



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-204

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

Appearances:

Cuddy Law Firm, P.C., attorneys for petitioner, Jason H. Sterne, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from that portion of a decision of an impartial hearing officer (IHO) which set maximum rate limits upon respondent's (the district's) obligation to provide her son with home-based applied behavioral analysis (ABA) and supervisory services. The district cross-appeals from that portion of the IHO's decision which found that it failed to offer the student an appropriate educational program and ordered it to pay for home-based ABA and supervisory services. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has received diagnoses of mental retardation and autism (Parent Exs. G; P at p. 1; Z; AA; CC at pp. 1, 2). On May 16, 2011 the CSE convened to develop the student's program for the 2011-12 school year (Dist. Ex. 1 at pp. 1-2). The May 2011 CSE determined that the student was eligible to receive special education and related services as a student with autism (id. at p. 1). The May 2011 CSE recommended that the student receive 12-month services in a 6:1+3 special class placement at a State-approved nonpublic day school program, (Dist. Ex. 1 at p. 1). The May 2011 CSE also recommended that the student be provided with individual speech-language therapy as a related service for two sessions per week for 30 minutes per session (id. at p. 15). The May 2011 CSE further recommended that services provided by the student's 1:1 crisis management paraprofessional be discontinued (id. at pp. 2, 15). Consistent with the May 2011 IEP, the hearing record reflects that, in August 2011, the student continued to attend the State-approved nonpublic

day school, moving to a new 6:1+3 special class (Tr. pp. 139; Parent Exs. V; W; see Dist. Ex. 4 at p. 1).

While the hearing record does not reveal if there was any particular reason it was scheduled, the CSE convened again on January 24, 2012 (Tr. pp. 154-55; Dist. Ex. 5 at pp. 1; Parent Ex. D).¹ ² The January 24, 2012 CSE determined that the student should receive special education programs and services as a student with autism (see Dist. Ex. 5 at p. 1).³ The section of the January 24, 2012 IEP used to the student's recommended special education programs and related services was left blank (Tr. pp. 213-15; see Dist. Ex. 5 at pp. 6-7). However, according to the student's teacher the January 24, 2012 CSE recommended that the student receive speech-language therapy two times per week, for 30 minutes per session (see Tr. p. 217). according to the assistant director at the student's school, the student-to-staff ratio in the student's classroom during the 2011-12 school year continued to be 6:1+3 (see Tr. pp. 31, 110).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated March 9, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) on both substantive and procedural grounds (Parent Ex. A). In particular, the parent asserted that (1) neither the May 2011 nor the January 2012 IEP described the student's academic or cognitive levels in any detail; (2) the annual goals in the January 2012 IEP were inadequate; (3) neither the May 2011 nor the January 2012 IEP offered parent counseling and training; (4) the behavioral intervention plan (BIP) attached to the May 2011 IEP "appear[ed]" to have been prepared without first developing a functional behavioral assessment (FBA) and did not comply with State regulations and that the "FBA and the BIP attached to the January 24th IEP" did not comply with State regulations; (5) the January 24, 2012 CSE improperly declined the parent's request for ABA services in the home; (6) the May 2011 CSE removed the student's 1:1 crisis paraprofessional due to a lack of funding, rather than a lack of need on the part of the student and that the absence of a 1:1 crisis paraprofessional in the January 24, 2012 IEP denied the student a FAPE; and (7) the improper absence of occupational therapy (OT) from both the May 2011 and January 2012 IEPs (id. at pp. 1-4).

¹ Parent Exhibit D is the same as page 15 of District Exhibit 5 (see Parent Ex. D; Dist. Ex. 5 at p. 15). Since Parent Exhibit D is more legible District Exhibit 5, any references herein to that particular page will be to Parent Exhibit D).

² The hearing record includes correspondence directed "to whom it may concern" from the student's pediatrician, requesting that the student be provided with an additional 20 hours per week of at home-based ABA to supplement his school services (see Parent Ex. G). While the IHO and Exhibit List indicate that this letter is dated September 18, 2011, a review of the document itself and other records of the student's pediatrician suggest that the document may be dated April 18, 2011 (see IHO Decision at p. 9; Tr. p. 102; Parent Exs. CC at p. 1; G). The hearing record also includes correspondence directed "to whom it may concern," dated October 12, 2011, from the Medicaid services coordinator of a private entity, recommending that the student be provided with 20 hours per week of ABA services outside of the student's school program (see Parent Ex. F). However, the hearing record does not include any additional information relative to this correspondence, including whether the correspondence triggered the January 24, 2012 CSE meeting.

³ The student's eligibility for special education programs 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]).

As relief, the parent requested an order annulling the student's current IEP and directing the district to (1) develop an appropriate IEP with the proper classification of autism, with equal participation of the parent, to address the student's needs; (2) develop current and accurate present levels of performance and appropriate, measurable annual goals and short-term objectives to address the student's needs, including identification of appropriate methodologies to address those needs; (3) develop a comprehensive FBA and BIP, which would include input from the parent; (4) develop and review assessments and evaluations of the student's progress and needs in counseling, speech-language therapy, and OT, and recommend such related services for the student, as warranted by such assessments and evaluations; (5) provide the student with 20 hours per week of at home SETSS services in the form of ABA; (6) provide the student with OT services, 3 times per week for 30 minutes per session; (7) provide the student with a full time crisis management paraprofessional; (8) provide parent counseling and training for three hours per month; (9) provide progress reports "as required" with respect to the student's annual goals and short-term objectives; (10) provide additional services to the student to compensate for services not provided during the 2011-12 school year, including hour for hour make-up services for SETSS, OT, and parent counseling and training; and (11) provide additional services to the student to compensate for services inappropriately provided during the 2011-12 school year, including hour for hour make-up of speech-language therapy, which had been inappropriately provided due to the absence of speech-language annual goals and short-term objectives in the January 24, 2012 IEP (Parent Ex. A at pp. 4-5).

B. Impartial Hearing Officer Decision

The impartial hearing began on June 19, 2012 and concluded on August 8, 2012, after two days of proceedings (see Tr. pp. 1-266).⁴ By decision dated September 17, 2012, the IHO found that there were no procedural errors during the development of the January 24, 2012 IEP that "were tantamount to a denial of FAPE" (IHO Decision at p. 5).⁵ With respect to the parent's request that the student be provided with 20 hours per week of home-based ABA, the IHO found that, without supplemental ABA services, the January 24, 2012 IEP did not provide the student with a FAPE (*id.* at p. 7). However, the IHO also found that, because the student was receiving ABA services in his current day program, the award should be limited to 15 hours per week of direct home-based ABA services, plus two hours of supervisory services weekly to include parent training and coordination with the student's current school (*id.*). With respect to the parent's request for compensatory home-based ABA services, the IHO found that an award for such services was not warranted because of the absence of documentary evidence (*id.*). Regarding this, the IHO indicated that the rationale that had been prepared with respect to the justification for providing

⁴ The hearing record reflects that the IHO scheduled a prehearing conference for February 28, 2012 to discuss hearing dates and pre-hearing issues (Prehearing Conference Summary and Scheduling Order; see also 8 NYCRR 200.5[j][3][xi]).

⁵ The parent, who was represented by an attorney at the impartial hearing, did not address many of the claims asserted in the parent's March 2012 amended due process complaint notice in her brief to the IHO, thereby abandoning them (see Parent Exs. A; GG; see also Application of the Dep't of Educ., 08-037; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024; cf. C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *2 n.5 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Central Sch. Dist., 2013 WL 1187479, at *9 n.6, *12 n.7 [S.D.N.Y. Mar. 21, 2013]; Escambia County Bd. of Educ v. Benton, 406 F. Supp. 2d 1248, 1258 n.9 [S.D.Ala. 2005]). Thus, the IHO appropriately declined to decide such claims.

the student with such services had not been submitted into evidence at the impartial hearing (*id.*). With respect to the lack of OT services, the IHO indicated that the student may have exhibited deficits that required OT as a related service (*id.*). Accordingly, the IHO found that it was appropriate that the district conduct an OT evaluation of the student (*id.*).

The IHO ordered that, "as of the date" of the IHO decision, the district should provide the student home-based ABA services consisting of 15 hours per week of direct services at a rate not to exceed \$30 per hour and two hours of supervisory services at a rate not to exceed \$75 per hour (IHO Decision at pp. 7-8). The IHO further ordered that the district conduct an OT evaluation of the student by no later than October 1, 2012 (*id.* at p. 8).

IV. Appeal for State-Level Review

The parent appeals, requesting an order annulling the IHO's decision to the extent that it limited the hourly rate for direct home-based ABA services to \$30 per hour and for supervisory services to \$75 per hour (*see* IHO Decision at pp. 7, 8). The parent asserts that the IHO erred in limiting these hourly rates on the basis that such limits lack any support in the hearing record. The parent attaches to her petition an affidavit containing information relating to whether the district would make payment of hourly rates for home-based ABA services for the student in excess of the amounts set forth in the IHO's order, the hourly rates for ABA services in circumstances where the district has been ordered to provide for such services, and the hourly rates charged for home-based ABA services by two providers, including the State-approved nonpublic school attended by the student.

The district submitted an answer and cross-appeal. With respect to the parent's appeal of the hourly rates set forth in the IHO's order, the district objects to the additional evidence proffered by the parent. The district further alleges that the parent is not aggrieved by the IHO's decision. In particular, the district asserts that there is no indication in the hearing record that the student's educational needs could not be served with the hourly rates set forth in the IHO's order and that the parent's concerns are therefore speculative. In the alternative, the district contends that the parent's due process complaint notice did not request the provision of home-based ABA services at any particular rate, that the district did not agree to expand the scope of the impartial hearing to include this issue, and that, therefore, the issue of the hourly rate for home-based ABA services is outside the scope of the SRO's review. The district further asserts that, even if such issue was within the scope of the reviewing authority, the hearing record and pleadings reveal no evidence that the student would not be able to receive home-based ABA services and that, therefore, the student has not been prejudiced by the IHO's decision. Finally, the district asserts that the parent has offered no explanation as to why she did not raise the hourly rate issue at the impartial hearing.

The district cross-appeals the IHO's finding that, without a recommendation for supplemental ABA services, the January 2012 IEP did not offer the student a FAPE. The district asserts that certain of the IHO's underlying conclusions relating to the student's needs were unsupported by citation to any evidence in the hearing record, were therefore conclusory, and were not a sufficient basis to support a finding that the district failed to offer the student a FAPE. Additionally, the district contends that the hearing record does not suggest that the student required home-based ABA services in order to make progress at the State-approved nonpublic day school program the student attended. The district alleges that, as a consequence, applicable law did not provide the student with a right to home-based ABA services as part of a FAPE. Therefore, the

district alleges that the IHO erred in finding that such services were a necessary in order to offer the student a FAPE.

The parent answers the district's cross-appeal, asserting, in relevant part, that certain evidence proffered by witnesses at the impartial hearing was consistent with the IHO's determination that home-based ABA services were necessary in order for the student to be provided with a FAPE.

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 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., 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], aff'd, 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, 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*, 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. Preliminary Matters

1. Finality of Unappealed Determinations

Initially, neither party has appealed that part of the IHO's decision, which ordered the district to conduct an OT evaluation of the student no later than October 1, 2012, but which did

not order the provision of OT services as requested by the parent (see IHO Decision at pp. 7-8). Nor did the parent appeal the IHO's findings that "there were no procedural errors during the development of the IEP on January 24, 2012 that were tantamount to a denial of FAPE" and that an award of compensatory home-based ABA services was not appropriate (see id. at pp. 5, 7). Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

2. Scope of the Impartial Hearing and Review

Before reaching the merits in this case, I must determine which claims are properly before me on appeal. A party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at * 4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at * 23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. 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 [S.D.N.Y. 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).

In her decision, the IHO addressed the fact that the January 24, 2012 CSE meeting was held by telephone, that parts of the January 24, 2012 IEP were left blank, and that the student's classroom teacher at the State-approved nonpublic day school program testified that part of the January 24, 2012 IEP, which indicated that the student did not need a BIP, was not accurate (see IHO Decision at pp. 5-6). These issues cannot be reasonably read from the text of the amended due process complaint notice; nor does the hearing record show that the district agreed to expand the scope of the impartial hearing to include these issues. Further, the hearing record does not reflect that the parent submitted or that the IHO authorized a further amendment of the parent's March 2012 due process complaint notice to include these issues. Under such circumstances, the IHO should not have addressed these particular itemized issues.

Furthermore, upon review of the parent's March 2012 amended due process complaint notice, I find that it may not be reasonably read to raise the allegation that the district provided no prior written notice relating to the district's refusal to provide the student with requested home-based ABA services and that this substantially impacted the parent's ability to meaningfully participate in the IEP process (see Parent Ex. A). Nor may the March 2012 amended due process complaint notice be reasonably read to raise the allegation that the district representative at the January 24, 2012 CSE meeting unilaterally denied the parent's request that the student be provided with home-based ABA services, which substantially impacted the parent's ability to meaningfully participate in the IEP process (see id.). Additionally, upon review, the hearing record does not indicate that the district agreed to expand the scope of the impartial hearing to include these two

issues (Application of the Bd. of Educ., Appeal No. 10-073). Moreover, as these issues appeared only in the parent's memorandum of law, counsel is reminded that a memorandum of law is not a substitute for a pleading under the practice regulations (see 8 NYCRR 279.4, 279.6; Application of the Bd. of Educ., Appeal No. 10-122; Application of the Dep't of Educ., Appeal No. 09-051). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6). Thus, to the extent that the parents or their attorney have incorporated by reference or argued additional issues solely within the memorandum of law, the arguments have not been properly asserted and I decline to consider or address them.

Based on the foregoing, I am precluded from reviewing these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995], aff'd, 69 F.3d 687 [2d Cir. 1995], and Hoefl v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D., 2011 WL 4914722, at *12 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

3. Additional Evidence

The district objects to the consideration of the additional evidence submitted with the parent's petition, consisting of an affidavit containing information relating to whether the district would make payment of hourly rates for home-based ABA services to the student in excess of the amounts set forth in the IHO's order, the hourly rates for ABA services in circumstances where the district has been ordered to provide for such services, and the hourly rates charged for home-based ABA services by two providers, including the State-approved nonpublic school attended by the student. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, 10-047; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, the documentary evidence proffered by the parent was available at the time of the impartial hearing and is not necessary to reach a decision in this case. Accordingly, I will not consider this additional evidence.

B. Home-based ABA Services

Regarding the district's cross-appeal of the IHO's finding that, without supplemental home-based ABA services, the January 2012 IEP did not provide the student with a FAPE (see IHO Decision at pp. 6-7), several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir. 1991]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *17 [E.D.N.Y. Oct. 30, 2008]).⁶ In light of the information available to the CSE, the student's needs at home, and the progress the student made during the 2011-12 school year, leading up to the January 24, 2012 CSE meeting, the evidence does not support the conclusion that the CSE failed to offer the student a FAPE as a result of its failure to recommend home-based ABA services (see Application of the Dep't of Educ., Appeal No. 12-052; Application of a Student with a Disability, Appeal No. 11-068).

The hearing record shows that the student is diagnosed with mental retardation and autism and that his cognitive functioning has been estimated to be in the "[s]everely [l]imited [r]ange," at or below two years of age (Parent Exs. G; O at pp. 1-3; P at p. 1; Z; AA; CC at pp. 1-2). In addition the student has significant communication and social skills deficits, interfering behaviors, and is visually impaired (Dist. Ex. 5 at pp. 1, 2; Parent Exs. N at p. 1-2, 3, 4; O at p. 1, 2, 3; P at p. 1). The student is unable to sit for long periods of time and requires high levels of reinforcement (Dist. Ex. 5 at p. 1). Due to the student's need for a high degree of individualized attention and intervention, the student attended and the January 24, 2012 CSE continued to recommend for the student a 6:1+3 special class at a State-approved nonpublic school, at which he received 1:1 ABA instruction for 4-5 hours per day (Tr. pp. 32-33, 202; Dist. Exs. 1 at pp. 1, 13; 4 at p. 1).⁷

The evidence also does not show that evaluative information submitted to, or considered by, the January 24, 2012 CSE recommended that the student be provided with home-based ABA services (see Application of the Dep't of Educ., Appeal No. 12-052). While the hearing record contains correspondence directed "to whom it may concern" from the student's pediatrician, dated April or September 14, 2011, and from the Medicaid service coordinator of a private agency, dated October 12, 2011, both of which recommending that the student be provided with 20 hours of home-based ABA services, the hearing record does not show that the parent submitted such

⁶ Regarding the district's contention that certain of the IHO's conclusions were unsupported by citation to any evidence in the hearing record, I note that except for a single reference, that part of the IHO's decision which sets forth her findings of fact does not reference particular transcript pages or exhibit numbers. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]).

⁷ In support of her conclusion that the student required home-based ABA, the IHO noted that, according to the evidence, although ABA was used throughout the school day, the student received 1:1 ABA services only for 45 minutes (IHO Decision at p. 6). This conclusion is not supported by the evidence. To the contrary, the hearing record shows that the student received 1:1 ABA between four and a half to five hours per day (see Tr. pp. 32-33, 202).

information to the January 24, 2012 CSE for consideration and review (see Parent Exs. F; G). Furthermore, the hearing record indicates that this information was not reviewed by the January 24, 2012 CSE (see Tr. pp. 216-17, 223-24). Even assuming the two letters had been before the CSE, it is unclear how it would have required the CSE to alter its recommendation for services since the rationale of the Medicaid service coordinator appears to focus on the high number of repetitions the student would require to generalize skills to a new environment and the pediatrician's correspondence states only that the home based services would "reinforce" the therapies in school and teach the mother to support the student in the home (Parent Exs. F; G). Neither piece of correspondence provides rationale that describes why 20 hours of home-based ABA was an appropriate level of service for the student (Parent Exs. F; G; see Student X, 2008 WL 4890440, at * 19).

Turning to the testimony referenced by the IHO, the assistant director indicated that the student had difficulty generalizing from the school to the home environment and that she felt he needed home-based ABA services in order to accomplish that (Tr. pp. 63, 117-18, 131-32; see IHO Decision at p. 6). Additionally, the student's classroom teacher during the 2011-12 school year testified that the student had not reached a point where he was generalizing a lot of skills, even in school, and indicated that home-based ABA was necessary to carry over skills to the student's home and into the community (Tr. pp. 193, 200-201). The classroom teacher further testified that one of the reasons he recommended that the student receive home-based ABA services was in the "hope" that "whatever" was taught in school " could be generalized at home" (Tr. p. 199).⁸

With respect to the student's needs at home, the IHO referenced testimony that home-based ABA services would be beneficial to the student to reinforce "basic" home skills relating to communication, controlling the student's behavior, eating, washing, and toileting (IHO Decision at pp. 6-7). The assistant director testified that, in addition to addressing the student's needs relating to generalization, her recommendation that the student receive home-based ABA services was also primarily for support at home (Tr. p. 63). Further, the student's classroom teacher at the time of the January 24, 2012 CSE meeting indicated that home-based ABA services were necessary to address the student's educational and behavioral needs at home (Tr. p. 193). The parent testified that while the student was doing "good" and "well" at school, he was "not doing good at home" (Tr. p. 237). However, even an earnest and well-meaning desire facilitate supervision, custodial care, and behavior and functioning of the student in his or her home is not itself a sufficient basis to require that home-based ABA instruction be made part of the student's educational program under the IDEA (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care

⁸ In support of her contention that the January 24, 2012 CSE should have, but did not, recommend that the student be provided with home-based ABA services, the parent submitted affidavits from the assistant director, the student's classroom teacher during the 2011-12 school year, and the parent. Among other things, the affidavits set forth that the parent's request for home-based ABA services was based, in significant part, on the student's need to carry over and generalize skills learned at school to his home and into the community (see Parent Exs. DD ¶¶ 4, 8; EE ¶¶ 4, 8, 10; FF ¶¶ 5). However, the affidavits were prepared after the January 24, 2012 CSE meeting and, in relevant part, describe the student as of the time they were written rather than at the time of the January 24, 2012 CSE meeting (see Parent Exs. DD; EE; FF). This evidence which describes the student's after the IEP was drafted is of lesser probative value under these circumstances because an "IEP must be evaluated prospectively as of the time of its drafting" (R.E., 694 F.3d at 186).

in the home were not required], aff'd 2013 WL 3814669 [2d Cir. July 24, 2013]; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. April 21, 2008]; Application of the Dep't of Educ., Appeal No. 12-086; Application of a Student with a Disability, Appeal No. 12-052; Application of a Student with a Disability, Appeal No. 11-068; Application of the Dep't of Educ., Appeal No. 10-123).

The IHO also based her determination that the student required home-based ABA on her conclusion that the student's progress was "minimal" (IHO Decision at p. 6). In particular, the IHO indicated that, in terms of many of his daily living goals, the student continued to require prompting and assistance, though feeding and toileting skills had improved (id.; see Dist. Exs. 4 at p. 2; 5 at p. 2). The IHO also found that the student's communication skills remained primitive and were largely confined to pointing and a few modified signs (IHO Decision at p. 6; see Dist. Exs. 3; 4 at p. 1; 5 at p. 1). Additionally, the IHO found that, behaviorally, the student continued "to exhibit a high frequency of out-of-seat behaviors including dropping to the floor and throwing things" and that "[t]hese significantly interfering behaviors necessitate[d] close supervision and reinforcement" (IHO Decision at p. 6; see Dist. Exs. 4 at p. 1; 5 at p. 2).⁹

In contrast, the assistant director testified that the student's 6:1+3 program at the State-approved nonpublic day school was an appropriate program for the student and that this was because the student was making progress (Tr. pp. 43-44, 128, 131). The assistant director also testified that the level of progress made by the student was "pretty much what [was] expected" and that this was based on the fact that in previous years, the student had always made, slow, gradual progress (Tr. p. 43). She also indicated that she felt that the student would receive an educational benefit from that school without the benefit of a home-based ABA program (Tr. p. 130). At the same time, the assistant director indicated that an additional program of home-based ABA would "definitely be helpful" for the student to maintain the skills that he was learning in his school setting (Tr. p. 117). The student's classroom teacher testified that the State-approved nonpublic school was "a highly appropriate setting" for the student and was "like a perfect fit" for the student (Tr. p. 190). He also indicated that, without an additional program of home-based ABA, the student would receive an educational benefit from the State-approved nonpublic day school program and that he was able to make progress at that program (Tr. pp. 191, 194). Like the assistant director, the classroom teacher also testified that an additional home-based ABA program "would definitely help [the student]" (Tr. pp. 220, 222).

Additionally, the hearing record provides detailed information relating to the extent to which the student made progress under the May 2011 IEP between the time he transitioned into his current classroom in August 2011 and the time of the January 24, 2011 CSE meeting (see Dist.

⁹ In support of this finding, the IHO specifically referenced a March 2012 quarterly speech-language progress report (IHO Decision at p. 6; see Dist. Ex. 10). That report, however, was prepared subsequent to the CSE meeting and IEP at issue and is not relevant to the adequacy of the IEP under review. As noted above, an "IEP must be evaluated prospectively as of the time of its drafting" (R.E., 694 F.3d at 186). A parent can not, subsequent to a challenge to an IEP, "use evidence that their child did not make progress under the IEP in order to show that it was deficient from the outset" (id. at 187 [citation omitted]).

Exs. 3; 4; Parent Exs. R; S; V).¹⁰ The assistant director and the student's classroom teacher prepared a classroom progress note dated December 6, 2011 (see Parent Ex. V). The progress note reported that the student had made "moderate progress over the first four months of the school year" (id.). The progress note reported that, upon entering the classroom in August, the student "had great difficulty sitting for long periods of time and complying with instructional demands" (id.). It reported that the major focus of his curriculum had been "building communication skills, which [would] limit frustration during instructional tasks" (id.). It reported that the student had been working on sign language "to communicate his wants and needs," that he could "independently use" three signs, but "especially" needed assistance with one of them "due to [the student's] low tolerance for demands" (id.). The progress note reported that classroom staff had been trying to build rapport with the student "to help him sit appropriately during instruction" (id.). The progress report advised that the student was working on various programs and that most of them focused on "learning readiness" skills which would help the student gain "important pre-requisite skills needed to learn important skills" (id.). The report stated that the student "struggle[d] with most of his academic programs mainly due to the fact that he [could] not tolerate sitting during instruction" (id.). The progress report indicated that, as a consequence, staff had "worked on teaching [the student] to request [] frequent breaks during instruction to help limit his frustration and also teach a functional and appropriate escape from demands" (id.). The report indicated that, at the time it was written, the student appeared to be learning that skill but still needed to be prompted to request a break or he would "begin to engage in inappropriate escape maintained behaviors," which consisted of dropping to the floor or throwing instructional materials (id.). With respect to the student's behaviors, the report advised that the student engaged "in instances of problem behavior, which includ[ed] dropping to [the] floor, throwing objects, and consistently getting out of [his] seat" (id.). The progress report indicated that program staff had recently begun to prompt the student to point in the direction of what he wanted, as a way of communicating that he wanted to get up, and that this "had proven to be effective thus far, but [that the student] must learn this skill independently" (id.). With respect to communication, the report advised that "[o]verall" the student had "made progress" but that he still "engage[d] in many instances of escape maintained problem behavior" (id.). The report indicated that this would "prompt staff to continue to work on communication skills to help limit these instances of problem behavior" (id.).¹¹

¹⁰ I note that the student's classroom teacher at the time of the January 24, 2012 CSE meeting provided testimony at the impartial hearing with respect to the student's progress relative to the annual goals during the 2011-12 school year, as a whole (see Tr. pp. 144-50). This testimony is, as a whole, was not especially relevant to the particular inquiry at hand, as it did not focus on the progress made by the student leading up to the January 24, 2012 CSE meeting, but included information subsequent to the time of that meeting (id.).

¹¹ The hearing record also contains earlier progress notes dated subsequent to the May 2011 IEP. In a progress note dated June 17, 2011, the assistant director and the student's previous teacher reported, among other things, that the student had "made moderate progress in the last three months" and that "[i]n summary," the student had made "steady academic progress in the past couple of months" (Parent Ex. X at pp. 1, 2). It also indicated that the student had "engage[d] in inappropriate behaviors," and had been "continually redirected back on task" (id. at p. 2). In a progress note prepared on August 2, 2011, which was at the time of the student's transition into his new classroom, the assistant director and the student's new classroom teacher (who was the student's teacher at the time of the January 24, 2012 CSE meeting), indicated that "[o]ver the past two months, the main focus ha[d] been on generalization and maintenance of skills" and that the student had "been generalizing already mastered skills across different instructors, and different settings" (Parent Ex. W). The August 2, 2011 progress note also indicated that the student's behavior at the time that he had initially entered his new classroom program had been "very good" and "quite compliant" (id.).

The assistant director and the student's classroom teacher prepared a report dated January 17, 2012, entitled "Summary of Progress" (Dist. Ex. 4). The report advised that the student was "able to verbally communicate some basic wants and needs through gestures and simple sign language" (*id.* at p. 1). Regarding his sign language, the report indicated that the student could sign for "music" and "break" but that he required staff assistance "to use [those] signs in a functional manner" (*id.*). The report stated that the student could also "gesture in the form of pointing in the direction of desired tangible items" (*id.*). The report also indicated that the student could not "discriminate receptively and [had] visual impairments" (*id.*). With respect to English Language Arts, in addition to the indicated use of signs and gestures and the need for staff assistance when using communication skills, the report indicated that the student was "working on a variety of academic programs" focusing "mostly on learning readiness skills," such as providing eye contact and sitting and waiting appropriately (*id.*). The report indicated that the student could "independently wait for short durations of time" but "[could] not tolerate long durations of waiting" (*id.*). The report further indicated that the student "struggle[d] with maintaining eye contact and sitting appropriately without attempting to get out of [his] seat" (*id.*). According to the report, functional communication training was being used to help the student learn "how to request" a desired item without getting out of his seat (*id.*). With respect to the area of math/science/technology, the report indicated that the student was "working" on a number of programs including "one-step directions" (*id.*). Regarding this, it indicated that the student was able to independently follow one-step directions to "stand up and sit down" but that he required "a thick schedule of reinforcement to stay on task" (*id.*). The report noted that the student had "poor discrimination skills" and that, as a result, he "struggle[d] with matching various letters, numbers and colors" (*id.*). "To help alleviate this," the report indicated that "bigger stimuli [would] be used to help teach discrimination skills" (*id.*). In the area of social studies and history, the report indicated that the student was "working on skills such as responding to his own name, visual tracking, and vocal imitation" (*id.* at p. 2). The report indicated that the student could visually track a highly preferred item "in various directions" but advised that "the problem" was that the student would "only visually track a very highly preferred item" (*id.*). According to the report, the student was able to respond to his own name if the staff person were "sitting directly next to him" but could not respond "from long distances away" (*id.*). The report indicated that the student had "some vocal skills" but would only imitate sounds and words if singing (*id.*). The report further indicated that the student "engage[d] in a high frequency of out of seat behavior" which could consist of "dropping to the floor and throwing objects" (*id.*). The report indicated that these behaviors "may occur" when the student was "unable to communicate" what he wanted to and reported that functional communication training was being used to help teach the student to appropriately ask for things (*id.*). According to the report, "during all academic tasks" the student required "frequent breaks from instruction" (*id.*). The report indicated that staff would "assist" the student in "signing 'break' as a way to escape from academic demands" (*id.*).

In the area of health and physical education, the summary of progress report advised that the student "require[d] close supervision in physical education" and assistance from staff to "appropriately engage in various target skills" (Dist. Ex. 4 at p. 2). With assistance, the student was able to "engage" in skills such as "kicking a ball, throwing a ball, riding a bike, and shooting a basketball" (*id.*). The report indicated that the student was "unable to chew solid food," that independent feeding was a target goal, and that staff would "continuously fade prompts in an attempt to help [the student] independently feed himself" (*id.*). The student could "independently put the spoon to his mouth;" but he required "assistance in scooping food" (*id.*). The report also advised that the student was "visually impaired," that he had eyeglasses, but that he "refused to

wear them during the school day" (*id.*). In the area of music and art, the report advised that the student "really enjoy[ed] listening to music" and that music functioned as "a very strong reinforcer" for the student (*id.*). Consistent with this, it indicated that the student "responds very well to music" and "is able to vocally imitate words when staff sings to him" (*id.*). According to the report, the student also enjoyed "musical instruments such as a drum" or "banging on a table to establish a beat while singing" (*id.*). The report further indicated that the student would "sit for long durations of time when music was used as a reinforcer" (*id.*). The student also engaged in "art activities" "consisting of coloring and cutting" and that he required "hand over hand prompting in order to complete these tasks" (*id.*). With respect to daily living skills, the report indicated that the student worked on "a variety" of such skills every day including "unpacking upon arrival," "pack-up upon dismissal," "washing hands," and "heating up lunch" (*id.*). The report also indicated that the student "require[d] assistance during all of these skills but that he ha[d] made progress during bathroom skills, especially with the ability to independently pull pants up and down" (*id.*).

The summary of progress report recommended that the student "continue his placement" in a 6:1+3 class setting that provided "a highly structured teaching environment, which focuse[d] on 1:1 instruction and group instruction" (Dist. Ex. 4 at p. 3). The report stated that the recommended setting was "beneficial for the student's future success at acquiring new skills and reducing maladaptive behavior" (*id.*).

In a quarterly speech-language progress report dated December 11, 2011, the student's speech-language therapist reported, as she had in her previous report, that the student was "beginning to understand" one-step verbal directions (Parent Ex. R at p. 1; *see also* Parent Ex. T at p. 1). The speech-language therapist advised that during that quarter, the student "continue[d] to work on signing, matching pictures, and following verbal directions" (Parent Ex. R at p. 2). The speech-language therapist wrote that the student's progress had been "minimal due to noncompliance and high distractibility" (*id.*). The speech-language therapist also advised that the student "continue[d] to request highly desired item's with [American Sign Language (ASL)] signs but [that] novel signs have not yet been mastered" (*id.*). The speech-language therapist indicated that "[t]herapy [would] focus on improving [the student's] attention and focus for improved functional communication skills" (*id.*).¹²

The student's speech-language therapist prepared an "annual progress report" dated January 19, 2012 (Dist. Ex. 3). The speech-language therapist advised that the student demonstrated "significant deficits in expressive and receptive language skills" (*id.*). She also indicated that the student was making "some gains" in his speech-language therapy and was "working on requesting using gestures and [ASL]" (*id.*). According to the speech-language therapist, the student was independently able to use three signs ("I want music," "finished," and "break") (*id.*). At the time of the report, the speech-language therapist indicated that the student was continuing to work on producing four signs to request additional classroom and gym items ("ball," "book," "bike," and

¹² In a previous quarterly speech-language progress report dated August 3, 2011, which was immediately after the student had transitioned into his new classroom, the student's speech-language therapist indicated that the student had continued "to work on signing, verbalizing, matching pictures and following verbal directives" (Parent Ex. T at p. 2). The speech-therapist also indicated that the student's progress was "inconsistently demonstrated and highly dependent on his behavior" (*id.*). She also indicated that "when compliant," the student was "able to request highly desired items (music and book) using signs and words" (*id.*). At that time, and looking to the future, the speech-language therapist advised that the student's therapy would "focus on improving his attention and focus for improved functional communication skills" (*id.*).

"computer") but he had not independently mastered the use of these signs (id.). The speech-language therapist also indicated that the student was able to sign "more" to request recurrence (id.). The speech-language therapist advised that the student's "verbalization skills" were "extremely limited" as he was "not yet able to verbalize spontaneously or upon request" (id.). The speech-language therapist indicated that the student had "made progress with his receptive language skills" (id.). "Depending on attention and compliance with tasks" the student was "sometimes able to select targeted picture[s] for familiar items in a field of two but not yet consistently" (id.). The speech-language therapist noted that the student was "improving his eye contact during greetings and farewell" (id.). She also indicated that the student was "not yet able to exchange [a] named toy with a peer or consistently follow verbal directions" (id.). Further, while the student had "recently become more compliant with tasks and remaining in his seat for therapy," she noted that the student was "sometimes difficult to engage in therapy and attempt[ed] to escape tasks by throwing clinician's materials and pushing the clinician and the chairs away" (id.). According to the speech-language therapist, the student's therapy would "focus on improving [the student's] receptive and expressive language skills utilizing gestures/ASL and pictures to improve all aspects of communication" (id.). As a summary, the speech-language therapist advised that the student had "demonstrated progress in [speech-language] therapy but [that] significant deficits continue[d] to exist" (id.). The report recommended that speech-language therapy "should continue [two] times per week" for 30 minute individual sessions (id.).

The hearing record also contains documentary information relating to the extent to which the student had made progress relative to the annual goals in his May 2011 IEP. With respect to his classroom annual goals and the period beginning when the student transitioned into his current 6:1+3 classroom in August 2011 and extending into December 2011, the student was marked "progress made, goal not yet met," "anticipate meeting goal" in two annual goals, relating to: the student's ability to independently request five of his preferred items via sign language or by pointing; and his ability to independently sip from a cup across staff and settings (Parent Ex. S at pp. 1, 3). During this period, the student was marked as making "little progress," "anticipate meeting goal" in three annual goals, relating to independently completing five independent work activities; independently attending to and following 20 teacher directed instructions across instructional sessions; and independently self-feeding at least four different cubed foods across staff and settings (id. at pp. 1, 2, 3). Finally, the student was marked during this period as making "no progress," "do not anticipate meeting goal" in one annual goal, which was that the student would independently attend to 20 teacher directed instructions in a small group setting with no more than two additional students (id. at p. 2). With respect to the student's speech-language goals during this period, the student was marked "progress made, goal not yet met," "anticipate meeting goal" in each of his four annual goals (id. at pp. 4-6). These annual goals related to the student's ability to (1) imitate 10 ASL signs independently, (2) verbally imitate eight nouns to label/request highly desired items, (3) increase his receptive language skills by accomplishing different, specified short-term objectives, and (4) attend to and follow five one-step verbal directives with 80% accuracy across five consecutive sessions (id.).¹³

¹³ The hearing record also contains documentary information relating to the extent to which the student had made progress with respect to the annual goals in the May 2011 IEP prior to or at the time of his transition into his new classroom in August 2011. With respect to his classroom goals, in an IEP goals progress report with information dated June 14, 2011, the student was marked "progress made, goal not yet met," "anticipate meeting goal" in two annual goals, relating to: independently completing five independent work activities; and independently sipping from a cup across staff and settings (Parent Ex. S at pp. 1, 3). At that time, the student was marked as "little

In terms of evaluating the student's progress with respect to the student's annual classroom goals, the students' classroom teacher testified that, at the time of the January 24, 2012 CSE meeting, none of the annual goals in the May 2011 IEP had been completely mastered (Tr. p. 207). During the January 24, 2012 CSE meeting, the student's annual classroom goal relating to independently requesting items was downwardly modified, such that the student would be expected to independently request at least four items and not five and, further, that the student would request the item by pointing instead of using sign language or by pointing (compare Dist. Ex. 1 at p. 7 with Dist. Ex. 5 at p. 5). Similarly, the January 24, 2012 CSE modified the student's annual classroom goal relating to the completion of work activities by reducing the targeted number of completed independent activities from five to four (id.). Additionally, I note that the January 24, 2012 CSE modified many of the student's classroom goals in the January 2012 IEP to take into account a need to address behavior issues (compare Dist. Ex. 1 at pp. 7-9 with Dist. Ex. 5 at pp. 5, 12, 13). In terms of evaluating the student's progress with respect to his speech-language annual goals, the January 24, 2012 CSE reduced the number of annual speech-language goals from four to three, reduced the number of ASL signs the student was targeted to use from 10 to seven, and also reduced the number of one-step verbal directives the student was expected to attend to and follow from five to three (compare Dist. Ex. 1 at pp. 10-12 with Dist. Ex. 5 at p. 10). Finally, with respect to the student's annual goal of independently self-feeding at least four different cubed foods, the hearing record reflects that, because of parental concerns that soft foods would injure the student's esophagus, at some point before the student transitioned to his new classroom, the district's self-feeding activities with the student did not utilize cubed foods (Tr. pp. 22-23; see Dist. Ex. 1 at p. 9; Parent Ex. S at p. 3; see also Tr. pp. 149-50). While, the student's annual goals were modified by the January 24, 2012 CSE, upon review, I find that they continued to target the student's identified needs and set appropriate expectations that the student would master new skills (see Tr. pp. 155-61, 173-88; Dist. Exs. 3; 4; 5 at pp. 1-2, 5-6, 10-13).

In view of the evidence described above and upon careful review of the hearing record, I disagree with the IHO's finding that the district was required to offer the student home-based ABA services in order to offer the student a FAPE at the time of the January 24, 2012 CSE meeting. Despite the student's challenges, as reported by the assistant director and the student's classroom teacher and speech-language therapist at the time of the January 24, 2012 CSE meeting, and as noted above, the student demonstrated progress in his assigned classroom, in his speech-language therapy and toward his annual goals in the May 2011 IEP (see Dist. Ex. 3 at pp. 1, 2, 3, 4, 5; Parent Exs. S; V).¹⁴

progress made," "anticipate meeting goals" in four annual goals, relating to the student's ability: to independently request five of his preferred items via sign language or by pointing towards the item; to independently attend to and follow 20 teacher directed instructions across instructional sessions; to independently attend to and follow 20 teacher directed instructions in a small group setting with no more than two additional students, and to independently self-feed at least four different cubed foods across staff and settings (id. at pp. 1-3). With respect to the student's progress in his speech language goals in the May 2011 IEP and prior to or immediately after the student's transition into his new classroom in August 2011, the student was marked as "progress made, goal not yet met," "anticipate meeting goal" for each one of his four annual goals during both the June 14, 2011 and August 3, 2011 marking period (see id. at pp. 4-6).

¹⁴ I also note that as indicated above, the progress that the student made in his classroom and with respect to his annual goals subsequent to his transition into his new classroom in August 2011 also followed progress that the student had made subsequent to the development of the May 2011 IEP and prior to his transition to his new classroom in August 2011, a period of time during which the student was also enrolled in a 6:1+3 classroom and

I find that the district offered the student an appropriate educational program that would address the student's significant needs during the school day and that the evidence does not establish that the student required the additional home-based services in order for the student to receive educational benefits. The evidence supports a finding that adding home-based services may provide greater opportunities for the student overall, however, 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). Instead, the evidence shows the district satisfied the more modest requirement of developing an IEP likely to produce "progress, not regression" (Walczak, 142 F.3d at 130). Under the circumstances, while it is understandable that the parent, whose son has substantial needs, desires greater educational benefits through the auspices of special education (see Tr. p. 237; Parent Ex. FF ¶ 9), it does not follow that the district must be made responsible for them or to ensure that that appropriate custodial care of the student in the home is addressed through ABA services provided by the school district (see Luke P., 540 F.3d at 1152-53; Gonzalez, 254 F.3d at 353; Devine, 249 F.3d at 1293; Hendry County Sch. Bd., 941 F.2d at 1573; Application of the Dep't. of Educ., Appeal No. 12-086). The IDEA 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, 873 F.2d at 567] [citations omitted]). Thus, based on all of the foregoing, I agree with the district and find that the IHO erred when she concluded that, without home-based ABA services, the student would not receive a FAPE (see IHO Decision at p. 7). Accordingly, I also find that the IHO's decision ordering the district to provide the student with home-based ABA services must be reversed.

C. Limitations Placed on the Hourly Rates

Because I have found that the IHO erred with respect to her conclusion that at the time of the January 24, 2012 CSE meeting the student required home-based ABA services in order to receive a FAPE, it is not necessary that I address the parent's appeal of the IHO's decision on the basis that the IHO improperly capped the hourly rate at \$30 per hour for direct home-based ABA services and \$75 per hour for supervisory services (see IHO Decision at pp. 7-8). However, upon review of the hearing record, were it necessary to reach the issue, I would agree with the parent that the limitations placed on the hourly rates by the IHO lack evidentiary support. Initially, it is noteworthy that the issue of caps on the hourly rate for payment of direct ABA services or for payment of supervisory services did not appear to a matter in dispute at the impartial hearing, and, therefore, the parties had little reason to adduce evidence and submit argument on this issue. I also note that under such a circumstance, the IHO should not have considered this issue and set hourly rates for the services ordered (S.M., 2013 WL 773098, at * 4; Application of the Dept of Educ., Appeal No. 12-070; Application of a Student with a Disability, 11-154; Application of the Bd. of Educ., Appeal No. 11-143; Application of a Student with a Disability, Appeal No. 11-073; see 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]); accord Dist. of Columbia v. Pearson, 923 F. Supp. 2d 82, 87-88 [D.D.C. 2013]; Dep't of Educ. v. C.B., 2012 WL 1537454, at *8 [D. Haw. May 1, 2012]).

VII. Conclusion

For the reasons detailed above, I find that the IHO incorrectly concluded that the student required home-based ABA services in order for the student to receive a FAPE, that the district's

not receiving any home-based ABA services (see Parent Exs. S at pp. 1-6; W; X at pp. 1, 2).

appeal must be sustained and, therefore, that the parent's appeal must be dismissed as a result. However, while it is not necessary to reach the parent's contention on appeal that the IHO incorrectly limited the hourly rates for direct home-based ABA services and supervisory services relating to such home-based ABA services, assuming for the sake of argument that I had dismissed the cross-appeal and concluded that home-based ABA services were required to address the student's needs, I would have found that the limits on the hourly rates imposed by the IHO were without evidentiary support. I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of the determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated September 17, 2012 is modified by reversing those portions which found that the district failed to offer the student a FAPE, and directing the district to provide additional home-based ABA and supervisory services.

Dated: **Albany, New York**
 October 7, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER