



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-224

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for a publicly funded placement for their son at Brooklyn Autism Center (BAC) and additional home-based services. 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

The student was diagnosed with autism at the age of two years eight months and received early intervention services consisting of instruction using applied behavior analysis (ABA) methods, speech-language therapy, and occupational therapy (OT) (Tr. pp. 336-38; Dist. Ex. 1 at p. 1; Parent Ex. D at p. 7). The student began attending a private preschool program in June 2011 and continued to receive ABA services at an afternoon daycare program (Tr. pp. 344-46; Dist. Ex. 1). After the student reached school age, he began attending a district public school in September 2012 (Tr. pp. 193-94).

On December 13, 2012, the CSE convened to conduct the student's annual review and to develop his IEP (Dist. Ex. 6). Finding the student eligible for special education programs and related services as a student with autism, the December 2012 CSE recommended a 12-month program in a 6:1+1 special class in a special school (id. at pp. 1, 11, 14).¹ The CSE also

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

recommended related services of three 30-minute sessions of individual speech-language therapy per week, one 30-minute session of speech-language therapy per week in a group of two, two 30-minute sessions of individual OT per week, and parent counseling and training on a quarterly basis (id. at pp. 11-12).

By letter to the district dated January 2, 2013, the parents stated their concerns regarding the December 2012 IEP (Parent Ex. S). The letter indicated the parents' belief that the IEP contained inappropriate goals, did not provide for 1:1 special education itinerant teacher (SEIT) services,² and that the IEP would not provide the student with meaningful educational benefits (id. at pp. 1-3). The letter also indicated the parents' request that the student receive 1:1 speech-language therapy and OT, parent training in the TEACCH methodology,³ an alternative bus schedule, and a list of private schools for which the district would pay the costs of the student's tuition (id. at pp. 2-3).

The district responded to the parents by letter dated January 10, 2013, agreeing to provide the student with 1:1 speech-language therapy, as per the parents' request (Parent Ex. T at p. 1).⁴ With respect to parent counseling, the district stated that it provided materials to the parents and would work with the parents in developing a TEACCH schedule for the student to be implemented in the student's home (id.). The letter further indicated that although ABA services were not listed on the December 2012 IEP, the district was aware of an "agreement" that the student continue to receive the services (id. at p. 2). Lastly, the district advised the parents that they would need to contact the office of pupil transportation or request a limited travel accommodation to change the student's bus schedule (id.).

On April 5, 2013, the parties signed a resolution agreement with regard to a due process complaint notice filed by the parents in January 2013, in which the district agreed to provide the student with 10 hours of ABA services from July 5, 2013 through January 31, 2014 (Parent Ex. E at pp. 1-2; see Dist. Ex. 8 at p. 1).⁵ The agreement further provided that the CSE would convene prior to January 1, 2014 to consider provision of these services for the remainder of the 2013-14 school year (Parent Ex. E at p. 1).⁶ By letter to the parents dated June 24, 2013, BAC advised the parents that the student had been accepted to BAC for the 2013-14 school year (Parent Ex. X).⁷

² The services provided to the student in a 1:1 ratio using an ABA methodology are variously referred to in the record as SEIT services, special education teacher support services (SETSS), and ABA services. Because SEIT services are defined by State law as services provided to a preschool student with a disability (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]), this decision shall hereafter refer to the services, however referenced in the hearing record, as the student's ABA services.

³ Although not defined in the hearing record, it is presumed that TEACCH refers to the Treatment and Education of Autistic and Related Communication Handicapped Children methodology.

⁴ This letter referenced a January 4, 2013 telephone conversation between the parent and the district (Parent Ex. T at p. 1).

⁵ The January 2013 due process complaint notice was not included in the hearing record.

⁶ The agreement was later extended through the end of the 2013-14 school year because the parent was "unable to secure" the services during the initial term of the agreement (Dist. Ex. 8 at p. 2).

⁷ BAC has not been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

At the time of the impartial hearing, the student continued to attend the 6:1+1 special class placement in a district public school recommended by the December 2012 CSE (Tr. pp. 348, 404).

A. Due Process Complaint Notice

By due process complaint notice dated June 28, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) (Parent Ex. A at p. 3). Specifically, the parents contended that the December 2012 CSE was not duly constituted because it did not contain a regular education teacher (*id.*). Additionally, the parents alleged that the district did not provide them with adequate notice of the CSE meeting and, as a result, the parents' experts did not attend (*id.*). The parents further alleged the district predetermined decisions regarding the provision of related services (*id.*). The parents also argued that the December 2012 CSE did not provide evidence to support its recommendations (*id.*). Relative to the December 2012 IEP, the parents argued that it was not appropriate because it was designed without meaningful goals, did not include any parent counseling, and that the IEP was not calculated to enable the student to make progress or provide the student with educational benefit (Parent Ex. A at p. 3).

In an affidavit submitted with the due process complaint notice, the student's father averred that 1:1 instruction using an ABA methodology was the only effective means of instructing the student and that the district public school the student attended did not offer such instruction (Pet. Ex. A-1 at pp. 1-2, 4). The student's father also contended that the goals in the IEP were insufficient for the student to receive educational benefits (*id.* at pp. 3-4). Furthermore, the student's father asserted that the student had begun engaging in disruptive behaviors while attending the district public school placement (*id.* at pp. 2-4).

As relief, the parent requested the following: (1) public placement and funding at BAC or another private school providing instruction using ABA methodology; (2) an increase in the student's ABA services from 10 hours to 15 hours per week; and (3) attorneys' and expert evaluation fees (Parent Ex. A at p. 1; *see* Pet. Ex. A-1 at pp. 1, 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 3, 2013 and concluded on October 4, 2013, after four days of proceedings (Tr. pp. 25-522).⁸ By decision dated October 28, 2013, the IHO found that the December 2012 IEP offered the student a FAPE and consequently denied the parents' request for placement at BAC and public funding for the costs thereof (IHO Decision). Initially, the IHO found that the following issues were not properly raised in the parents' due process complaint notice: (1) that the December 2012 CSE was improperly composed because it did not include an additional parent member (2) the district failed to provide ABA services to the student, and (3) the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student (*id.* at pp. 12, 15).

With respect to the parents' allegation that the December 2012 CSE was not duly constituted because the CSE did not include a regular education teacher, the IHO concluded that such individual was not required because the student was not participating in the general education

⁸ There are four transcript volumes from the impartial hearing which are consecutively numbered pages 25 through 522. The first transcript volume, dated September 3, 2013 begins on pg. 25.

environment, nor did the parties contemplate such participation (*id.* at p. 12). Additionally, with respect to the parents' allegation that they received a defective notice regarding the December 2012 CSE meeting, the IHO noted that the hearing record was devoid of any evidence of the notice sent to the parent regarding the meeting, precluding him from making a determination (*id.*).

Relative to the December 2012 IEP, the IHO found that the IEP was appropriate, sufficient, and reasonably calculated to provide the student with meaningful educational benefit (IHO Decision at p. 16). The IHO found in particular that the IEP appeared to accurately reflect the student's needs and that annual goals and short-term objectives developed by the December 2012 CSE were appropriate and sufficient to meet those needs (*id.* at p. 13). With respect to the parents' contention that they were not offered any parent counseling, the IHO noted that the December 2012 IEP specifically provided for parent counseling (*id.*).

Lastly, the IHO found that the parents were not entitled to an increase in the amount of the student's ABA services because such issue was resolved amongst the parties in the April 2013 resolution agreement (IHO Decision at pp. 16-17).

IV. Appeal for State-Level Review

The parents appeal the IHO's decision that the district offered the student a FAPE for the 2013-14 school year, asserting that the IHO erred in denying the student prospective placement and funding at BAC. The parents further assert that the IHO erred in denying their request for an increase in the student's ABA services.

First, the parents contend that the December 2012 CSE was not duly constituted because the CSE lacked a regular education teacher, an additional parent member, and a member with expertise to evaluate psychological assessments. The parents also assert that the district failed to prove what documentation the CSE considered before rendering its determination and that it failed to produce an accurate evaluation which identified the student's needs. Additionally, the parents argue that the omission of ABA services from the IEP was predetermined and deprived the parents of the opportunity to participate in the IEP development process.

Regarding the December 2012 IEP, the parents assert that the IHO erred in finding that the IEP was appropriate, and that the IHO erred in declining to make a determination regarding the proper methodology for the student, as all experts who evaluated the student opined that the student required instruction using ABA methodology to make progress. The parents also argue that the IHO erred in finding that the district failed to conduct a FBA and develop a BIP but still found that the district offered the student a FAPE, as the hearing record indicated that the student's behaviors were interfering with his instruction by the time of the December 2012 CSE meeting. Finally, the parents assert error in various evidentiary rulings made by the IHO.

In an answer, the district responds to the parents' petition by denying the allegations raised therein and asserting that the IHO correctly determined that the district offered the student a FAPE. The district also asserts that the IHO correctly denied the parents' request for placement of the student at BAC at public expense. Finally, the district asserts that the IHO correctly declined to

rule on the parents' request for an increase in the amount of ABA services provided to the student as that issue was resolved as part of a resolution agreement.⁹

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

⁹ The parents submitted a reply to the district's answer. Pursuant to State regulations, a reply is limited to responding to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the district did not interpose any procedural defenses in, or submit additional evidence with, its answer; therefore, consistent with the practice regulations, the parents were not permitted to submit a reply to the district's answer and it reply will not be considered.

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. Initial Matters—Scope of Review and Additional Evidence

Before reaching the merits in this case, a determination must be made regarding which claims are properly addressed on appeal. The district asserts that the parents present several claims on appeal that were not contained in their due process complaint notice, including that: (1) the December 2012 CSE was not duly constituted due to a lack of an additional parent member; (2) the district should have conducted an FBA and developed a BIP for the student; and (3) the absence of ABA therapy in the assigned school deprived the student of a FAPE.

With respect to the parents' claims raised for the first time on appeal, 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]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 2014 WL 322294 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ., 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; see K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *3, *6 [2d Cir. July 24, 2013]).

Upon review, I find that the parents' due process complaint notice cannot reasonably be read to include challenges to the composition of the December 2012 CSE for the failure to include an additional parent member or that the district should have conducted a FBA or develop a BIP (see Parent Ex. A).¹⁰ A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice to include these issues. Accordingly, the allegations in the parents' petition are

¹⁰ Although not applicable to the facts of this case, effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, the student, or another member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]).

outside the scope of review and will not be considered (see, e.g., M.P.G., 2010 WL 3398256, at *8).¹¹

With respect to the parents' argument regarding the absence of ABA therapy in the assigned school, the IHO was correct in finding that that this allegation was not raised in the parents' due process complaint. However, the parents did raise this argument in an affidavit, which was referenced in their due process complaint notice (Pet. Ex. A-1; see Parent Ex. A at p. 3). Although counsel for the parents attempted to introduce the affidavit into evidence during the impartial hearing, the IHO refused to accept it into the record on the basis that the parent was available for questioning during the hearing (Tr. pp. 328-330). Generally, documentary evidence not presented at a hearing may be considered in an appeal from an IHO's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable the SRO to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [noting that an SRO is only required to admit additional evidence if necessary to render a decision]). In this case, I shall accept the affidavit since it was filed with the district along with the due process complaint notice and, accordingly, should have been considered by the IHO as containing additional facts relating to the nature of the problem stated in the complaint (Tr. pp. 327-28). Accordingly, the issue of whether ABA services should have been provided in the assigned school was properly raised at the impartial hearing.

The parent submitted several other exhibits with his petition for consideration as additional evidence (Pet. Exs. A-2; A-3; A-4). As these exhibits were not offered as evidence during the impartial hearing, they need not be considered; in any event, they are not necessary to render a decision in this appeal (id.).¹²

¹¹ To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, at *9; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), the additional issues raised in the petition were not initially elicited by the district and, therefore, the district did not "open the door" to this issue under the holding of M.H. (see A.M., 2013 WL 4056216, at *10-*11; c.f., Y.S. v. New York City Dep't of Educ., 2013 WL 5722793, at *6 [S.D.N.Y. Sept. 24, 2013]; P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at *14 [S.D.N.Y. July 22, 2013]).

¹² Specifically, the exhibits all reference events that occurred contemporaneously with the impartial hearing, none of which were raised by counsel for the parents as error during the impartial hearing. Insofar as the parents now assert that the IHO erred in making certain evidentiary rulings, even were these issues properly raised on appeal, the parents have not asserted sufficient prejudice so as to warrant reversal on the basis that the IHO abused his discretion (see Letter to Stadler, 24 IDELR 973 [OSEP 1996]). To the extent that the parents assert the IHO erred in declining their request for a subpoena for the student's educational records, I note that federal regulations independently provide parents with the right to "inspect and review" their child's educational records, making a subpoena unnecessary (34 CFR 300.613). While the parent objects to delays in the hearing, counsel for the parent consented to all extensions granted on the record; however, I remind the IHO 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]).

B. CSE Composition

Turning to the issues properly raised on appeal, it is first necessary to address the parents' assertion that the December 2012 CSE was not duly constituted because a regular education teacher was not included. The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

A review of the December 2012 IEP reflects that attendees at the December 13, 2012 CSE meeting included a district representative, the student's special education teacher, the student's occupational therapist, the student's speech-language therapist, and the student's father (Dist. Ex. 6 at p. 17). In this case, the evidence shows that a regular education teacher did not participate at the CSE meeting. Nonetheless, the hearing record demonstrates that the student was not participating in a general education classroom. Furthermore, neither party asserts that the student would be appropriately placed in a general education setting, which is consistent with the CSE's determination that placing the student in a general class would not be "viable" (id. at p. 15). Therefore, I find that a regular education teacher of the student was not required at the December 2012 CSE meeting because the evidence does not support the conclusion that there was a reasonable likelihood that the student would have participated in a general education setting (34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see J.G. v. Kiryas Joel U.F.S.D., 777 F. Supp. 2d 606, 644-45 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 287-88 [S.D.N.Y. 2010]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 365-66 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *5-*6; see also Application of the Dep't of Educ., Appeal No. 11-136; Application of the Bd. of Educ., Appeal No. 11-129; Application of a Student with a Disability, Appeal No. 08-035). Even if a regular education teacher were otherwise required at the December 2012 CSE meeting, the parents do not allege, nor does the hearing record support a finding, that the lack of such a teacher impeded the student's right to a FAPE or deprived the student of educational benefits, or significantly impeded the parents' opportunity to participate in the development of the IEP (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

C. Sufficiency of Evaluative Information

Turning to the parents' assertion that the December 2012 CSE failed to consider sufficient evaluative information in developing the student's December 2012 IEP, an 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]; 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]), and the 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). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *9 [S.D.N.Y. Aug. 19, 2013]).

Although it is unclear what specific information the December 2012 CSE used to develop the December 2012 IEP, the IEP reflected current evaluative data and descriptions of the student consistent with a March 2012 psychoeducational report, an undated occupational therapy annual review plan, and a November 2012 speech-language progress report (compare Dist. Exs. 2-4, with Dist. Ex. 6 at pp. 1-2).¹³ In addition the student's teacher, who participated at the December 2012 CSE meeting, testified that she conducted an ABLLS-R evaluation which was also reflected in the December 2012 IEP (Tr. pp. 452, 456; Dist. Ex. 6 at p. 1).

Although the parents assert that the district had no information available to "justify" its recommendation, based on the foregoing, the information before the December 2012 CSE was sufficient for the CSE to accurately identify the student's needs and those needs were reflected and set forth in sufficient detail in the December 2012 IEP (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]). Furthermore, the parents do not assert that the present levels of performance section of the IEP misstated the student's needs or abilities or caused him any deprivation of

¹³ The hearing record would be more clear regarding what information was available to the CSE if the district had introduced into evidence a prior written notice informing the parents of the evaluative materials relied on by the CSE in formulating the program and placement recommendations contained in the December 2012 IEP (34 CFR 300.503[b][3]; 8 NYCRR 200.5[a][3][iv]).

educational benefits.¹⁴ To the extent the parents assert that the CSE denied the student a FAPE by failing to include instruction using ABA methodology on the student's IEP, that claim is not properly before me for the reasons stated further below.

D. Assigned School—ABA Methodology

To the extent that the parent argues that the December 2012 CSE's alleged failure to consider ABA methodology for the student contributed to a denial of a FAPE, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher. I note that although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.H., 685 F.3d at 257; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-CV-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; L.K. v. Dep't of Educ., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]).¹⁵

Next, I will address the parents' allegation that the assigned school does not successfully address the student's special education needs because the assigned school utilizes primarily the TEACCH methodology (see Tr. pp. 396-397), instead of ABA, the instructional methodology which the parent maintains the student requires in order to receive educational benefits. The hearing record contains reports from the student's ABA therapist, a developmental pediatrician, and a private clinical psychologist, each of which recommend the use of a methodology that utilizes the principles of ABA (Parent Exs. F; M; O). Initially, the hearing record does not indicate whether these reports were available to the December 2012 CSE. In any event, they do not support the conclusion that the student required the provision of instruction using principles of ABA methodology during the school day to receive academic benefit. In an undated ABA therapy report, the student's ABA therapist indicated that the student was successful using an ABA method with "successive approximation of skills, positive reinforcement, and a prompt and prompt fading procedure" along with a recommendation of a highly structured learning environment with "repetition and lots of motivation in order to learn" (Parent Ex. F at pp. 1-2). In an October 2012 letter, the developmental pediatrician suggested that the student learned best during 1:1 instruction using an ABA methodology, and that his academic environment should provide "intensive individual support (using the principles of ABA), consistent prompting with visuals, and consistent positive reinforcements" (Parent Ex. N at pp. 3-4). A September 2012 research evaluation prepared by the private clinical psychologist recommended that "naturalistic ABA approaches should be incorporated" into the student's program and that the student's "school intervention" should "incorporate visual structure" which would help to encourage attention, learning, motivation and interest in work activities (Parent Ex. O at p. 4). The clinical psychologist

¹⁴ Similarly, although the parents do not object to the annual goals in their petition, the hearing record supports that the annual goals contained in the December 2012 IEP correlated with the student's needs as specified in evaluative information in existence at the time of the CSE meeting (compare Dist. Ex. 6 at pp. 3-11, with Dist. Exs. 2-4, and Dist. Ex. 6 at pp. 1-2).

¹⁵ In any event, for the reasons stated below the parents' claims on this issue are not properly addressed in the context of this proceeding.

testified that ABA would be a "very important part of his treatment and a very important intervention for improving his communication skills and therefore his learning"; however, she did not provide any details as to why or how ABA would benefit the student (Tr. pp. 74-75). Furthermore, the developmental pediatrician opined that the student's IEP "should have ABA as a primary consideration," and that the student's December 2012 IEP was inappropriate for its absence; however, she did not explain why the student required instruction employing an ABA methodology to receive academic benefit (Tr. pp. 105-08).¹⁶

The student's special education teacher testified that during the 2012-13 school year, she utilized the TEACCH methodology, specifying that it provided a structured classroom with separate "stations" for tasks such as math, reading, writing, computer, and IEP goals; and that students in the class spent time at each station with 1:1 assistance from the classroom paraprofessionals (Tr. pp. 449-50; 460). She further indicated that in the beginning of the school year, the student exhibited behavioral issues which were addressed through 1:1 assistance while working at a slower pace and that with the 1:1 support, his behavior improved and the student made progress (Tr. pp. 455-56; 461). Moreover, the teacher testified that in addition to using TEACCH, she used visual cues and pictures (Tr. p. 451, 463-464). In light of the above, I find that the use of the TEACCH methodology in implementing the student's IEP did not deprive the student of a FAPE (see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012]).¹⁷

E. Requested Relief

With respect to relief, the parents seek a publicly-funded placement at BAC in addition to an increase in the amount of home-based ABA services the student receives. Initially, public funding of a nonpublic school placement is generally available only when the student is unilaterally placed in a private school. This requires the parent to "enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency" (20 U.S.C. § 1415[a][10][C][ii] [emphasis added]; 34 CFR 300.148[c]). While the parents may place the student in BAC at their own expense, they cannot obtain public funding for such a placement unless they have unilaterally placed the child in BAC (see A.R. v. New York City Dep't of Educ., 2013 WL 5203228, at *6 [S.D.N.Y. Sept. 16, 2013]; Application of a Student with a Disability, Appeal No. 12-046).

In the instant case, the student was attending the district public school recommended by the December 2012 CSE (Tr. pp. 348, 404). Since the parent did not remove the student from the district public school, the parent did not unilaterally place the student at BAC. Consequently, the parent was not obligated to pay the costs of the student's tuition at BAC for the 2013-14 school

¹⁶ In any event, as previously noted, subsequent to the December 2012 CSE meeting, the district agreed to provide the student with 10 hours per week of home-based ABA services through the end of the 2013-14 school year, and the hearing record does not support a finding that the student required a greater amount of ABA services to receive educational benefit.

¹⁷ Although, as noted by the IHO, the district should perhaps have referred the student for evaluation when he exhibited interfering behaviors toward the end of the 2012-13 school year (Tr. pp. 448-49), the parents raised no such claim in their due process complaint notice. Nonetheless, I encourage the parents and the district to consider conducting an FBA to determine the causes of the student's interfering behaviors before the CSE next convenes to develop an IEP for the student.

year (see Burlington, 471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192; Mr. and Mrs. A., 769 F. Supp. 2d at 406, 427-30; see also 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; Application of a Student with a Disability, Appeal No. 11-049). As the parents did not enroll the student in BAC, the parents' request for public funding for placement at BAC is not yet ripe for review, and cannot be considered.¹⁸

Lastly, the parents request an increase in the student's ABA services from 10 hours to 15 hours per week. After review of the hearing record, I find that the parents' request is precluded by virtue of the parties' April 2013 resolution agreement because the resolution agreement was in "complete settlement of all claims" raised in the January 2013 due process complaint notice (Parent Ex. E at pp. 1-2; see 8 NYCRR 200.5[j][2][iv]; see also 20 U.S.C. § 1415[f][1][B]; 34 CFR 300.510[d]). State regulations provide that "if, during the resolution process, the parent and school district reach an agreement to resolve the complaint, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the school district," and further that "such agreement shall be enforceable in any State court of competent jurisdiction or in a district court of the United States" (8 NYCRR 200.5[j][2][iv]). Moreover, State regulations provide that resolution agreements are "legally binding" and may be enforced in a State or federal district court (20 USC § 1415[f][1][B][iii]; Educ. Law § 4404[b]; 34 CFR 300.510[d][2]; 8 NYCRR 200.5[j][2][iv]). In this case, the parties entered into a resolution agreement resolving an issue over the student's ABA services related to the parents' January 2013 due process complaint notice (Parent Ex. E at p. 2). Here, the parents attempt to modify the April 2013 resolution agreement by raising this issue in their June 2013 due process complaint. As the parties' April 2013 resolution agreement is a legally binding document and the hearing record does not support a finding that the district denied the student a FAPE for any of the reasons raised in the parents' due process complaint notice, there is no reason appearing in the hearing record to disturb the resolution agreement.¹⁹

¹⁸ To the extent the parents' petition could be read to request an order directing the district to place the student at BAC, as noted above the hearing record does not support a finding that the district denied the student a FAPE for any of the reasons raised in the parents' due process complaint notice. Accordingly, there is no basis to award the parents the sought-after relief.

¹⁹ The parents correctly note that the hearing record does not include the January 2013 due process complaint notice. However, while they assert that the settlement agreement does not preclude their request for additional hours of home-based ABA services, the petition contains no argument in favor of their request for an additional five hours per week, nor did the parents submit the January 2013 due process complaint notice for the purpose of establishing that their subsequent request for additional home-based services was not precluded by the April 2013 settlement agreement.

VII. Conclusion

Having determined, as did the IHO, that the evidence in the hearing record establishes that the district offered the student a FAPE to the extent challenged by the parents, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 12, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**