.N.Y. June 8, 2016] [remanding to an SRO upon determining that ambiguous phrasing in an SRO decision prevented the SRO from reaching a clear determination on a central issue in the case]). The IHO did observe in her decision that the parent's allegations regarding the district's failure to conduct an FBA and develop a BIP and recommend assistive technology were "technically correct" or "true" but did not specify whether she viewed them as procedural violations (IHO Decision at pp. 14-15, 16-17).[9] If the IHO finds any of the parent's claims (such as the claims regarding the FBA and BIP and assistive technology) to constitute procedural violations of the IDEA based on applicable legal standards, the IHO should clarify and/or determine whether the evidence in the hearing record supports a finding that 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]). If the IHO determines that any procedural violations, standing alone or when considered individually, did not result in the denial of a FAPE, she must determine whether the aggregate effect of the violations resulted in a denial of a FAPE (F.B., 923 F. Supp. 2d at 589 n. 7 [directing that the SRO consider, on remand, whether additional violations cumulatively with procedural violations identified by the court resulted in a denial of a FAPE]; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123 [2d Cir. 2016] [finding that four procedural violations, three of which the Court identified as "serious," as well as "additional isolated deficiencies" in the IEPs, cumulatively denied the student a FAPE];

[9] The Second Circuit has stated that "the 'failure to conduct an FBA is a particularly serious procedural violation for a student who has significant interfering behaviors.'" (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016], citing R.E., 694 F.3d at 194).

R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 434 [S.D.N.Y. 2014] [noting that "multiple procedural violations may not result in the denial of a FAPE when the 'deficiencies . . . are more formal than substantive'"] [ellipses in original], quoting F.B., 923 F. Supp. 2d at 586).

It is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the issues described above and/or whether the parties should submit further evidence to otherwise fully develop the hearing record.[10] Based on the foregoing, the IHO's determination that the district offered the student a FAPE is vacated and I decline to review the merits of the IHO's decision at this time. However, if either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf., D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

VII. Conclusion

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the claims identified herein. At this time, it is therefore unnecessary to address the parties' remaining contentions in light of the determinations above.

IT IS ORDERED that the IHO's decision, dated September 19, 2016, is vacated and the matter is remanded to the same IHO who issued the September 19, 2016 decision to determine the merits of the unaddressed claim(s) from the parent's due process complaint notice consistent with the body of this decision and to clarify and/or determine whether the district committed procedural violations and, if so, whether they individually or cumulatively denied the student a FAPE, and

IT IS FURTHER ORDERED that, if the IHO who issued the September 19, 2016, decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
December 29, 2016

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[10] Both parties sought to introduce additional evidence for consideration by an SRO on appeal. Although it is unnecessary to address at this time because of the disposition of this matter, on remand, the parties may proffer such evidence to the IHO for consideration in the first instance.