The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-030

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

Susan Luger Associates, Inc., Special Education Advocates for respondent, Lawrence D. Weinberg, 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) daughter and ordered it to reimburse the parent for the costs of the student's tuition at the Rebecca School for the 2012-13 school year. The appeal must be sustained in part, and as explained more fully below, 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 300.514[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

On March 7, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 2 at pp. 1, 7-8, 10-12). Finding that the student remained eligible for special education and related services as a student with autism, the March 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school, as well as the following related services: five 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual physical therapy (PT); three 30-minute sessions per week of individual occupational therapy (OT), and one

30-minute session per week of OT in a small group (see id. at pp. 1, 7-8, 11).[1] In addition, the March 2012 CSE recommended the services of a full-time, 1:1 health paraprofessional and special transportation services for the student (id. at pp. 8, 10). The March 2012 CSE also developed annual goals with corresponding short-term objectives to address the student's needs (id. at pp. 2-7).

In a letter dated March 14, 2012, the parent notified the district that at the March 2012 CSE meeting, she and the student's then-current teacher advocated for the student's placement in a "classroom" with a "1 to 1" student-to-teacher ratio due to the student's needs (Parent Ex. B at p. 1). The parent indicated that the March 2012 CSE advised her that the district did not have "any schools/classes functioning with a one to one, teacher to student ratio" and that the 6:1+1 special class placement recommended by the March 2012 CSE was the "only recommendation that the CSE could make" (id.). The parent further indicated that the district did not have the "appropriate classroom environment to adequately address [the student's] multi-facet delays and deficits," and the March 2012 CSE should have deferred the student to the "Central Based Support Team (CBST)" for placement in an appropriate nonpublic school (id. at pp. 1-2). At that time, the parent requested a deferral to the CBST, as well as notification of an assigned public school site so that she could immediately visit the site to determine if it was appropriate (id. at p. 2).

On June 10, 2012, the parent executed an enrollment contract with the Rebecca School for the student's attendance during the 2012-13 school year beginning July 2, 2012 (see Parent Ex. I at pp. 1, 4).[2]

On July 25, 2012, the parent visited the assigned public school site, and in a letter of the same date, notified the district that it was not appropriate for the student (see Parent Ex. E).[3] The parent rejected the assigned public school site because the methodology used at the site had not "work[ed]" for the student in the past, the assigned public school site could not adequately address the student's sensory needs, and the 6:1+1 "setting" was not appropriate because the student required a "1:1 setting" in order to address her sensory issues (id.). The parent also notified the district of her intentions to "return" the student to the Rebecca School for the 2012-13 school year and to seek funding for the costs of the student's tuition, but noted that she would be "happy to visit" any "additional public school sites" (id.).[4]

---

[1] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 200.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has continuously attended the Rebecca School since September 2010 (see Tr. p. 240).

[3] According to the parent's due process complaint notice, she received a final notice of recommendation (FNR) dated June 11, 2012, which identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Ex. A at pp. 5-6).

[4] By letter dated February 7, 2013, the parent requested a copy of the March 2012 IEP for her "records," as she had "never received" it (Parent Ex. F at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated May 7, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school years (see Parent Ex. A at pp. 1-6). In particular, the parent asserted that the March 2012 CSE ignored concerns she expressed at the meeting, which deprived her of the opportunity to meaningfully participate (id. at p. 2). Additionally, the parent asserted that the timing of the student's annual review in March 2012 precluded the CSE from considering the student's needs "as reflected by her progress or lack thereof in the second half of the school year" (id. at p. 3). The parent further asserted that the March 2012 CSE was not properly composed because neither the special education teacher nor the district representative met the applicable criteria, and members of the March 2012 CSE did not attend for the entire CSE meeting (id. at pp. 4-5). The parent alleged that the March 2012 CSE failed to conduct adequate and appropriate evaluations of the student, and failed to collect adequate and appropriate information about the student's academic and social/emotional needs in order to recommend an appropriate program (id. at p. 4). In addition, the parent alleged that the evaluative information relied upon by the March 2012 CSE—including a December 2010 classroom observation report, an April 2011 psychoeducational evaluation, an April 2011 social history, a May 2011 speech-language evaluation, and a June/July 2009 neuropsychological evaluation—were "outdated," and generally failed to provide sufficient information upon which to make appropriate recommendations for the student (id.).

With respect to the March 2012 IEP, the parent asserted that although the annual goals were read aloud at the March 2012 CSE meeting, the March 2012 CSE did not develop the annual goals at the meeting, which deprived her of the opportunity to meaningfully participate in the development of the annual goals (see Parent Ex. A at p. 3). In addition, the March 2012 CSE relied upon "pre-written" annual goals designed for implementation at the Rebecca School (id.). The parent also asserted that the "methods to measure" the student's progress lacked specificity, and thus, prevented an appropriate measurement of progress (id.). The parent contended that "every goal" in the March 2012 IEP also used the "same vague 'methods of measuring goals'" and lacked "individuality" to address the student's needs (id.).

Next, the parent alleged that the March 2012 IEP failed to sufficiently identify the student's present levels of functional performance and did not include annual goals to address the student's identified needs (see Parent Ex. A at p. 3). The parent also alleged that the March 2012 IEP—including the present levels of academic performance, the annual goals, and the management needs—did not meet all of the student's unique needs (id.). In addition, the parent indicated that the March 2012 IEP—including the statement of annual goals, social/emotional performance, and management needs—did not address all of the student's unique social/emotional needs (id.). The parent further indicated that the March 2012 IEP did not adequately address the student's sensory needs (id.).

The parent also asserted that the March 2012 CSE failed to recommend an appropriate "program," the March 2012 CSE predetermined the recommendation based upon the district's availability rather than the student's needs, and the recommendation was not consistent with "opinions" of individuals with direct knowledge of the student (Parent Ex. A at p. 5). In addition, the parent contended that the March 2012 CSE could not provide "information" about the program, the "class size and the student to teacher ratio" were "too large" for the student, and the student

would not have sufficient opportunity for "1:1 instruction or attention" (id.). The parent also alleged that the recommended "program" did not offer "adequate or appropriate instruction, supports, supervision or services" to meet the student's needs (id.). The parent also indicated that the March 2012 CSE failed to recommend parent counseling and training (id. at p. 4). Finally, the parent asserted that the district failed to provide her with a copy of the March 2012 IEP until she requested it one year later, and the district failed to prior written notice in accordance with applicable regulations (id. at pp. 2, 5).

With respect to the assigned public school site, the parent alleged that she was not permitted "access" to observe a 6:1+1 special class placement with "lower functioning students who would more closely resemble" the student (Parent Ex. A at p. 6). In addition, the parent indicated that the assigned public school site could not address the student's sensory needs because it did not have a sensory gym or a sensory integration program (id.). The parent further indicated that the "class size [was] too large and the student to teacher ratio [was] not appropriately formed," the teaching methodologies used at the assigned public school site were not appropriate, the assigned public school site could not provide sufficient opportunities for "1:1 instruction or attention," and the assigned public school site could not implement the student's IEP (id.).

With respect to the student's unilateral placement, the parent alleged that the Rebecca School provided the student with "instruction, supports, methodologies, supervision and services" specifically designed to meet the student's unique needs and enabled the student to make progress (Parent Ex. A at p. 6). With regard to equitable considerations, the parent asserted that she cooperated with the CSE, she did not impede the CSE from offering the student a FAPE, and she timely notified the district of her intention to seek reimbursement for the costs of the student's tuition (id.). As relief, the parent requested payment of the costs of the student's tuition at the Rebecca School for the 2012-13 school year; the provision of door-to-door special education transportation; and payment, compensatory educational services, or the provision of related services' authorizations (RSAs) for the student's related services (id. at p. 7).

B. Impartial Hearing Officer Decision

On July 23, 2013, the IHO conducted a prehearing conference, and on August 5, 2013, the parties proceeded to an impartial hearing, which concluded on October 21, 2013 after three days of proceedings (see Tr. pp. 1-382). By decision dated January 21, 2014, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the student's unilateral placement at the Rebecca School was appropriate, and equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 8-15).[5]

[5] Although the final day of the impartial hearing occurred on October 21, 2013, the "Actual Record Closed Date" is designated as January 20, 2014 on the cover page of the IHO's decision (see Tr. pp. 197, 378-81; IHO Decision at p. 2 [indicating, however, that the "proceedings were closed" upon completion of the "hearings" on October 21, 2013]). In addition, while the IHO did note in the written decision that extensions to the compliance date had been "requested and granted as needed due to extensive testimony and issues," the hearing record does not include any of the documentation setting forth the reason for each extension as required by State regulation (8 NYCRR 200.5[j][i]-[iv]; see Tr. pp. 1-382; Dist. Exs. 1-9; Parent Exs. A-L; IHO Ex. I; IHO Decision at p. 2). Therefore, the IHO is reminded, as explained in a State guidance document, that a hearing record is "closed when all post-hearing submissions are received by the IHO" and "no further extensions to the hearing timelines" may be granted once the hearing record has been closed ("Changes in the Impartial Hearing Reporting System," Office of Special

Initially, the IHO enumerated nine issues for resolution at the impartial hearing based upon the parent's May 7, 2013 due process complaint notice (see IHO Decision at pp. 2-3). Next, the IHO summarized the testimonial evidence presented for each party's case and the applicable legal standards (id. at pp. 3-9). With respect to whether the district offered the student a FAPE for the 2012-13 school year, the IHO concluded that the district's "sole witness" failed to explain or establish why the March 2012 CSE recommended a 6:1+1 special class placement and why the 6:1+1 special class placement was reasonably calculated to offer the student a FAPE (id. at pp. 10-11). In addition, the IHO found that although the district's witness testified that the March 2012 CSE relied upon a Rebecca School progress report, the student's 2011-12 IEP, and the "student's file" to develop the March 2012 IEP, the witness failed to explain how these documents supported a finding that the student could "handle" a 6:1+1 special class "program" or how "such a program provide[d] the small structured environment" the student required (id. at p. 10). In addition, the IHO found that neither the Rebecca School progress report nor the testimonial evidence supported the 6:1+1 special class placement recommendation in the March 2012 IEP (id.). Consequently, the IHO concluded that the district did not establish that the "program" recommended in the March 2012 IEP was "adequately supportive" of the student's educational needs, and the hearing record did not establish that the recommended "program" provided "appropriate sensory supports and accommodations" for the student (id. at pp. 10-11). The IHO also found that the March 2012 IEP failed to include a recommendation for parent counseling and training (id. at p. 11). In summary, the IHO concluded that the March 2012 CSE failed to "address or assess" the student's needs for "intense 1:1 adult supervision and support," which had been confirmed by those individuals who knew and worked with the student directly, and consequently, the March 2012 CSE recommended the 6:1+1 special class placement as a matter of "administrative convenience" and as a predetermined outcome "destined to fail as a matter of its design" (id.).

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year, the IHO indicated that the decision did not "turn" on the "validity" of the assigned public school site or whether the district could implement the student's March 2012 IEP, and therefore, there was no need to address this issue (IHO Decision at pp. 11-12).

Turning, next, to the parent's unilateral placement of the student at the Rebecca School for the 2012-13 school year, the IHO found that the evidence in the hearing record supported a finding that the Rebecca School was appropriate; the Rebecca School provided the student with "'educational instruction specially designed'" to meet her needs; the student became "more regulated" through OT services; the program addressed the student's needs in the areas of social/emotional regulation, communication, language, articulation, and reading readiness, as well as providing parent counseling and training; and the student made progress (IHO Decision at pp. 12-14). With respect to equitable considerations, the IHO found that the parent cooperated with the district and provided timely notice regarding the student's enrollment at the Rebecca School (id. at p. 14). As a result, the IHO concluded that the parent was entitled to payment or reimbursement of the costs of the student's tuition for the 2012-13 school year, payment or

---

Educ. Mem. [August 2011], available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf).

compensatory educational services or RSAs for the student's related services, and payment of the costs of round-trip transportation services (id. at pp. 15-16).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year, that the Rebecca School was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's requested relief. The district argues that the IHO erred in finding that the failure to recommend parent counseling and training in the March 2012 IEP contributed to a failure to offer the student of FAPE, and the "program recommendation" was not appropriate and not supported by the evaluative information. In addition, the district asserts that the IHO erred in concluding that the March 2012 CSE impermissibly predetermined the student's "program recommendation," and further, the IHO erred in concluding that the "recommended program" did not include sufficient sensory supports and accommodations. The district also argues that the IHO erred in finding that the recommended 6:1+1 special class together with the services of a full-time, 1:1 health paraprofessional, did not appropriately address the student's need for "1:1 supervision/support." The district contends that the IHO erred to the extent the IHO concluded that an inquiry into the appropriateness of the assigned public school site and the implementation of the March 2012 IEP were relevant issues, given that the student did not attend the public school. Finally, the district alleges that the parent's remaining allegations in the due process complaint not otherwise addressed by the IHO did not result in a failure to offer the student a FAPE for the 2012-13 school year. More specifically, the district asserts that the March 2012 CSE relied upon sufficient evaluative information to develop the student's March 2012 IEP and to make appropriate recommendations; neither the parent's alleged nonreceipt of the March 2012 IEP or the timing of the CSE meeting in March 2012 resulted in a failure to offer the student a FAPE; the development of the annual goals in the March 2012 IEP, as recommended by the Rebecca School, was appropriate; the annual goals in the March 2012 IEP were appropriate, sufficiently specific, and addressed the student's deficits; the descriptions of the student's present levels of academic performance in the March 2012 IEP were sufficient and accurate; the March 2012 CSE was properly composed; the hearing record contained no evidence that members of the March 2012 CSE either left early or participated for less than the entire duration of the March 2012 CSE meeting; and the March 2012 CSE's decision to recommend a program similar to the program recommended for the prior school year had no bearing on the appropriateness of the program recommended by the March 2012 CSE.

In an answer, the parent generally responds to the district's allegations with admissions, denials, or various combinations of the same. With respect to the district's allegations pertaining to issues in the parent's due process complaint notice that the IHO did not address, the parent neither admitted nor denied the particular assertions (compare Pet. ¶¶ 41-44, 49, with Answer ¶¶ 41-44, 49. In addition, the parent affirmatively argues to uphold the IHO's decision with respect to the following issues: the hearing record did not support findings that the student could "handle" a 6:1+1 "program, or establish that the "program" would offer the student a "small structured environment," and the hearing record did not contain evidence to establish that the 6:1+1 special class was adequately supportive of the student's needs; the March 2012 IEP did not provide the student with appropriate sensory supports; the March 2012 IEP did not include a recommendation for parent counseling and training; the 6:1+1 special class placement was predetermined; and the district failed to provide sufficient evidence to conclude that the assigned public school could

implement the student's March 2012 IEP (see Answer ¶¶ XI-XIII, XV-XXII). As relief, the parent seeks 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, 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).

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. CSE Process

1. CSE Composition

In this case, the parent alleged that the March 2012 CSE was not properly composed because neither the special education teacher nor the district representative in attendance met the

applicable criteria, and members of the March 2012 CSE did not remain for the entire CSE meeting. Although the IHO did not address these issues in the decision, the district alternatively argued in the petition that the March 2012 CSE was properly composed and that the hearing record did not contain any evidence that CSE members left the meeting early or participated for less than the entire duration of the meeting (see Pet. ¶¶ 47-48). In the answer, the parent admitted both allegations (see Answer ¶¶47-48). Accordingly, neither of these issues remains in dispute any longer and, therefore, neither issue will be considered further in this decision.

2. Predetermination/Parental Participation

The district contends that the IHO erred in finding that the March 2012 CSE impermissibly predetermined the 6:1+1 special class placement recommendation in the March 2012 IEP as a matter of administrative convenience, ignoring the parent's disagreement with the recommendation, as well as the opinions of professionals who directly worked with the student and had knowledge of the student and her need for "intense 1:1 adult supervision and support." The parent rejects the district's contentions. As explained below, a review of the evidence in the hearing record demonstrates that contrary to the IHO's conclusion, the March 2012 CSE did not impermissibly predetermine the 6:1+1 special class placement recommendation or otherwise ignore the parent's expressed concerns, and the IHO's determination on this issue must be reversed.

Initially, a key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). Moreover, the IDEA "'only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long

as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

In this case, the hearing record indicates that the following individuals attended the March 2012 CSE meeting: a district school psychologist (who also served as the district representative), a district special education teacher, a district social worker, an additional parent member, a Rebecca School social worker, the student's then-current teacher at the Rebecca School (via telephone), and the parent (see Dist. Exs. 2 at p. 13; 8 at p. 1).

At the impartial hearing, the district school psychologist described the process used by the CSE to develop the student's March 2012 IEP, beginning with the introduction of team members and the review of "materials and reports" available to the CSE (see Tr. pp. 61-62, 64-65, 67-69). In this case, the district school psychologist testified that the March 2012 CSE had access to the student's "file," which included a "previous IEP," and a December 2011 Rebecca School progress report (see Tr. pp. 66-67, 92-94, 96-97, 172-73; Dist. Ex. 8 at p. 1). Generally with respect to "school reports," the district school psychologist "ask[ed]" whether the teacher prepared the school reports and whether the report accurately reflected the student's functioning—especially with regard to the time period between the date the report was written and the date of the CSE meeting (Tr. pp. 67; see Tr. p. 70). According to the district school psychologist, the CSE team functioned more as a "collaborative conversation," indicating that the CSE "talk[ed] a lot" about how the student did in school—both academically and socially—and the CSE directed a "lot of questions" to the student's teacher (Tr. pp. 67-68; see Tr. pp. 90-92). The district school psychologist also testified that the CSE made parents aware that they were "active participant[s]" at the meeting, and encouraged parents to ask questions or contribute to conversations (Tr. pp. 67-68). At CSE meetings, the district school psychologist testified that he attempted to make parents "comfortable in the situation" and emphasized that it was a "collaborative discussion" (id.; see Tr. pp. 94-97). In particular, the district school psychologist testified that generally the CSE asked for everyone's input about the student, and the CSE would talk to parents about the students' progress and how the students performed outside of school (Tr. pp. 68-69; see Tr. pp. 95-96).

At the March 2012 CSE meeting, the district school psychologist testified that the December 2011 Rebecca School progress report included "goals," which the March 2012 CSE reviewed (Tr. pp. 68-69). In this case, the district school psychologist read the annual goals aloud and asked the student's then-current Rebecca School teacher whether the student met any of the annual goals and objectives (Tr. p.69). In addition, the district school psychologist testified that the March 2012 CSE discussed whether specific annual goals and objectives should be carried over to the next school year, what related services were appropriate, and what program options would be appropriate for the student for the 2012-13 year (see Tr. pp. 68-70, 77-85).

In reaching the decision to recommend a 6:1+1 special class placement in a specialized school with the services of a full-time, 1:1 health paraprofessional, the evidence in the hearing record demonstrates that the March 2012 CSE considered, but rejected, other placement options for the student for the 2012-13 school year. More specifically, the March 2012 CSE considered and rejected a special class in a community school because it did not offer the student the support

she required and it did not offer a 12-month school year program (see Tr. pp. 83-84; District Ex. 2 at pp. 11-12). The March 2012 CSE also considered and rejected an 8:1+1 special class placement in a specialized school and a 12:1+4 special class placement in a specialized school because both placement options served students with functional levels "too discrepant" from the student's own functional levels and because neither special class placement options offered the student appropriate opportunities for communication and socialization (Tr. pp. 84-85; see Tr. pp. 167-69; Dist. Exs. 2 at pp. 11-12; 8 at pp. 3-4).

The district school psychologist explained in his testimony that a 6:1+1 special class placement in a specialized school provided a 12-month school year program with "intensive support" to work on a student's "academic skill levels," "cognitive functioning," "communication skills," and "socialization skills" (Tr. p. 80). According to the district school psychologist, the 6:1+1 special class placement was appropriate because the student required "more support than would be provided for within a typical community school setting," and the student would benefit from a "more intensive program with a more supportive student teacher ratio" that could more specifically address her needs (Tr. pp. 80-81). The district school psychologist also testified that at the March 2012 CSE meeting, the 6:1+1 special class placement was described to the parent as a "full-time, special education program" that was "structured to function on a 12-month basis," which the district developed to support students who demonstrated needs to develop their "academic skills, their social skills, socialization skills, their communication skills, and cognitive skills" and to provide "instruction in various small groups with more intensive attention" (Tr. pp. 121-22). He further testified that the March 2012 CSE did not defer the student to the CBST because the March 2012 CSE concluded that a 6:1+1 special class placement was appropriate (see Tr. p. 181). Finally, when asked by the IHO whether the 6:1+1 special class placement recommendation was the "best of the bunch" of the programs available to the CSE, the district school psychologist testified that based upon his experience and feedback from others, the 6;1+1 special class placement was a "really good program" and it "should really be actively considered for a student with these kinds of needs" (Tr. pp. 165-66).

The district school psychologist also testified, however, that the parent and the Rebecca School staff in attendance at the March 2012 CSE meeting disagreed with the 6:1+1 special class placement recommendation, and believed the student should remain at the Rebecca School for the 2012-13 school year (see Tr. pp. 80-82, 116-18, 161-67; Dist. Ex. 8 at pp. 3-4). According to the March 2012 CSE meeting minutes, the parent and the student's then-current Rebecca School teacher thought a "lower student to teacher ratio" was "more appropriate," and specifically, the parent thought the student required "1:1 assistance" (Dist. Ex. 8 at pp. 3-4; see Tr. pp. 117-18).[6]

Therefore, based upon the foregoing, the hearing record establishes that the parent was provided with, and took advantage of, the opportunity to meaningfully participate in the development of the March 2012 IEP by expressly voicing her disagreement with the March 2012 CSE's recommendation of a 6:1+1 special class placement. Moreover, the hearing record also establishes that the March 2012 CSE's decision to recommend a 6:1+1 special class placement was not predetermined or selected based upon administrative convenience, but rather, was reached

[6] In this case, the parent did not present any testimonial evidence; in addition, none of the Rebecca School staff who attended the March 2012 CSE meeting were called as witnesses at the impartial hearing (see Tr. pp. 1-382; compare Dist. Ex. 2 at p. 13, with Tr. pp. 1-382).

upon consideration of the student's needs and how the 6:1+1 special class placement could meet the student's needs.[7, 8] While the parties strongly disagreed on the appropriate setting for the student, the forgoing evidence shows that it did not amount to predetermination or significantly impeding the parent's participation. Therefore, the IHO's findings related to these issues must be reversed.

B. March 2012 IEP

1. Parent Counseling and Training

It is undisputed that the March 2012 IEP did not include a recommendation for parent counseling and training; however, under the circumstances of this case, the district correctly argues the failure to recommend such service did not, by itself, result in a failure to offer the student a FAPE for the 2012-13 school year.

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this

---

[7] To the extent that the parent asserted in her letter to the district dated March 14, 2012, that the student required placement in a "classroom" with a "1 to 1" student-to-teacher ratio due to the student's needs, the March 2012 CSE advised her that the district did not have "any schools/classes functioning with a one to one, teacher to student ratio," and the 6:1+1 special class placement was the "only recommendation that the CSE could make"—the hearing record does contains ample evidence that supports the conclusion that the CSE did not predetermine the student's placement but does not contain evidence to further corroborate such statements or assertions (see Tr. pp. 1-382; Dist. Exs. 1-9; Parent Exs. A-l; IHO Ex. I).

[8] Placement decisions must be based on a student's unique needs as reflected in the IEP, rather than based on the existing availability of services in the district (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

While it is undisputed that the March 2012 CSE did not recommend parent counseling and training as a related service in the student's March 2012 IEP, the hearing record does not contain sufficient evidence upon which to conclude that the failure to recommend parent counseling and training in the March 2012 IEP, resulted in the district's failure to offer the student a FAPE for the 2012-13 school year. In addition, although the March 2012 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, this violation alone does not support a finding that the district failed to offer the student a FAPE (R.E., 694 F.3d at 191; see also F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *4 [2d Cir. Jan. 8, 2014]; see also M.W., 725 F.3d at 141-42).[9]

C. Unaddressed Issues

Finally, the district contends that particular issues alleged by the parent in the due process complaint notice but not addressed by the IHO would not alternatively result in a finding that the district failed to offer the student a FAPE for the 2012-13 school year. The parent neither admitted nor denied these allegations in the answer.[10] A review of the hearing record reveals that the IHO not only failed to address numerous issues alleged by the parent in the May 7, 2013 due process complaint notice, but also failed to address all of the issues the IHO specifically identified for resolution within the IHO decision itself (compare IHO Decision at pp. 2-3, 8-12, with Parent Ex. A at pp. 1-6).[11]

Accordingly, and notwithstanding the district's appeal of the IHO's decision, the matter should be remanded to the IHO for a determination on the merits of the remaining issues set forth in the parent's due process complaint notice—and as set forth above in section III.A.—which have

[9] The district is cautioned, however, that it cannot continue to disregard its legal obligation to include parent counseling and training on a student's IEP. Therefore, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

[10] See generally Bd. of Educ. v. Ill. State Bd. of Educ., 2014 WL 1245086, at *2 (N.D. Ill. Mar. 26, 2014) (expressing disapproval of responses asserted by a party under similar procedures that failed to assist the court in determining whether any material facts were "legitimately in dispute").

[11] In addition, it is unclear how the IHO reached the conclusion that the 6:1+1 special class placement in a specialized school with the services of a full-time, 1:1 health paraprofessional—together with related services—failed to address the student's needs and was not reasonably calculated to enable the student to receive educational benefits (see IHO Decision at pp. 9-11). It is also unclear whether the IHO determined that the evaluative information available to the March 2012 CSE was sufficient to develop the March 2012 IEP (id.).

yet to be addressed by the IHO (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013].[12] It is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to each of the unaddressed issues. Furthermore, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the remaining issues (see 8 NYCRR 200.5[j][3][xi][a]). Based on the foregoing, I decline to review the merits of IHO's decision at this time. However, if either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf., D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

VII. Conclusion

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the remaining claims set forth in the parent's May 7, 2013 due process complaint notice and identified herein, which have yet to be addressed. At this time, it is therefore unnecessary to address the parties' remaining contentions in light of the determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 21, 2014, is modified by reversing those portions which found that the district impermissibly predetermined the 6:1+1 special class placement recommendation in the March 2012 IEP and which found that the district's failure to recommend parent counseling and training in the March 2012 IEP contributed to a finding that the district failed to offer the student a FAPE for the 2012-13 school year; and

IT IS FURTHER ORDERED that the district shall, within 10 days after the next CSE meeting for the student, provide the parent with prior written notice consistent with State regulation and the body of this decision on the form prescribed by the Commissioner of Education, and

IT IS FURTHER ORDERED that the matter be remanded to the same IHO who issued the January 21, 2014 decision to determine the merits of the unaddressed issues set forth in the parent's May 7, 2013 due process complaint notice; and

[12] Based upon the issues reached in this decision, however, the IHO need not consider the March 2012 CSE composition, predetermination/parental participation, or parent counseling and training as potential issues upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year.

IT IS FURTHER ORDERED that, if the IHO who issued the January 21, 2014 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
March , 2014

____
JUSTYN P. BATES
STATE REVIEW OFFICER