



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-021

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

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

Educational Advocacy Services, attorneys for respondent, Jennifer A. Tazzi, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for the costs of the student's tuition at the Rebecca School for the 2012-13 school year. The appeal must be sustained.

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

On September 27, 2011, the CSE reconvened to conduct the student's annual review and to develop an IEP to be implemented from September 8, 2011 through September 24, 2012 (see Dist. Ex. 5 at pp. 1, 4-9, 13).¹ Finding the student eligible for special education and related services as a student with a visual impairment including blindness, the September 2011 CSE recommended

¹ It appears from the hearing record that the CSE initially convened on or about August 8, 2011 for the student's annual review, and then reconvened on September 27, 2011 and October 13, 2011 to finalize the student's IEP (see Dist. Exs. 3 at pp. 2-6; 5 at p. 13). The hearing record does not, however, contain an IEP generated from either the August 2011 or October 2011 CSE meetings (see Tr. pp. 1-152; Dist. Exs. 1-14; Parent Exs. A-B; D-L).

a 12-month school year program in a 6:1+2 special class placement at a State-supported nonpublic school, together with related services consisting of two 30-minute sessions per week of individual physical therapy (PT), two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, and one 30-minute session per week of individual speech-language therapy within the special education classroom (id. at pp. 1, 9-13).^{2,3} In October 2011, the student began attending the State-supported nonpublic school and received special education and related services pursuant to the September 2011 IEP; the student continued to attend the State-supported nonpublic school during July 2012, August 2012, September 2012, and a portion of October 2012 (see Dist. Exs. 6-11; see also Tr. pp. 12, 14-15, 22-23, 58-60, 121-22, 134).

By letter dated September 24, 2012, the district invited the parent to attend the student's annual review scheduled for October 9, 2012 (see Dist. Exs. 3 at p. 2; 12 at pp. 1-2). In a letter of the same date, September 24, 2012, the parent provided the district with a "10 day notice" letter, advising that she did not agree with the student's "current placement" and that the current placement did not meet the student's "needs academically and socially, emotionally, and behaviorally" (Parent Dist. Ex. D at p. 1). Accordingly, the parent notified the district of her intentions to enroll the student at the Rebecca School for the 2012-13 school year and to seek funding from the district for the student's placement (id.).

On September 27, 2012, the parent executed an enrollment contract with the Rebecca School for the student's attendance during the 2012-13 school year beginning on October 11, 2012 (see Parent Ex. G at pp. 1, 4, 6).⁴

On October 9, 2012, the CSE convened to conduct the student's annual review and to develop an IEP to be implemented from October 9, 2012 through October 7, 2013 (see Dist. Ex. 13 at pp. 1, 13). Finding that the student remained eligible for special education and related services as a student with a visual impairment including blindness, the October 2012 CSE recommended a 12-month school year program in a 6:1+2 special class placement at the same State-supported nonpublic school the student attended since September 2011, together with related services consisting of one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual (OT), and one 30-minute session per week of orientation and mobility services (id. at pp. 1, 10-11, 13-15). The October 2012 CSE also recommended that the student receive door-to-door special transportation and participate in alternate assessments (id. at pp. 12-14). In addition, the October 2012 CSE

² The student's eligibility for special education programs and related services as a student with visual impairment including blindness is not in dispute (see 34 CFR 300.8[c][13]; 8 NYCRR 200.1[zz][13]).

³The 6:1+2 special class placement recommendation in the September 2011 IEP reflected the actual student-to-teacher ratio at the State-supported nonpublic school (compare Dist. Ex. 5 at pp. 9, 11, with Dist. Ex. 4 at p. 9). The September 2011 IEP also referenced, without explanation, a 6:1+1 special class placement within the "Service Delivery Recommendations" (see Dist. Ex. 5 at p. 9).

⁴ The director of the Rebecca School testified that the parent first contacted the school during summer 2012 (see Tr. pp. 42-43, 52).

developed annual goals and corresponding short-term objectives targeting the student's identified needs in the areas of speech-language skills, social/emotional and behavioral skills, motor skills, vision, and basic cognitive and activities of daily living (ADL) skills (id. at pp. 4-10). Finally, the October 2012 CSE noted in the IEP that the parent decided to withdraw the student from the State-support nonpublic school (see id. at p. 15).

On October 11, 2012, the student began attending the Rebecca School (see Tr. pp. 43, 65; Parent Ex. K at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated March 28, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex. 1 at pp. 1-2). The parent asserted that the district failed to respond to her request to change the location of the student's special education program to a different State-approved nonpublic school (id. at p. 2).⁵ In addition, the parent asserted that the district failed to recommend a "program" capable of addressing the student's "autism and the resultant behaviors" (id.). The parent also alleged that although the district knew of her concern that the "recommended placement" was not appropriate, the district did not address the student's multiple needs during the CSE meeting (id.). Next, the parent alleged that the district failed to schedule a timely annual review (id.).

With respect to the student's unilateral placement, the parent alleged that the Rebecca School was an "appropriate and necessary placement" for the student (Dist. Ex. 1 at p. 2). With regard to equitable considerations, the parent alleged that she cooperated with the CSE (id.). As relief, the parent requested direct payment of the costs of the student's tuition to the Rebecca School for the 2012-13 school year and the provision of round-trip transportation (id.).

B. Impartial Hearing Officer Decision

On May 15, 2013, the IHO attempted to conduct a prehearing conference, however, only a district representative appeared (see Tr. pp. 1-4). On June 26, 2013, the parties proceeded to conduct the impartial hearing, which concluded on November 13, 2013 after four days of proceedings (see Tr. pp. 5-152). By decision dated December 30, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the student's unilateral placement at the Rebecca School was appropriate, and that equitable considerations weighed in favor of the parent's request for tuition reimbursement (see IHO Decision at pp. 6-13).

In determining that the district failed to offer the student a FAPE, the IHO found that the district failed to conduct a timely annual review, and failed to explain why the district did not have an IEP in place for the beginning of the school year (see IHO Decision at p. 9). In addition, the

⁵ The parent's due process complaint notice also included less specific allegations, such as that the district failed to "draft an IEP" that was "reasonably calculated to confer educational benefit" to the student for the 2012-13 school year and that the "recommended program" was not "individually tailored" to meet the student's needs including a "vision impairment and autism" (Dist. Ex. 1 at pp. 1-2). However, such generic allegations do not provide meaningful guidance or notice to the district regarding particular issues with the special education programs or related services recommended for the student.

IHO found that the October 2012 CSE did not discuss the parent's concerns about the "recommended placement" (i.e., the State-supported nonpublic school) despite knowing about the parent's disagreement with the "recommended placement" (*id.*). The IHO also found that the district did not conduct a classroom observation and that it was "unclear how many of the [annual] goals were actually discussed" at the October 2012 CSE meeting (*id.*). As a result, the IHO concluded that the parent did not have the opportunity to meaningfully participate in the meeting (*id.*). However, the IHO also found that the October 2012 CSE did provide several annual goals and related services to address the student's needs associated with autism (*id.* at p. 10).

Next, the IHO indicated that the parent "rejected" the student's recommended program at the State-supported nonpublic school based upon her "personal knowledge and experience at the time," as well as her observations of both the student—and the other students—in the classroom during the 2011-12 school year (IHO Decision at p. 10). The IHO found that although the State-supported nonpublic school could meet the student's vision needs, it was "unable to meeting his social and emotional needs" (*id.*). In addition, the IHO indicated that the round-trip travel time between the student's home and the State-supported nonpublic school was "unreasonable" (*id.*).

With respect to the student's unilateral placement, the IHO found that the evidence established that the Rebecca School was appropriate because the student attended a 12-month school year program, he made progress, and the Rebecca School helped foster his independence and adapted the environment to allow the student to make progress despite his visual impairment (*see* IHO Decision at pp. 10-12).

With respect to equitable considerations, the IHO found that the parent did not act unreasonably in removing the student from the State-supported nonpublic school, and she provided the district with timely notice of her intention to enroll the student at the Rebecca School (*see* IHO Decision at p. 12). The IHO also found that the execution of the enrollment contract with the Rebecca School, on September 27, 2013, did not constitute bad faith, and further, that the parent established that she was entitled to direct payment of the student's tuition costs to the Rebecca School (*id.*). Consequently, the IHO ordered the district to reimburse the parent for any expenses paid, and to directly fund any remaining costs of the student's tuition to the Rebecca School (*id.* at pp. 12-13).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year, that the Rebecca School was appropriate, and that equitable considerations weighed in favor of the parent's requested relief. The district argues that the IHO erred in finding that the student's annual review held on October 9, 2012 was not timely and that the district did not have an IEP in place at the beginning of the 2012-13 school year. The district also contends that the IHO erred in finding that the October 2012 CSE did not discuss the parent's concerns about the State-supported nonpublic school at the meeting and that the district did not conduct a classroom observation of the student to facilitate discussions about the State-supported nonpublic school or the student's annual goals. The district also argues that the IHO erred in finding that the State-supported nonpublic school was not appropriate to meet the student's social and emotional needs, because such arguments are speculative given that the student did not attend the State-supported nonpublic school for the remainder of the 2012-13 school year. The

district also asserts that the IHO erred in finding that the State-supported nonpublic school was not appropriate due to the excessive round-trip travel time, and moreover, the parent did not raise this issue in the due process complaint notice.

With respect to the student's unilateral placement, the district asserts that the Rebecca School program was not appropriate because it was not specially designed to meet the student's significant visual impairment. In addition, the student must use outside services to address his vision needs and needs related to orientation and mobility. The district also asserts that equitable considerations do not weigh in the parent's favor because the IHO erred in finding that the parent attended the October 2012 CSE meeting with an open mind.

In an answer, the parent responds to the district's allegations and asserts additional arguments upon which to uphold the IHO's decision in its entirety.

V. Applicable Standards

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

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

Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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. Scope of the Impartial Hearing

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. A review of the hearing record reveals that the IHO exceeded her jurisdiction by sua sponte addressing in the decision several issues, including whether the October 2012 CSE discussed the parent's concerns about the "recommended placement" (i.e., the State-supported nonpublic school), whether the district was obligated to conduct a classroom observation of the student, whether the October 2012 CSE discussed the annual goals, whether the parent had the opportunity to meaningfully participate in the October 2012 CSE meeting, whether the State-supported nonpublic school could meet the student's social/emotional needs, and whether the round-trip travel time to the State-supported nonpublic school was unreasonable, because the parent did not raise these as issues in dispute in the March 28, 2013 due process complaint notice (compare IHO Decision at pp. 9-10, with Dist. Ex. 1 pp. 1-3).

With respect to the issues raised and decided sua sponte by the IHO in the decision, 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. 13-151; 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][b]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 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., 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., 530 Fed. App'x 81, 87; 2013 WL 3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the issues raised and decided sua sponte by the IHO (see Dist. Ex. 1 pp. 1-3). Moreover, 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 (see Tr. pp. 1-152; Dist. Exs. 1-14; Parent Exs. A-B; D-L).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, these issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 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 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13 [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]).

Accordingly, the IHO exceeded her jurisdiction by addressing in the decision whether the October 2012 CSE discussed the parent's concerns about the "recommended placement" (i.e., the State-supported nonpublic school), whether the district was obligated to conduct a classroom observation of the student, whether the October 2012 CSE discussed the annual goals, whether the parent had the opportunity to meaningfully participate in the October 2012 CSE meeting, whether the State-supported nonpublic school could meet the student's social/emotional needs, and whether the round-trip travel time to the State-supported nonpublic school was unreasonable, and therefore,

the IHO's findings related to these issues must be annulled (see N.K., 2013 WL 4436528, at *5-*7; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery Co. Pub. Schs., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]).^{6, 7}

B. October 2012 CSE Process

1. Timeliness of Annual Review

The district argues that the IHO erred in finding that the student's annual review held on October 9, 2012 was not timely and that the district did not have an IEP in place at the beginning of the 2012-13 school year. The parent rejects the district's allegations, and argues that the district failed to explain the delay in holding a CSE meeting until October 9, 2012. A review of the hearing record supports the district's arguments, and thus, the IHO's findings must be reversed.

While the IDEA and State regulations require a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]), neither the IDEA nor State regulations preclude additional CSE meetings, prescribe when a CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (see 20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). A school district must, however, have an IEP in effect for each student with a disability within its jurisdiction at the beginning of each school year (see 20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). As a matter of State law, the school year runs from July 1 through June 30; therefore, a 12-month school year program effectively begins on July 1 (see Educ. Law § 2[15]). In this case, the timing of the student's annual review in October 2012 did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

⁶ 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 217, 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, *9; B.M., 2013 WL 1972144, at *5-*6), the issues raised and addressed sua sponte by the IHO in the decision were initially raised by counsel for the parent on cross-examination of a district witness or through testimony of witnesses for the parent (see Tr. pp. 24-25, 60-64, 121-26, 132-33). In this case, the district did not initially elicit testimony relative to these issues, and therefore, the district did not "open the door" to these issues under the holding of M.H. While the district solicited testimony regarding the discussion of the annual goals (see Tr. p. 20), this examination of the witness elicited general background information as part of routine questioning and did not serve to "open the door" to this issue under the holding of M.H. (see A.M., 2013 WL 4056216, at *10-*11; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *6).

⁷ Notably, State regulation provides that a student "appointed on a day basis shall be appointed to the school for the deaf or blind nearest their place of residence;" however, with the parent's consent, a student may be appointed to the particular State-supported nonpublic school at issue in this decision "without regard" to whether it is "nearer to the student's place of residence" (8 NYCRR 200.7[d][2][iv]).

With respect to whether the district failed to offer the student a FAPE for the 2012-13 school year, the hearing record establishes that the student's September 2011 IEP was expected to expire on or about September 24, 2012—and that the student was educated, and continued to receive special education and related services, pursuant to the September 2011 IEP through a portion of October 2012 (see Dist. Exs. 6-11; see also Tr. pp. 12, 14-15, 22-23, 58-60, 121-22, 134).⁸ Therefore, because the September 2011 IEP remained in effect from July 2012—the beginning of the 2012-13 academic school year—through approximately September 24, 2012, the IHO erred in finding that the district did not have an IEP in place at the start of the 2012-13 school year (see IHO Decision at p. 9).⁹ Moreover, as the parent did not assert any issues related to the special education and related services recommended in the September 2011 IEP, or with respect to the implementation of the September 2011 IEP at the State-supported nonpublic school, in the due process complaint notice, a determination of whether the district failed to offer the student a FAPE for that portion of the 2012-13 school year wherein the September 2011 IEP remained in effect and the student continued to receive special education and related services pursuant to the September 2011 IEP—namely, July 2012, August 2012, and September 2012—any analysis of the September 2011 IEP is unwarranted under these facts.

Next, it is undisputed that the district did not conduct an annual review or develop an IEP for the student until October 9, 2012 (see Dist. Ex. 13 at pp. 1, 13). Here, a review of the evidence in the hearing record does not support a conclusion that a delay of approximately 15 calendar days (or 11 school days) between the expiration of the September 2011 IEP—on September 24, 2011—and the date of the CSE meeting—held on October 9, 2012—was a procedural violation that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]; see Tr. pp. 1-152; Dist. Exs. 1-14; Parent Exs. A-B; D-L). In addition, a review of the evidence in the hearing record does not reflect that the parent objected to the timing of the CSE meeting or requested to meet earlier in the school year (see Tr. pp. 1-152; Dist. Exs. 1-14; Parent Exs. A-B; D-L).

C. October 2012 IEP

Having resolved the parties contentions regarding the IHO's sua sponte findings, as well as the findings the IHO properly reached, a careful review of the entire hearing record indicates that even if the parent had raised specific issues in the due process complaint notice related to the October 2012 IEP, the evidence supports a finding that the special education and related services

⁸ For example, the hearing record demonstrates that several of the annual goals in the September 2011 IEP contemplated completion of particular tasks by "September 2012" (see Dist. Ex. 5 at pp. 4-9).

⁹ While it may be disconcerting for parents and, at times, school district personnel when a district develops an IEP that overlaps two academic school years—as in the instant matter—in some circumstances it may be necessary, and there is no legal authority whatsoever that precludes a district from doing so. Similarly, there is no legal authority to support the IHO's apparent presumption that school districts must have a new IEP in place at the start of each academic school year or that, in this case, the student's September 2011 IEP automatically expired at the conclusion of the 2011-12 academic school year (June 30, 2012) such that no IEP was in place at the start of the 2012-13 school year.

in the October 2012 IEP were reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2012-13 school year.

In this case, the following individuals attended the October 2012 CSE meeting: a district special education teacher (who also served as the district representative), a classroom teacher from the State-supported nonpublic school (classroom teacher), a secretary from the State-supported nonpublic school, a social worker from the State-supported nonpublic school (who also served as an interpreter), the parent, and the parent's advocate (see Dist. Ex. 13 at p. 16).¹⁰ To develop the student's October 2012 IEP, the evidence reflects that the October 2012 CSE considered, reviewed, and relied upon the evaluative information obtained from the following documents prepared by the student's classroom teacher and related services' providers from the State-supported nonpublic school: a June 2012 annual educational report, an August 2012 orientation and mobility intake evaluation report (intake evaluation), a September 2012 annual adapted physical education report, a September 2012 speech-language annual report, an October 2012 annual OT report, and an October 2012 annual PT report (see Tr. pp. 12-13, 15-22, 25; Dist. Exs. 6-11).¹¹ In addition, the district special education teacher testified that she received a draft IEP for the student's 2012-13 school year prepared by the State-supported nonpublic school, which could be amended based upon her own review of the draft IEP or based upon changes made during the CSE meeting to the draft IEP (see Tr. pp. 17-18, 25). The district special education also testified that the annual reports, noted above, described the student's current functioning in multiple domains, including his cognitive skills, language development, self-help skills, gross and fine motor skills, and his use of residual sight (see Tr. pp. 16-23, 25; Dist. Exs. 6; 8-11).

Next, a careful review of the annual reports, as well as the intake evaluation report, in conjunction with the October 2012 IEP supports a conclusion that the October 2012 CSE relied upon this evaluative information to adequately and accurately identify the student's needs in the October 2012 IEP. More specifically, the present levels of performance and individual needs section of the October 2012 IEP included evaluative information and anecdotal descriptions of the student's current levels of functioning, which substantially mirrored the evaluative reports enumerated above (see Dist. Exs. 6-11; 13 at pp. 1-3). For example, the October 2012 IEP included estimates of the student's cognitive development as presented in the June 2012 annual educational report, which indicated that the student functioned at approximately a two year old level with scattered skills in the "two to three year old range" (compare Dist. Ex. 6 at p. 1, with Dist. Ex. 13 at p. 1). The present levels of performance and individual needs section of the October 2012 IEP also included a depiction of the student's use of "single words and some 2-word phrases" and his

¹⁰ In response to the district's assertion in the petition regarding the composition of the October 2012 CSE and who attended that meeting, the parent admitted in the answer that the "classroom teacher" who attended the October 2012 CSE meeting was the student's classroom teacher at the State-supported nonpublic school he attended during the 2011-12 school year (compare Pet ¶ 11, with Answer ¶ 9). The hearing record also indicates that the social worker from the State-supported nonpublic school who attended the October 2012 CSE meeting also attended the student's September 2011 CSE meeting (compare Dist. Ex. 5 at p. 15, with Dist. Ex. 13 at p. 16).

¹¹ In response to the district's assertion in the petition listing the documents reviewed at the October 2012 CSE meeting, the parent admitted in the answer that the October 2012 CSE reviewed the documented listed in the petition (compare Pet ¶ 12, with Answer ¶ 9). The hearing record also indicates that the social worker from the State-supported nonpublic school who attended the October 2012 CSE meeting also attended the student's September 2011 CSE meeting (compare Dist. Ex. 5 at p. 15, with Dist. Ex. 13 at p. 16).

ability to follow "single-step directives in both Spanish and English," as indicated in the September 2012 speech-language annual report (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 13 at p. 2). The present levels of performance and individual needs section of the October 2012 IEP described the student's daily living skills, such as self-feeding, toileting, and his emerging social interaction skills, with a noteworthy absence of any reference to behavioral challenges as previously described in the September 2011 IEP (compare Dist. Ex. 5 at p. 2, and Dist. Exs. 6-9, with Dist. Ex. 13 at pp. 1-3). In addition, the October 2012 IEP outlined the student's ongoing physical-motor challenges, as reported in the October 2012 annual OT report and the October 2012 annual PT report (compare Dist. Ex. 10 at pp. 1-3, and Dist. Ex. 11 at pp. 1-3, with Dist. Ex. 13 at p. 3).

Reviewing the annual goals and short-term objectives in the October 2012 IEP reveals that the annual goals adequately address and properly align with the student's identified needs in the present levels of performance and individual needs section of the October 2012 IEP, and moreover, reflect development based upon the evaluative information available to the October 2012 CSE. For example, the October 2012 IEP included approximately 19 annual goals and approximately 21 corresponding short-term objectives targeting the student's needs in multiple domains, including speech-language, social/emotional and behavioral, motor, vision, and basic cognitive and daily living skills (see Dist. Ex. 13 at pp. 4-10). The district special education teacher testified that the annual goals in the October 2012 IEP were based on the "input" of the student's "individual providers" for PT, speech-language therapy, and other therapies, as well as "some proposed goals" submitted by the teacher (Tr. pp. 19-20). In addition, a comparative review of the annual reports and the intake evaluation report with the annual goals in the October 2012 supports the district special education teacher's testimony (compare Dist. Ex. 13 at pp. 4-10, with Dist. Ex. 6 at pp. 2-4, and Dist. Ex. 7 at pp. 2-3, and Dist. Ex. 8 at p. 2, and Dist. Ex. 9, and Dist. Ex. 10 at p. 2, and Dist. Ex. 11 at pp. 1-3). In addition, a number of the annual goals in the October 2012 IEP appeared as continuations of, or extensions of, certain annual goals the student worked on pursuant to the September 2011 IEP (compare Dist. Ex. 5 at p. 8, with Dist. Ex. 13 at pp. 7-8).¹²

In addition, a comparison of annual goals in the October 2012 IEP that aligned with annual goals in the September 2011 IEP reflected that the student made progress, as the annual goals in the October 2012 IEP increased either the criteria for measuring progress or increased the complexity of the task (compare Dist. Ex. 5 at pp. 4, and Dist. Ex. 6 and Dist. Ex. 8, with Dist. Ex. 13 at pp. 4, 7, 9). For example, the annual goals addressing the student's "heel to toe gait" increased the criteria by which to measure achievement of that annual goal from 60 percent—as indicated in the September 2011 IEP—to 85 percent, as indicated in the October 2012 IEP (compare Dist. Ex. 5 at p. 8, with Dist. Ex. 13 at p. 7). In another instance, the mathematics annual goals related to

¹² Although the October 2012 IEP also included a combination of short-term objectives and benchmarks to support the annual goals, several of these lacked information regarding the subordinate skills necessary for goal attainment or designated successive "target time periods for a behavior to occur" (see Dist. Ex. 13 at pp. 4-10; <http://www.p12.nysed.gov/specialed/publications/iepguidance/annual.htm>). For example, short-term objective of one of the annual goals was simply a repetition of the annual goal itself, and in another instance, paired a short-term objective addressing receptive language needs with an annual goal targeting expressive language skills (id. at p. 4). In another example, an annual goal addressing "basic cognitive/daily living skills" stated the student "will touch 3 familiar objects as they are names," with mastery criteria set at "70% success with moderate assistance over 12 months" (id. at p. 9). The benchmark for this annual goal was, "[the student] will touch 3 familiar objects as they are named with 60% success with moderate assistance," without identifying the targeted time period in which this benchmark should be met (id.).

counting also reflected an increase in the criteria by which to measure the student's achievement, as well as increasing the expectation set forth in the goal (compare Dist. Ex. 5 at pp. 4-5, with Dist. Ex. 13 at p. 9). Specifically, in the September 2011 IEP, the student had an annual goal to improve his ability to understand the concepts of "more," "just one," and "use his fingers to understand number counting" with "60 [percent] accuracy" as the criteria by which to determine progress on the annual goal (see Dist. Ex. 5 at pp. 4-5). In the October 2012 IEP, the mathematics annual goal related to counting targeted the student's ability to count up to five objects with a criteria to measure the student's progress set as "75 [percent] success with moderate assistance over 12 months" (Dist. Ex. 13 at p. 9).

The student's use of social language reflects another example of his progress as indicated by the difference between the annual goals in the September 2011 IEP and the annual goals in the October 2012 IEP (compare Dist. Ex. 5 at p. 6, with Dist. Ex. 13 at p. 4). Specifically, the annual goals within this domain in the September 2011 IEP relied heavily upon the student's basic response to interactions initiated by others, whereas similar annual goals in the October 2012 IEP focus on more purposeful use of social interactions, including those initiated by the student (id.). Whereas in the September 2011 IEP, the short-term objectives corresponding to an annual goal requiring the student to "respond" to input from others, the annual goals in the October 2012 address the student's need to "use words, phrases and sentences . . . to request, greet, question, comment, negate . . . during a variety of social, play, and structured therapeutic activities" (id.). Overall, the annual goals in the October 2012 IEP require more active use of social language skills (id.).

Next, a review of the hearing record demonstrates that the October 2012 IEP included related services' recommendations based upon information provided in the annual reports of the individual service providers, as well as the intake evaluation report, and the recommended levels of related services were sufficient to meet the student's needs (see Tr. pp. 20-22; Dist. Exs. 6 at p. 4; 7 at pp. 2-3; 8 at p. 2; 9; 10 at pp. 2-3; 11 at pp. 2-3; 13 at pp. 10-11). These same documents reviewed by the October 2012 CSE also demonstrated the student's progress in these areas. For example, the October 2012 annual OT report detailed the student's progress with toilet training and his ability to self-feed with a spoon, although he required prompts to avoid over-stuffing his mouth (see Dist. Ex. 10 at p. 2). According to the report, the student "slowly" made progress in his abilities to "participate functionally within the school environment and in self-help areas" (id. at p. 3). The October 2012 annual PT report also indicated the student displayed "emerging interactions with peers," as well as showing progress with regard to walking with an "improved gait pattern," demonstrating "protective techniques while walking in the gym," and climbing stairs using the handrail for support (Dist. Ex. 11 at p. 2).

With regard to the October 2012 CSE's recommendation of a 12-month school year program in a 6:1+2 special class placement at the same State-supported nonpublic school, the district special education teacher testified that based upon the information available to the October 2012 CSE, the student was "making progress" in his needs "not only for education and motor and social and emotional areas," but the student's "vision needs" were also being met (Tr. pp. 22-23). Additionally, the June 2012 annual educational report described the student as presenting with significant global developmental delays, as well as bilateral optic nerve atrophy and strabismus, and as a result, included a recommendation for the student to continue in his then-current educational placement in a 6:1+2 special class at the same State-supported nonpublic school, as

well as to continue to receive the same therapies the student received at that time (see Dist. Ex. 6 at p. 4).

Based upon the foregoing, the October 2012 IEP was reasonably calculated to enable the student to receive educational benefit at the time it was formulated, and offered the student a FAPE for the 2012-13 school year.

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that, contrary to the IHO's findings, the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school, the necessary inquiry is at an end and there is no reason to reach the issue of whether the student's unilateral placement at the Rebecca School was an appropriate placement or whether equitable considerations weighed in favor of the parent's requested relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated December 30, 2013, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2012-13 school year; and,

IT IS FURTHER ORDERED that the IHO's decision, dated December 30, 2013, is modified by reversing that portion which ordered the district to reimburse the parent for the costs of the student's tuition at the Rebecca School for the 2012-13 school year and which ordered the district to directly pay the Rebecca School for the remaining costs of the student's tuition for the 2012-13 school year.

Dated: **Albany, New York**
 March 19, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER