The University of the State of New York

The State Education Department
State Review Officer
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No. 13-115

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 Board of Education

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Children's Playhouse and other expenses. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

I was appointed to conduct this review on October 29, 2014.

On December 15, 2010, the student underwent an occupational therapy (OT) evaluation conducted at the preschool which he attended (see generally Parent Ex. B).[1] On January 28, 2011, the Committee on Preschool Special Education (CPSE) convened to conduct the student's initial review and to develop an IEP to be implemented for one year commencing on February 7, 2011 (see Parent Ex. C).[2] The CPSE recommended the following related services on a weekly basis:

[1] Although the parent testified otherwise, there is no documentary evidence in the hearing record to demonstrate that any other evaluations took place that day (see Tr. pp. 16, 63, 64).

[2] Only three pages of the January 2011 IEP—namely "Page 2," "Page 4," and "Page 9"—were included in the hearing record (see Parent Ex. C).

two 30-minute sessions of individual speech-language therapy and two 30-minute sessions of individual OT (see id. at p. 3). According to the parent, the student also received special education itinerant teacher (SEIT) services six hours per week (Tr. p. 20).

The parent testified that another CPSE meeting also took place on or around October 16, 2012 (Tr. p. 20).[3]

On January 8, 2013, the CPSE convened to conduct the student's annual review and recommended a 1:1 SEIT for 19 hours per week, as well as the following related services on a weekly basis: three 30-minute sessions of individual speech-language therapy, one 60-minute session of individual counseling, and three 30-minute sessions of individual OT (Parent Ex. E at pp. 1, 3).[4] The January 2013 CPSE also recommended a 12-month school year to avoid regression (id. at p. 4). In approximately May 2013, the parent and/or the providers decided to terminate the student's SEIT and related services (see Tr. pp. 39-40, 45-46). At the time of the impartial hearing, the student was attending a private general education preschool (Tr. pp. 30-31).

A. Due Process Complaint Notice

By due process complaint notice dated April 9, 2013, the parent alleged that the student was not given enough time to complete his evaluations, which resulted in "incorrect" IEPs since 2010 with insufficient services (see Parent Ex. A). The parent also claimed that the CPSE denied the student a FAPE "a few times" (id.). The parent proposed relief in the form of a correct IEP with future recommendations, as well as the costs incurred thus far and those anticipated of "all school expenses" and SEIT and related services, along with attorney's fees (id.).

B. Impartial Hearing Officer Decision

An impartial hearing commenced on May 23, 2013 and concluded on June 10, 2013 after two days of proceedings (see Tr. pp. 1-74).

By decision dated June 28, 2013, the IHO found that the district offered the student a FAPE for the challenged school years and found that the January 28, 2011 IEP provided the student a FAPE (IHO Decision at p. 9). Specifically, the IHO determined that, absent a specific objection to the December 2010 OT evaluation or other information regarding what services should have been recommended by the January 2011 CPSE, the hearing record did not support a finding that the January 2011 IEP was inappropriate (id. at pp. 8). The IHO also rejected the parent's argument that a different, more appropriate disability classification would have resulted in different IEP recommendations (see id. at pp. 7-8, 10). In addition, the IHO rejected the parent's position that, because the student's mandated services were eventually increased, this reflected that the January 2011 IEP recommendations were insufficient (id. at p. 8). The IHO concluded that the OT and speech-language therapy services recommended in the January 2011 IEP were not inconsistent with the description of the student's needs in the December 2010 OT evaluation (id. at p. 9). The IHO further found that the, at the time of the impartial hearing the student was not receiving and/or

[3] The hearing record does not include an IEP resulting from a CPSE meeting in October 2012.

[4] Parent Exhibit E includes several pages of the January 2013 IEP; however, it does not include pages setting forth the student's present levels of performance or annual goals (see generally Parent Ex. E).

the parent terminated SEIT and related services, and the hearing record included no information from a provider that the services recommended in the student's IEP could not "be delivered in a manner that would benefit the student" (id. at 11). The IHO concluded that the parent was not entitled to any future recommendations or reimbursement for future services (id.). The IHO also found that the parent did not present sufficient information to indicate that the district had any obligation to reimburse her for the costs of the student's tuition at the nonpublic preschool, including summer camp, or for the costs of an automobile (id. at 12).

IV. Appeal for State-Level Review

The parent appeals by petition dated June 22, 2013.[5] Initially, regarding the conduct of the impartial hearing, the parent alleges that the IHO erred in granting an extension of time, improperly engaged in off the record discussions, and asked the parent to consent to the provision of services to the student that the district did not offer and which were not appropriate. Next, the parent indicates that she "appeal[s] any of the IHO['s] and[/]or lack of decisions" relating to certain enumerated issues. Specifically, the parent alleges that the student's evaluations were "cramped" together. She alleges that the district teachers, providers, and administrators failed to recognize that the student exhibited symptoms consistent with diagnoses of autism and attention deficit hyperactivity disorder (ADHD) and that the district failed to set forth such diagnoses on the student's IEPs. In addition, the parent asserted that the CPSEs failed to develop a behavioral intervention plan (BIP) for the student. The parent asserts that she presented sufficient evidence at the impartial hearing to establish that the district failed to provide the student with a FAPE, including proof of procedural violations that interfered with her opportunity to participate in the decision making process regarding the provision of a FAPE to the student.

For relief, the parent requests that: the SRO conduct an investigation of the district, the impartial hearing process, and "third party agencies" to ensure proper referral of students for evaluations, proper performance of such evaluations, accurate recognition of the signs and symptoms of autism and ADHD, and the provision of a FAPE to student with disabilities. The parent also indicates that such investigations should result in a directive or "remind[er]" to private schools that serve students with disabilities to install safety window guards, to treat the signs and symptoms of autism, to comply with the orders and recommendations of the doctors of students, and to listen to the parents of students. The parent also requests that the SRO ensure that "any [and] all IHOs" not have personal or professional interests that conflicts with objectivity, be knowledgeable about the law, and have the ability to conduct hearings and render decisions consistent with the law. In addition, the parent seeks an order directing the district to open a division call the "Committee on Pre K Special Education" and address "age appropriate signs [and] symptoms with appropriate services to [a]void [r]egression." Finally, the parent appeals that the district stop the "intentional stonewalling" and start classifying students with disabilities appropriately.

In an answer, the district denies the parents allegations and alleges that it provided the student with a FAPE. The district asserts that the IHO properly granted an extension of the decision deadline and that the parent's appeal in this regard is interlocutory and improper. Further,

[5] The affidavit of service indicates the parent served the district with a copy of the petition on June 28, 2013, the same date on which the IHO issued his decision (see Parent Aff. Of Service).

the district argues that the parent's appeal is insufficient because it does not challenge the IHO's findings, conclusions, or orders. The district also sets forth that petition improperly raises issues beyond the scope of the due process complaint notice. The district also argues that it provided the student with a FAPE and that the parent refused appropriate services. The district also contends that the parent is not entitled to any compensatory additional services or reimbursement.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE or CPSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Conduct of the Impartial Hearing

Contrary to the parent's allegations, a review of the entire hearing record confirms that the procedures at the impartial hearing were consistent with the requirements of due process.

First, the hearing record reveals that, on June 10, 2013, at the conclusion of testimony and over the parent's objection, the IHO granted the district's request for an extension of time in order to allow the IHO time to receive the transcript, which was expedited (Tr. pp. 71-73). The parent alleges that the IHO initiated an off the record conversation to suggest an extension of time to the parties (8 NYCRR 200.5[j][5][i]). However, the record does not indicate an objection to any off the record solicitation by the IHO for an extension of time or an objection to any off the record conversations that may have taken place. An impartial hearing officer may grant specific extensions of time . . . at the request of either the school district or the parent" (8 NYCRR 200.5[j][5][i]). Therefore, while it is understandable that the parent desired a faster resolution of this matter, there is no reason to reverse the IHO's decision on this basis. However, the IHO is reminded to document that he has responded in writing to each extension request, that he fully considered the cumulative impact of the factors relevant to granting extensions, and his reasons for granting the extensions (8 NYCRR 200.5[j][5][i], [ii], [iv]).

Next, in the petition, the parent makes general requests that the SRO ensure that all IHOs are impartial, are knowledge regarding the IDEA and federal and State regulations, and possess the knowledge and ability to conduct hearings. In this regard, the parent's concerns are already addressed by federal statute and by federal and State regulations. An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations, and the legal interpretations of the IDEA and its implementing regulations; and must be possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

In this case, the IHO advised the parties on the first day of the impartial hearing of his professional background and that he was not an employee of the school district (Tr. p. 3). Furthermore, based on a review of the record, there is no evidence that he was not capable of conducting the hearing or was not knowledgeable of the IDEA and applicable federal and State law and regulations.

2. Sufficiency of the Pleadings

The district argues that, given the date of the parent's petition, it was served without the benefit of the IHO's final decision, and, therefore, constituted an interlocutory appeal. A party aggrieved by the decision of an IHO may subsequently appeal to an SRO (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). With regard to interim decisions of an IHO, "[a]ppeals from an [IHO's] ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to . . . Education Law [§ 4404]."

The parent's petition is dated June 22, 2013—twelve days after the conclusion of testimony and six days prior to the issuance of the IHO decision. The affidavit of service indicates that the parent served the district with a copy of the petition on June 28, 2013, the same date on which the IHO issued his decision (see Parent Aff. Of Service). It appears from the content of the parent's petition that it was likely intended as an appeal from a final decision of the IHO, the result of which the parent anticipated. However, State regulations also require that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). The district is correct that, given the date on the petition, as well as its content that lacks reference or citation to the IHO's decision, the petition appears to have been developed without the benefit of the IHO's decision (see generally IHO Decision; Pet.). State Review Officers have exercised their discretion and dismissed petitions that failed to comply with 8 NYCRR 279.4(a) (see, e.g., Application of the Dep't of Educ., Appeal No. 13-236; Application of a Student with a Disability, Appeal No. 12-016; Application of a Student with a Disability, Appeal No. 09-110; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-004; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 07-024). Here, the parent developed, signed, and verified her petition prior to the issuance of the IHO decision and therefore could not have possibly challenged any of the IHO's final conclusions, findings or orders.

In addition, the district notes that the petition fails comply with State regulations that provide that "pleadings shall set forth the allegations of the parties in numbered paragraphs" (see 8 NYCRR 279.8[a][3]). Documents that do not comply with these requirements "may be rejected in the sole discretion" of an SRO (8 NYCRR 279.8[a]). Here, the parent's petition does not contain numbered paragraphs as required by State regulations (see generally Pet.).

While I recognize that the parent is proceeding in this matter pro se, due to the foregoing violations of State regulations applicable to the required content and form of pleadings submitted to the Office of State Review, I exercise my discretion to reject the parent's petition in this case and dismiss the parents' appeal. Nevertheless, in this instance, I address, in the alternative, the following procedural issue and the merits of the parent's submissions.

3. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student

with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). 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 300.507[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]; 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. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]).

The parent's due process complaint notice raises an issue relating to the sufficiency of the district's evaluations of the student (Parent Ex. A). The parent alleged that this insufficiency resulted in subsequent unspecified problems with the student's IEP (id.). The parent sought relief in the form of a corrected IEP with future recommendations, a FAPE, reimbursement of school expenses, SEIT and therapy expenses along with attorney's fees (id.). The petition, on the other hand, raises additional issues regarding the provision of a FAPE to the student, including questions regarding the district's failure to identify the student's diagnoses or disability classifications, the CPSE's failure to develop a BIP for the student, and the district's failure to afford the parent an opportunity to participate in the development of the student's IEPs (Pet.). In addition, the petition sets forth various requests for relief that were not set forth in the parent's due process complaint notice (id.). These issues and requests for relief raised in the parent's petition, which were not raised in the due process complaint notice, will not be addressed in this decision (see Parent Ex. A; Pet.).

In addition, much of the relief sought by the parent in her petition requests investigations and directives relating to underlying systemic complaints. An impartial hearing may be held on issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 CFR 300.507[a][1]; see 20 U.S.C. § 1415[b][6]). With respect to this, there is no provision in the IDEA or the Education Law that confers jurisdiction upon an IHO or SRO to sit in review of alleged systemic violations (see Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has "consistently distinguished . . . systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators"], aff'd, 2009 WL 3765813 [2d Cir. Nov. 12, 2009]). Accordingly, I find that while I have jurisdiction over the parent's claim that that the relevant IEPs were not based on the student's needs, I do not possess plenary authority to investigate the district or other entities identified by the parent or order the district to adopt a specific policy in this matter (see, e.g., Application of a Student with a Disability, Appeal No. 12-006; Application of a Student with a Disability, Appeal No. 11-091). Moreover, even assuming for the sake of argument that I had jurisdiction to resolve systemic complaints or direct the district to establish special education policies, as noted above, the parent did include such complaints in her due process complaint notice and the parties therefore understandably did not address the matter in the presentation of their cases during the impartial hearing.

B. Sufficiency of Evaluative Information

As noted above, the crux of the parent's allegations, as set forth in the due process complaint notice, related to the time available to the student to complete evaluations and the alleged errors in the subsequent IEPs resulting from this alleged abbreviated evaluation session.

Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Moreover, State regulation provides that "[e]ligibility as a preschool student with a disability shall be based on the results of an individual evaluation which is provided in the student's native language, not dependent on a single procedure, and administered by a multidisciplinary team" and consistent with all other relevant State regulations concerning procedures for evaluation (8 NYCRR 200.1[mm]).

The parent's assertion that the evaluations were "cramped" together does not set forth a violation of federal or State law or regulation. Indeed, the completion of different evaluative measures during a single evaluative session by a multidisciplinary team satisfies the requirements of State regulations specific to the evaluation of a preschool student with a disability (8 NYCRR 200.1[mm]).

Moreover, to the extent that the parent attempted to elaborate during the impartial hearing on how the rushed evaluations resulted in a denial of a FAPE, her primary concern related to the student's diagnoses and disability classification (Tr. pp. 17, 35, 47, 22, 23, 40, 42; Parent Ex. A.). Even if this concern was properly raised in the parent's due process complaint notice, federal and State regulations do not require the district to set forth students' diagnoses in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA (or, as in this case, whether the student is eligible for special education as a preschool student with a disability) and obtain information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.1[mm], [zz], 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *13 [S.D.N.Y. Mar. 31, 2014] [finding that the "absence of an explicit mention" of a particular diagnosis in a student's annual goals was not fatal to the IEP because the goals were adequately designed to address the student's learning challenges as a whole and related to the particular diagnosis]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *10 [S.D.N.Y. Oct. 12, 2011]). Moreover,

the IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R.2011 WL 6307563, at *9 [finding that once a student's eligibility is established, "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in the original]; R.C. v. Keller Indep. Sch. Dist., 958 F. Supp. 2d 718, 730-32 [N.D. Tex. 2013] [holding that the IDEA "provides no specific right for a student to be classified under a particular disability, but requires that the student's educational program be designed to suit the student's demonstrated needs"]).

Thus, while the district offered nothing at the impartial hearing to establish the appropriateness of the student's IEPs, given the limited allegations that can be gleaned from the parent's due process complaint notice, it is unclear what evidence the district could present without inadvertently expanding the scope of the impartial hearing (see M.H., 685 at 250-51).

Even if I were to find that the district denied the student a FAPE, I would deny the parents claim for tuition reimbursement because the student is attending a general education program that does not offer the student a special educational program or related services that address the student's unique needs (see Tr. pp. 30-31; see also Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

I also deny the parent's request for reimbursement for her automobile. The evidence in the hearing record is not sufficient to show how this automobile relates to the student's educational needs (see Tr. p. 26; Parent Exs. I, J, L). With respect to the parent's request for an IEP with "future" recommendations, considering the student was scheduled to be evaluated on June 13, 2013, it is the province of the CSE to make recommendations regarding the student's special education program (Tr. pp. 32-33).

VII. Conclusion

Having determined that the parent did not comply with State regulations applicable to the required content and form of pleadings submitted to the Office of State Review and, further, having determined that the evidence in the hearing record establishes that the district sustained its burden relative to the allegations raised in the due process complaint notice to establish that it offered the student a FAPE, the necessary inquiry is at an end. In the alternative, review of the hearing record shows that the parent failed to sustain her burden to establish that the appropriateness of the student's unilateral placement at the Children's Playhouse.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 24, 2014

THOMAS J. REILLY
STATE REVIEW OFFICER