The University of the State of New York

The State Education Department
State Review Officer
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No. 12-029

Application of the BOARD OF EDUCATION OF THE WILLIAM FLOYD UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Bond, Schoeneck & King, PLLC, attorneys for petitioner, Howard M. Miller, Esq., & Brian P. Murphy, 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 a decision of an impartial hearing officer (IHO) which determined that the educational services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2011-12 school year are not appropriate. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 to: 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[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record reflects that the student exhibits significant global developmental delays and behavioral difficulties, and has received a diagnosis of autism (Dist. Exs. 17-20; 22-30; 32; 34-35; 37-39; 41; Parent Ex. A). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8 [c][1]; 8 NYCRR 200.1[zz][1]). On June 30, 2011,[1] the CSE convened for the student's annual review and

[1] Although the student's IEP for the 2011-12 school year is dated June 30, 2011, the hearing record reflects that the CSE reconvened on July 5, 2011 to review evaluations and further develop the student's educational program (Dist. Ex. 1 at p. 2). Both the parties and the IHO referred to the IEP at issue as the June 30, 2011 IEP (see Sept. 19, 2011 Tr. pp. 4, 12; Oct. 13, 2011 Tr. pp. 103-04; IHO Decision at pp. 7, 27, 34). Therefore, to avoid confusion, I will also refer to the IEP at issue as the "June 2011" IEP in the decision while recognizing that it also contained notations from July 2011.

to develop the student's IEP for the 2011-12 school year (Dist. Ex. 1).[2] At the time of the June and July 2011 CSE meetings in this case, the student was receiving two hours per day of home instruction, and home-based occupational therapy (OT) and speech-language therapy pursuant to a June 9, 2011 interim order[3] issued by another IHO (Hearing Officer 2) in a different proceeding related to the student's 2010-11 school year (Oct. 13, 2011 Tr. pp. 171-72; Dist. Ex. 1 at p. 3; Parent Ex. I at pp. 1-2, 18-19).[4] For the 2011-12 school year, the CSE recommended, among other things, a 12-month 6:1+1 special class and residential placement at the School for Adaptive and Integrated Learning (SAIL), which is located outside the district and which has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Oct. 20, 2011 Tr. p. 159; Dist. Ex. 1 at pp. 1-2; see 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notice

On July 5, 2011, the parent filed a due process complaint notice alleging, among other things, that the June 2011 IEP was inappropriate for the student because it did not recommend OT or PT services for the 2011-12 school year, and that the IEP recommended inadequate levels of home instruction and speech-language services to address the student's needs (Dist. Ex. 15 at p. 3). The parent sought an order directing the district to place the student at a school on Long Island, either in a Board of Cooperative Educational Services (BOCES) day program, or in a private residential program (id.).

B. Impartial Hearing Officer Decision

On September 19, 2011, the IHO conducted a prehearing conference (see 8 NYCRR 200.5[j][3][xi]), during which the parent withdrew her allegations relative to the recommended levels of home instruction and speech-language services, but continued her challenge to the lack of OT and PT services in the June 2011 IEP and her objection to the CSE's recommendation that the student attend SAIL based upon the school's distance from the student's home (see Oct. 13, 2011 Tr. pp. 21-25; IHO Ex. 3 at p. 4). The IHO also ordered that a guardian ad litem be appointed for the student "[d]ue to my concerns regarding the parent's ability to identify and present her position" (Sept. 19, 2011 Tr. pp. 9-10; IHO Ex. 3 at p. 4; see 8 NYCRR 200.5[j][3][ix]; see also 8 NYCRR 200.1[s]). The impartial hearing concluded on November 28, 2011, after four days of proceedings.

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[2] The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and IHO exhibits were identical. I remind the IHO that it is her responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

[3] The June 9, 2011 interim order is not included in the hearing record.

[4] In the other due process proceeding, Hearing Officer 2 issued a final decision dated July 12, 2011, which directed the district, among other things, to conduct OT and physical therapy (PT) evaluations "to determine the student's current level of need" for those related services (Parent Ex. I at pp. 18-19). The hearing record in this case shows that evaluations by an occupational therapist and physical therapist had already been conducted by the time Hearing Officer 2 issued the July 12, 2011 decision (compare Dist. Ex. 17 at pp. 1, 3, and Dist. Ex. 18 at pp. 1, 7, with Parent Ex. I at pp. 18-19).

On January 2, 2012, the IHO issued a decision, determining, among other things, that the district failed to meet its burden of proving that it offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 27-31). Specifically, the IHO found that the student's June 2011 IEP did not offer the student a FAPE because, among other things, it failed to recommend OT and PT services for the student, and she directed the district to fund independent OT and PT evaluations and to reconvene the CSE and revise the student's IEP consistent with the results of the evaluations (see id. at pp. 28, 31-33).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision, arguing, among other things, that her determination that the district failed to offer the student a FAPE for the 2011-12 school year is erroneous. The district argues that based upon adequate evaluations, OT and PT services were not recommended for the student in the home environment and that the need for these services should be revisited once the student adjusted to the recommended residential placement. The district contends that the IHO improperly found that the district failed to enter a functional behavioral analysis (FBA) and behavior intervention plan (BIP) into evidence and failed to consistently implement the student's BIP in the home. The district argues that the IHO ignored the evidence showing that the student's goals cannot be achieved in the home and that a publicly funded residential placement is not available for the student on Long Island. The district also asserts that the student's need for a residential placement was undisputed by the parties. According to the district, the evidence demonstrates that its recommended residential placement at SAIL is the least restrictive environment (LRE) in which the student can receive a FAPE for the 2011-12 school year. The district seeks reversal of the IHO's decision and dismissal of the parent's due process complaint notice.

The parent answers the district's petition and, among other things, maintains that for the 2011-12 school year, she is willing to accept an educational program from the district for her son that includes either continued home instruction, an 8:1+1 special class placement in a district high school, or a residential placement on Long Island.[5]

V. Applicable Standards

Two purposes of the IDEA 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 v. T.A, 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).

[5] The parent's answer is not verified and is therefore not in compliance with State regulations (see 8 NYCRR 279.7).

While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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; 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 accurately reflects the results of evaluations to identify the student's needs (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing

As an initial matter, I note that in reaching her conclusion that the district failed to offer the student a FAPE, the IHO addressed several issues in her decision that were not raised in the parent's due process complaint notice. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Additionally, although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the IHO to raise issues that were not presented by the parties to the hearing and then base his or her determination on the issues raised sua sponte.

In this case, the IHO found that the June 2011 IEP was inadequate to provide the student with a FAPE for the 2011-12 school year because the district failed to conduct appropriate OT and PT evaluations, and because the IEP lacked a recommendation for a "twenty-four hour, one-to-one aide" for the student and parent counseling and training (see IHO Decision at pp. 28, 30). Additionally, although she did not explicitly find the annual goals and short-term objectives contained in the June 2011 IEP to be inadequate, the IHO noted that the IEP contained only one speech-language goal and that the CSE "did not incorporate" into the IEP "a goal of using [the student's] low-tech communication board to communicate a basic need," and suggested that "the CSE should review [the student's] speech-language goals and consider adding additional goals; including, if appropriate, the use of sign language and the low-tech communication boards, in addition to the use of [a] communication device" (id. at pp. 29-30). She also found that that a revised BIP developed by the district for the student on July 5, 2011 was "incomplete" because it did not contain a copy of the FBA to which it referred,[6] that "a new FBA must be performed," and that the hearing record lacked evidence "that any BIP has ever been implemented with any consistency" in the student's home learning environment (IHO Decision at pp. 27, 30-31; see Dist. Ex. 41 at pp. 2, 4).

The IHO concluded that these factors, taken together, rendered her "unable to find that the school district met its burden of proving the appropriateness of its recommendation to place [the

[6] Although the hearing record indicates that an FBA was conducted on June 23, 2011, it was not included in the hearing record (see Dist. Ex. 3 at p. 2; IHO Decision at p. 27).

student] in a residential facility which is not easily accessible to the [student's] family" and directed the district, among other things, to conduct a new FBA of the student and develop a new BIP, provide the parent with "independent OT and PT evaluations at school district expense," and following the completion of the independent evaluations, reconvene the CSE "to develop new goals, and to recommend an appropriate educational program" for the student (IHO Decision at pp. 30-33).

Here, the parent did not assert any of the issues identified above in her July 5, 2011 due process complaint notice or at the September 19, 2011 prehearing conference (see Sept. 19, 2011 Tr. pp. 1-13; Dist. Ex. 15). Further, the hearing record does not reflect that the parent requested, or that the IHO authorized a further amendment to the due process complaint notice to include these additional issues. Thus, the IHO should have confined her determination to the issues raised in the parent's due process complaint notice and at the prehearing conference and erred in reaching the issues set forth above (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of the Dep't of Educ., Appeal No. 11-156). Consequently, the IHO's determinations with respect to these issues must be reversed.

B. June 2011 IEP

As framed in the parent's July 5, 2011 due process complaint notice and further narrowed during the September 19, 2011 prehearing conference, the fundamental issue before the IHO and presented by parties in this appeal, is whether the June 2011 IEP, at the time it was developed by the CSE, offered the student a FAPE in the LRE for the 2011-12 school year. For the reasons discussed below, I find that it appropriately addressed the student's needs.

1. Related Services – OT and PT

The IHO concluded that the June 2011 IEP did not offer the student a FAPE because the IEP did not include OT or PT services for the student for the 2011-12 school year (IHO Decision at p. 28). With regard to OT services, the IHO found that the hearing record established that the student "benefits from [OT] and that it should continue" and that "[t]he main reason [the district] recommended against [OT] was due to [the student's] lack of progress; not due to the lack of need for the service" (id.). The IHO further stated that "the record indicates that, within the home setting, [the student] was more cooperative with his speech therapy sessions, when they followed [OT] sessions. This factor alone indicates that [the student] benefits from [OT] and that it should continue" (id.). Initially, I note that contrary to the IHO's reasoning, the IEP that is at issue recommended a residential placement for the student rather than homebound instruction and that the need for related services in the residential setting could be revisited once the student's placement was changed (see Oct. 13, 2011 Tr. p. 106).

The hearing record shows that on June 2, 2011, a private occupational therapist retained by the district issued a written report documenting the results of his OT evaluation of the student

(Dist. Ex. 18; see Oct. 13, 2011 Tr. pp. 210-22). At the time the report was generated, the student was receiving one individual 30-minute session per week of OT "at home or in a community setting" (Dist. Ex. 18 at p. 1). The report reflected that during the evaluation, the student's compliance with standardized testing was not achieved; however, based upon his therapeutic experiences with the student since September 2010, the evaluating occupational therapist observed and described the student's skills and deficits in the areas of activity level, neuromuscular status (including postural alignment, muscle strength, and range of motion), sensory processing (including tactile, vestibular, auditory, proprioceptive, and visual), fine motor control (including pinch/grasp patterns, visual motor and graphomotor skills), visual perceptual abilities, and self-help skills (id. at pp. 3-6).

In his report, the occupational therapist described the purpose of the student's OT services as "to ensure that the student has success in his/her environment" (Dist. Ex. 18 at p. 2). The occupational therapist testified during the impartial hearing that the purpose of the OT evaluation was to determine "whether [the student] would require [OT] in his home," which the evaluating occupational therapist "considered to be his school environment" (Oct. 13, 2011 Tr. pp. 211-12). The occupational therapist concluded that the student was "very functional in his own [home] environment, with multiple materials, manipulatives and [his] ability to complete tasks primarily when he is making the choices of how and when to do things" (Dist. Ex. 18 at p. 2). Specifically, he concluded that the student's fine motor and bilateral hand skills to perform activities of daily living (ADLs), self-care, assembly tasks, prevocational and vocational tasks, were "adequate to function in his current environment" (id. at p. 1; see Oct. 13, 2011 Tr. pp. 216-17). He added that the student has "a lot of skill that doesn't necessarily require a person [with an OT] degree to work with him personally. He could get that interaction through a vocational work skills program, daily living skills which occur more often in [a] residential treatment facility …" (Oct. 13, 2011 Tr. pp. 217-18; see id. at pp. 232-34). Although the OT evaluation report noted that the student may require prompts to complete activities at certain times, it also indicated that "his ability to participate and complete the tasks" was present, and that the student also demonstrated functional skills within community settings, such as at the supermarket (Dist. Ex. 18 at pp. 6-7).

The occupational therapist did not recommend OT services within the student's home environment for the 2011-12 school year, but indicated that the student would benefit from "an organized structured educational or residential environment" (Dist. Ex. 18 at pp. 1, 7; see Oct. 13, 2011 Tr. pp. 211-13). In testimony, the occupational therapist denied that his recommendation was predicated on the student's noncompliance with standardized testing protocols, and instead maintained that the student did not require home-based OT services because he had reached a "therapeutic plateau," and reiterated that the student "has certain abilities and his abilities are being inhibited by the lack of structure in his life, the lack of attending a structured program …" (Oct. 13, 2011 Tr. pp. 220-21, 223-30). He further testified that the student's lack of progress resulted from a combination of his disability and the structure in his home environment, adding that the student's "home structure and home environment limits his ability to focus and provides unstable structure" (id. at pp. 221, 230-31). However, the occupational therapist recommended that the student would benefit from a residential placement because "[t]hose facilities offer a lot of structure," which the student required to address his needs (Oct. 13, 2011 Tr. pp. 218-20, 222).

The occupational therapist participated in the June 2011 CSE meeting, during which he reviewed the student's progress and provided his recommendations, including the discontinuation

of OT in the student's home environment, placement of the student in a "small structured residential program where fine motor skills can be integrated into functional life skill activities reinforced by staff," and the provision of OT consultations, five times as needed for 30 minutes per session during the student's first month in the new residential placement (Dist. Exs. 1 at pp. 1-2; 20; see Oct. 13, 2011 Tr. p. 215). The student's June 2011 IEP incorporated the recommendations made in the June 2, 2011 OT evaluation (compare Dist. Ex. 1 at p. 9, with Dist. Ex. 18 at p. 1), and the CSE recommended that the student receive five OT consultation sessions during the first month of his residential placement to determine the extent to which OT services were needed in the residential environment (Oct. 13, 2011 Tr. pp. 214-16; Oct. 20, 2011 Tr. pp. 177-79; Dist. Ex. 1 at p. 20).[7]

The IHO also concluded that the June 2011 IEP was insufficient to provide the student with a FAPE because it did not include PT services for the student for the 2011-12 school year. On July 1, 2011, a private physical therapist retained by the district conducted a PT evaluation of the student and in his evaluative report he noted that behaviorally, the student appeared to be "tired and disinterested in the evaluation process" (Dist. Ex. 17 at p. 1; see Oct. 20, 2011 Tr. pp. 49-60, 74-75). The PT evaluation report indicated that the physical therapist used clinical observation, goniometry, and manual muscle testing of the student, and conducted a parent interview to assess of the student's gross motor skills (Dist. Ex. 17 at p. 1). Although the physical therapist reported that the student "was not compliant with many attempts to gather gross motor functioning and information needed for the evaluation," the resultant evaluative report provided descriptions of the student's skills, needs, and levels of required assistance in the areas of ADLs, ambulation, posture, muscle tone/strength, range of motion, and hand/eye coordination; specifically, the physical therapist observed that the student required minimal assistance for balancing while putting on his pants and minimal to moderate assistance during ADLs (id. at pp. 1-2). In the area of motor skills, the student sat with back support independently, ambulated with a "foot-flat to toe-off gait," transferred independently from sitting to standing, rose up on his toes, and stood unsupported on a balance board, briefly (id.). The physical therapist identified the student's "low" core muscle tone, "slowed" deep tendon reflexes, and "fair" bilateral strength throughout his lower extremities, and assessed the student's bilateral upper and lower extremity range of motion as falling within functional limits (id.). The physical therapist described the student's ability to track with his eyes as "fair," his overall coordination as "fair(-)/poor(+)," and his endurance as "poor," and added that the student exhibited "fair(-) hand/eye coordination," caught a small ball thrown to him in six out of ten attempts, and displayed a "poor" overhand throwing motion (id. at p. 2).

The physical therapist did not recommend physical therapy "at that time" due to the student's "lack of compliance, increased distractibility, poor communication skills and inconsistent listening" (Oct. 20, 2011 Tr. pp. 60-61; Dist. Ex. 17 at p. 3). However, during the impartial hearing, the physical therapist testified that if the student's educational environment changed from a home setting to a residential setting, the student's PT needs "would have to be reassessed" with regard to navigating or negotiating a new environment (Oct. 20, 2011 Tr. p. 62).

[7] I note that the June 2011 IEP also contained annual goals addressing improvement of the student's ADL skills in the residential placement (see Dist. Ex. 1 at pp. 18-19).

The hearing record reflects that the CSE reviewed the PT evaluation report during the June 2011 meeting and that its findings and recommendations were integrated into the student's IEP (Oct. 13, 2011 Tr. p. 125; Dist. Ex. 1 at p. 2). Although acknowledging that the student's noncompliance during the PT evaluation impeded his ability to complete tasks and that the student exhibited "low tone, posture and trunk control," the CSE concluded that the student could "navigate his home environment independently" and considered him "functional in his [current home] environment" (Dist. Ex. 1 at p. 2). The student's IEP reflected the CSE's determination that he "would benefit from a residential setting where his behavior could be controlled," and noted that "PT may be an option" once he reached a residential setting (id.).

In this case, the hearing record supports the conclusion that as a practical matter, the district was unable to meaningfully evaluate the extent to which the student may require OT and PT services to support his placement in a residential setting due to the student's current educational placement in his home. The hearing record further reflects that the student's receipt of home instruction was not based on a determination made by the CSE, but occurred because the parent opted not to accept the residential placement recommended by the district as the school was further from the student's home than she would have preferred (see Oct. 13, 2011 Tr. pp. 21-22). Moreover, the student was not progressing educationally in his home setting and there was little, if any, disagreement among the CSE and the OT and PT evaluators that the student should attend a residential placement where he could receive educational benefits from the 24 hour per day structure, reinforcement, and direction offered there (see Oct. 13, 2011 Tr. pp. 105, 107-08, 112-14, 116, 120-21, 128-29, 218-20, 222, 224-25, 230-31; Oct. 20, 2011 Tr. pp. 25, 40, 44, 92-93, 99-103, 140-41, 144, 146-47, 179-80; Nov. 28, 2011 Tr. pp. 72, 84-85, 95-98). Both the district's assistant director of special education/CSE chairperson and SAIL's director testified that once the student began attending the residential placement and became acclimated, SAIL would conduct OT and PT assessments of the student in order to assess his needs in the residential environment, after which, the CSE would reconvene to modify, if necessary, the recommended related services on the student's IEP (Oct. 13, 2011 Tr. pp. 105-06; Oct. 20, 2011 Tr. pp. 62, 176-79).

In consideration of the foregoing, I find that the hearing record does not support the IHO's determination that the June 2011 IEP was inappropriate to provide the student with a FAPE for the 2011-12 school year because it did not recommend OT and PT services for the student in the recommended residential placement. Given the student's receipt of home instruction at the time of the June 2011 CSE meeting and based on the information available to the CSE at the time of the meeting, I find that the proposed program in the June 2011 IEP was reasonable.

2. LRE

As discussed above, the parent does not allege that a residential program is inappropriate for the student; rather, she alleges that the district's recommendation of SAIL is inappropriate because it is insufficiently close to the student's home. The IDEA requires that a student's recommended program must be provided in the 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 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general

educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc], 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). State and Federal regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[8]

[8] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

With respect to the first prong of Newington, the parties do not disagree that the student required a special class setting rather than a general education setting, nor do they assert with respect to the second prong that the district failed to offer the student a program with access to nondisabled students to the maximum extent appropriate, with the exception of the disputed issue of whether the recommended residential placement is as close as possible to the student's home (8 NYCRR 200.1[cc], 200.4[d][4][ii][b]; see 34 CFR 300.116). The hearing record reflects that the parent was willing to accept a residential placement located on Long Island; however, she objected to the district's recommendation of SAIL because the school is located too far from the student's home (see Sept. 19, 2011 Tr. pp. 6-7; Oct. 13, Tr. pp. 21-22; Dist. Ex. 15 at p. 3). The CSE chairperson testified that "we have struggled to find residential placements close to [the student's] home or ones that [the parent] found satisfactory, [and] explored other placements," adding that "[t]here's very limited residential programs here [on] Long Island" (Oct. 13, 2011 Tr. pp. 91, 94). According to the hearing record, the district had been working in concert with the parent in an attempt to secure an in-State residential placement for the student on Long Island since 2008, but, according to the CSE chairperson, in 2011, the student had been rejected, either outright or after being placed on waiting lists, from three residential facilities located on Long Island that were considered potentially appropriate to address the student's educational needs (see Oct. 13, 2011 Tr. pp. 92-95; Dist. Exs. 33; 40; 42).[9] The CSE chairperson further testified that the CSE ultimately offered SAIL because it determined the placement was the student's LRE, and that the recommendation was based on the chairperson's observations of the program and SAIL's screening of the student, which occurred in spring 2010 (Oct. 13, 2011 Tr. pp. 105, 132-34).

Based upon the foregoing, I find that the evidence in the hearing record shows that the district made reasonable attempts, albeit unsuccessfully, to comply with the parent's wishes to place the student at an appropriate in-State residential facility located on Long Island, but has been prevented from doing so by a lack of available residential placements that could address the student's needs. Additionally, although I note that SAIL's location did not meet the parent's preferences, I find that the location of the school in relation to the student's home did not violate the IDEA's LRE requirement or render the recommended residential placement inappropriate to offer the student a FAPE for the 2011-12 school year.

VII. Conclusion

In summary, in light of my findings as discussed above, I find that the hearing record supports a determination that the district has offered the student a FAPE in the LRE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192), and that the IHO decision

[9] Although the CSE chairperson testified during the impartial hearing that the student was presently on the wait list at one of the Long Island residential facilities, the hearing record indicates that the student was rejected from this facility on the same date that the CSE chairperson testified, on the ground that the student had exceeded the eligible age limit for the facility (compare Oct. 13, 2011 Tr. p. 94, with Dist. Ex. 42 at p. 1).

dated January 2, 2012 must be reversed and the parent's claims in the due process complaint notice must be dismissed.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision dated January 2, 2012 is reversed and the parent's claims are dismissed.

Dated: **Albany, New York**
March 8, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER