The University of the State of New York

The State Education Department
State Review Officer
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No. 14-046

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 Board of Education of the Katonah-Lewisboro Union Free School District

Appearances:
Law Office of Peter D. Hoffman, PC, attorneys for petitioners, Jamie Mattice, Esq., of counsel

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, David H. Strong, 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 to for compensatory relief for the 2011-12 and 2012-13 school years, as well as reimbursement for their son's tuition costs at the Westfield Day School (Westfield) for the 2012-13 and 2013-14 school years. 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

Given the scope of this appeal, which spans three school years and involves seven IEPs, a broad overview of the amendments made to the student's IEP during the disputed school years is presented below. The parties' familiarity with the underlying facts in the hearing record in this case—many of which appear to be undisputed—is presumed.

With regard to the student's educational history, the hearing record shows that, since the student moved to the district prior to the 2004-05 school year (the student's third grade), he

received special education services from the district, consisting of resource room services and, at unspecified times, speech-language therapy (Joint Ex. 22 at p. 3). A November 2009 psychoeducational evaluation revealed cognitive skills in the average range (Joint Ex. 9 at p. 5). Speech-language evaluations conducted in March and April 2010 confirmed receptive and expressive language skills in the average range and further indicated that the student's auditory processing skills were within the normal range (Joint Exs. 14 at p. 6; 15 at p. 2). An April 2010 psychiatric evaluation detailed social-emotional deficits including a negative self-image, anxiety, and limited social skills/engagement (see Joint Ex. 12 at pp. 1-2). This April 2010 evaluation related that, according to the student's then-current IEP, the student's social needs affected the student's classroom performance by causing a "tendency to avoid long-term or lengthy writing assignments" (id. at p. 1). A review of the hearing record reveals that the student's social needs and work avoidance habits became more pronounced during the 2011-12 school year (see, e.g., Tr. pp. 1827-28, 2046-47, 2118-21; Joint Exs. 4 at p. 2; 5 at p. 2; 18 at pp. 1-8).

On June 3, 2011, a CSE convened to develop the student's IEP for the 2011-12 school year (Joint Ex. 3 at p. 1).[1] Finding the student eligible for special education services as a student with an other health-impairment, the June 2011 CSE recommended one 40-minute session of resource room daily in a 5:1 ratio, as well as one 30-minute session of counseling per week in a 5:1 ratio (id. at pp. 1, 8). The June 2011 CSE further recommended additional supports and modifications', such as scaffolded study guides, checks for understanding, additional time for long-term projects, directions and tasks broken down into smaller components, and the use of a graphic organizer (id. at p. 8).

The CSE reconvened on December 2, 2011 to consider a parental request to consider additional resource room services for the student (Joint Ex. 4 at pp. 1-2). Following a discussion of this issue, the December 2011 CSE declined to include an additional resource room on the student's IEP (id. at p. 2). The December 2011 IEP indicated, however, that the student's teachers in English language arts (ELA) and global studies offered to provide "extra help" to the student and to "collaborate with [the student's resource room teacher] on a weekly basis" (id.). The IEP further stated that the CSE would "reconvene at the end of January [2012] to discuss whether this plan [was] enough to address [the student's] educational needs" (id.). The December 2011 IEP also included as an added support that the student's regular education teachers, in collaboration with the resource room teacher, would modify the student's curriculum/classwork and homework assignments (id. at p. 8).

The CSE reconvened on January 31, 2012 and concluded that the additional teacher assistance described in the December 2011 IEP "ha[d] worked" but "not consistently as [the student] d[id] not always chose [sic] to go" to additional help sessions with teachers (Joint Ex. 5 at pp. 1-2). The January 2012 IEP further added a testing accommodation to the student's IEP indicating that the student would take all global studies tests in a separate location (id. at pp. 2, 10).

According to the CSE meeting comments, on April 13, 2012, the CSE recommended that the student's counseling services be provided on an individual basis, although such change was not

[1] The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

made to the student's April 2012 IEP, and recommended that the district conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) (Joint Ex. 6 at pp. 1-2). The April 2012 CSE also discussed, but did not recommend, placement in a special class for ELA (id. at p. 2).[2]

On June 4, 2012, the CSE convened and added one 30-minute session of individual counseling per week to the student's IEP (Joint Ex. 7 at pp. 1, 8). The June 2012 CSE further added access to a word processor/computer as a testing accommodation for social studies and ELA examinations (id. at p. 9).

In a letter dated October 12, 2012, the parents "reject[ed]" the June 2012 IEP as "not appropriate" (Parent Ex. B). The parents indicated that they would place the student at Westfield and "demand[ed] tuition reimbursement" from the district as well as "transportation to and from Westfield" (id.). A district form entitled "Withdrawal of Student Form" completed by the parents indicated that the parents removed the student from the public school on October 16, 2012 (see Dist. Ex. 21). The district acknowledged receipt of this form in a letter dated October 19, 2012 (Dist. Ex. 22).

On October 25, 2012, the CSE convened to discuss a private evaluation obtained by the parents and provided to the district (Joint Ex. 8 at pp. 1-2; see generally Joint Ex. 22). After considering this evaluation, the October 2012 CSE amended the student's IEP by adding the following to the student's preexisting educational program: a 15:1+1special class for English and social studies, one 30-minute session of individual speech-language therapy per week, and one 30-minute session of small group speech-language therapy per week (Joint Ex. 8 at pp. 1, 10). The October 2012 CSE additionally added access to a word processor/computer as a supplementary aid/service (id. at p. 11). The CSE further added flexible scheduling as a testing accommodation for the student (id. at p. 12).[3] The IEP also reflected that the parents informed the CSE that it was their "intention to have [the student] continue [at Westfield]" (id. at p. 3).

The CSE reconvened on June 3, 2013 to conduct the student's annual review (Joint Ex. 31 at p. 1). After considering a progress report card submitted by Westfield, a letter from Westfield's admission director, and updated information from the parent, the CSE recommended "continuation of all IEP program[ming] [and] service[s]" from the October 2012 IEP for the 2013-14 school year (id. at p. 2). The June 2013 IEP reflects that the parents rejected the IEP at the CSE meeting (id.).

On August 28, 2013, the CSE reconvened to consider recently conducted district evaluations as well as a private evaluation and other materials submitted by the parents (Joint Ex. 40 at pp. 1-2, 4-5). The August 2013 CSE revised the student's speech goals "to more accurately reflect [the student's] needs as per the evaluations" and, aside from omitting its special class

[2] The ratio of this proposed classroom was identified as "1:15:2," and the hearing record indicates that the special class included eight students at the time (Joint Ex. 6 at p 2; see Tr. p. 869). The parents disavowed any interest in placing the student in a special class for ELA in an e-mail to the district dated April 18, 2012 (Dist. Ex. 16).

[3] This accommodation permitted the student to take any Latin, social studies, or ELA exams lasting more than 40 minutes "over multiple days" (Joint Ex. 8 at p. 12).

recommendation for social studies, maintained its prior program recommendations (see id. at pp. 3, 10-12).[4]

In a letter dated September 6, 2013, the parents rejected the August 2013 IEP (Joint Ex. 41). This letter indicated that the student would attend Westfield during the 2013-14 school year and that the parents "reserv[ed] the right" to seek the costs of the student's education as well as "mileage to and from . . . Westfield" for the 2013-14 school year (id.).

A. Due Process Complaint Notice

The parents commenced a due process hearing by filing a due process complaint notice dated January 2, 2013 (IHO Ex. 1 at pp. 1-19). The parents amended this due process complaint notice twice during the course of the impartial hearing with the district's consent (see Tr. pp. 661-63, 1523-26; IHO Exs. 5; 10). In their second amended due process complaint notice, dated September 10, 2013, the parents alleged that the district failed to offer the student a FAPE for the 2011-12, 2012-13, and 2013-14 school years and, further, that it failed to implement the student's IEPs during the 2011-12 and 2012-13 school years (IHO Ex. 10 at pp. 1-21).[5] For relief, the parents sought compensatory education and, for the 2012-13 and 2013-14 school years, the costs of the student's tuition at Westfield (id. at pp. 20-21).[6]

Regarding the 2011-12 school year, the parents alleged that the district failed to provide the student with a second resource room and did not establish a formal schedule outlining the student's teachers' availability (IHO Ex. 10 at pp. 7-8, 13). The parents further averred that the student's resource room teacher was "ineffective" (id. at p. 14). Additionally, the parents contended that an FBA and BIP created in June 2012 were inappropriate to meet the student's needs (pp. 13, 14). The parents also argued that the IEPs developed during the 2011-12 school years were not appropriately implemented (see id. at pp. 2, 12, 20-21).

With respect to the 2012-13 school year, the parents argued that the program offered by the district was not sufficiently "therapeutic" for the student (IHO Ex. 10 at p. 9). The parents further contended that, contrary to a notation on the October 2012 IEP, the student's private tutor did not attend the October 2012 CSE meeting (id. at p. 10). The parents also complained that the October 2012 CSE did not consider recommendations contained in a private evaluation (id. at pp. 14-15). The parents further averred that the FBA and BIP developed for the student continued to be inappropriate (id. at p. 14). With regard to implementation of the student's IEPs during the 2012-13 school year, the parents contended that teacher-provided assistance "did not last long"

[4] It appears from the hearing record that the student no longer required a special class for social studies as he took and passed the global history (i.e. social studies) regents examination prior to the August 2013 CSE meeting (see Tr. p. 1568). Moreover, the student took and passed the United States history regents examination at Westfield prior to the October 2013 CSE meeting (Joint Ex. 39 at p. 1)

[5] The parents' second amended due process complaint notice consists of two unnumbered pages followed by 19 numbered pages (marked, e.g., "1 of 19"). The citations in this decision conform to the total number of pages in the exhibit, and not the document's internal pagination.

[6] The parents' second amended due process complaint also raised an issue regarding the district's disclosure of confidential information (IHO Ex. 10 at p. 10). This issue was not addressed by the IHO and the parents do not pursue it on appeal; accordingly, it will not be discussed further.

and that a special class recommended by the October 2012 CSE would have been inappropriate for the student (id. at p. 9; see also id. at p. 15).

As for the 2013-14 school year, the parents alleged that the IEPs developed during this school year were inappropriate insofar as they provided the "same inappropriate program" offered to the student during the 2012-13 school year (IHO Ex. 10 at p. 16). The parents also argued that the 'annual goals included in the August 2013 IEP were inappropriate for the student and complained that they did not receive copies of district evaluations prior to the August 2013 CSE meeting (id. at pp. 16-17).

The parents argued that Westfield was an appropriate unilateral placement for the student for the 2012-13 and 2013-14 school years (IHO Ex. 10 at pp. 18-20). Specifically, the parents indicated that Westfield provided small class sizes, personalized instruction, and therapeutic services to the student (see id. at pp. 18-19). Further, the parents argued that no equitable considerations affect their request for tuition reimbursement (id. at p. 20). In this regard, the parents represented that they cooperated with the district throughout the IEP development process and provided timely notice of the student's removal from the public school (id. at pp. 10, 14, 20).

For relief, the parent sought compensatory education for the 2011-12 and 2012-13 school years, as well as tuition reimbursement for the 2012-13 and 2013-14 school years (IHO Ex. 10 at p. 21). The parent additionally requested reimbursement for "mileage costs for transportation" associated with the student's attendance at Westfield for the 2012-13 and 2013-14 school year (id.).[7]

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 2, 2013 and concluded on November 21, 2013, after 13 days of proceedings (see Tr. pp. 1-2664).[8] In a decision dated February 21, 2014, the IHO found that the district offered the student a FAPE for the 2011-12, 2012-13, and 2013-14 school years (IHO Decision at pp. 63-72, 81). Accordingly, the IHO denied the parents' requested relief (id. at pp. 80-81).

The IHO began her decision with a comprehensive summary of the testimonial evidence adduced at the impartial hearing (IHO Decision at pp. 3-59). The IHO proceeded to issue findings of facts regarding the student's status and educational program during the school years in question

[7] In this respect, the parents also contended that the district unreasonably refused a parental request for transportation in October 2012 (IHO Ex. 10 at pp. 15-16). The parents withdrew this claim at the impartial hearing (see Tr. p. 2270).

[8] The hearing record further reflects that the IHO conducted prehearing conferences on February 5, 2013 and February 12, 2013 (IHO Ex. 3).

(id. at pp. 60-62). Next, the IHO discussed the parents' specific contentions pertaining to the school years in question (id. at pp. 63-72).[9]

First, regarding the 2011-12 school year, the IHO found that the district did not err by declining to offer additional resource room services for the student (IHO Decision at pp. 64-65). The IHO found that the parents offered "no sound educational reason" in support of this request (id. at p. 64). Moreover, because the student was not making effective use of his then-current resource room services, the IHO found that it was reasonable for the CSE to reject the parents' request (id. at p. 65). As to the parents' contention that the student's resource room instructor was "ineffective," the IHO found that the parent did not convey these concerns to the CSE and, therefore, the CSE was unaware of the parents' dissatisfaction (id.).

With respect to the district's failure to develop a formal schedule of teacher availability for the student, the IHO disposed of this allegation by noting that the IDEA does not require that districts generate such schedules (IHO Decision at p. 64). Further addressing this claim, the IHO found that the district's offered service of "extra help" from teachers, though "not . . . a special education service" and "inadequate in implementation," nevertheless provided academic benefit to the student (id. at p. 65).

Turning to the FBA and BIP developed for the student in June 2012, the IHO found that they were appropriate and developed in conformity with State regulations (IHO Decision at pp. 66-67). The IHO found that an FBA was not warranted until the spring of 2012 and that the resultant FBA contained input from "multiple sources" including the student, the parents, "charting" conducted by the student's then-current resource room teacher, and the student's then-current ELA teacher (id. at p. 67). The IHO further found that that the FBA and BIP were reviewed at the June 2012 CSE meeting and "adopted without objection" (id.). Although the IHO agreed with the parents that the BIP was not implemented in the 2011-12 school year, she found that this did not result in a denial of FAPE because the BIP "was only adopted [in June 2012] days before final exams and the end of the school year" (id.).

Next, the IHO considered the parents' challenges to the 2012-13 school year. First, regarding the parents' allegation that the program was not "therapeutic" enough, the IHO found that this recommendation originated with a May/June 2012 neuropsychological evaluation, which was not yet completed when the June 2012 CSE developed the student's program for the 2012-13 school year (IHO Decision at p. 68). Once the district received this evaluation, according to the IHO, it convened a CSE meeting in October 2012 to consider it (id.). The IHO further found that the October 2012 CSE incorporated several of the evaluation's recommendations into the student's IEP (id. at pp. 68-69).

Regarding the parents' objections to the student's FBA and BIP for the 2012-13 school year, the IHO found that the FBA and BIP "had been developed" prior to the start of the 2012-13 school year and that the BIP had been updated to include "new goals concerning avoidant behaviors and

[9] In addition to the issues described below, the IHO also explained why various other claims and arguments advanced by the parents at the impartial hearing were unpersuasive (see generally IHO Decision at pp. 63-72). Those findings that pertain to issues neither contained in the parents' due process complaint notice nor presented on appeal are not discussed in detail.

methods for dealing with stress" (IHO Decision at p. 68). As for the parents' allegations regarding a visit to an ELA special class within the public school, the IHO found these observations "irrelevant" because the parents removed the student from the public school before visiting the classroom (id. at 70). Furthermore, the IHO found that there was "no credible evidence that the parents were at any time considering re-enrolling [the student]" in the district (id.). Accordingly, the IHO found that the district offered the student a FAPE for the 2012-13 school year (id.).

The IHO next considered the parents' challenges to the 2013-14 school year. First, with respect to the June 2013 CSE meeting, the IHO found that the CSE permissibly adopted the recommendations of the prior CSE because the new information considered was consistent with "previous descriptions of [the student's] performance and difficulties" (IHO Decision at p. 70). The IHO found the parents' challenges to the annual goals without merit, finding that the IEP's counseling goals remained appropriate and that the speech-language goals addressed the student's areas of need (id. at pp. 70-71). Additionally, the IHO found that the parents' "refusal to provide the district with any information from [the student's] private speech therapist" or submit such evidence at the impartial hearing did not support their challenge to the speech goals on the June 2013 IEP (id. at p. 71).

With respect to the parents' claim that she did not receive copies of district evaluations prior to the August 2013 CSE meeting, the IHO found this claim "wholly without merit" (IHO Decision at p. 71). The IHO further found that the parents were precluded from arguing that the district failed to conduct evaluations in a timely manner because this claim was not raised in their second amended due process complaint notice (id.). Moreover, the IHO found that the parents were "at least partially responsible for the delay in evaluations being conducted" (id.).

Having concluded that the district offered the student a FAPE for the 2011-12, 2012-13, and 2013-14 school years, the IHO observed that she need not issue findings as to the appropriateness of Westfield or equitable considerations (IHO Decision at pp. 72, 78). Nevertheless, the IHO found, in the alternative, that Westfield was an inappropriate unilateral placement because the parents failed to introduce evidence that Westfield provided the student with specially designed instruction (id. at pp. 74-75). The parents' case was, according to the IHO, "limited in large part to the documentary record" because the parents elected "not [to] call a single teacher or therapist from Westfield to testify about [the student's] educational plan or his performance in the classroom or school" (id. at p. 76). Moreover, the student evinced the same struggles—in particular, work avoidance—that he demonstrated in the public school (id. at pp. 75-76). And while the IHO noted that the hearing record supported a conclusion that the student received counseling services, she found that it was "unclear" whether he received speech-language therapy as Westfield did not provide this service (id. at pp. 76-77). The IHO also found that Westfield did not constitute the least restrictive environment (LRE) for the student because the parents, despite their aversion to enrolling the student in a special class in public school, offered no explanation of why they "sought the more restrictive environment of Westfield, a school exclusively for students with IEPs or disability diagnoses" (id. at p. 78).

The IHO also issued alternative findings as to equitable considerations (IHO Decision at pp. 78-80). The IHO found that the parents' failure to provide adequate notice of the student's removal from the public school during the 2012-13 school year would have resulted in a complete denial of tuition reimbursement (id. at pp. 78-79). As for the 2013-14 school year, the IHO found

that the district was aware of the parents' dissatisfaction with the student's program because the impartial hearing commenced prior to the start of the school year (id. at p. 79). Accordingly, the IHO would not have denied relief on this basis (id.). The IHO further observed that neither party's conduct—including arguments that "were distractions at best" and "several occasions on which [the IHO] had to admonish counsel, parties, and witnesses"—weighed in favor or against the parents' requested relief (id. at 80).

Finally, the IHO denied the parents' request for transportation for the 2013-14 school year (IHO Decision at p. 80). As a preliminary matter, the IHO noted that the only evidence provided by the parents as to the sought amount of reimbursement was a mileage estimate (id.). As to the merits of this claim, the IHO found that the district offered the student bus transportation for the 2013-14 school year, which the parents declined (id.). Instead, the student drove to and from Westfield by car (id.). Although witnesses indicated that driving bolstered the student's self-esteem, the IHO found that this "ha[d] nothing to do with educational benefit" and was, therefore, irrelevant to the parents' claim (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO improperly denied their requests for relief relative to the 2011-12, 2012-13, and 2013-14 school years. First, regarding the 2011-12 school year, the parents contend that the IHO erred by finding that the district offered the student a FAPE. Specifically, the parents contend that extra help sessions offered by the student's teachers were not helpful to the student. The parents further aver that the district should have conducted an FBA and developed a BIP earlier than June 2012. Additionally, the parents contend that the IHO erred by finding that the CSE permissibly denied the parents' request for a second resource room. The parents further contend that the student only made progress during this school year due to services provided by a private tutor.

As to the 2012-13 school year, the parents alleged that the IHO erred in finding that the district offered the student a FAPE. The parents lodge specific objections pertaining to the June 2012 BIP, arguing that the June 2012 IEP did not include progress monitoring information pertaining to the BIP and that it was not appropriately implemented. Additionally, the parents contend that observations obtained during a visit to the special class recommended for the student revealed that it was inappropriate.

For the 2013-14 school year, the parents contend that the district offered the "same" program to the student and that it remained inappropriate to meet his needs. The parents further appeal the IHO's denial of their request for transportation expenses relative to the 2013-14 school year.

With regard to the Westfield, the parents contend that the IHO erroneously determined that it failed to offer specially designed instruction to the student. The parents argue that the student received academic and social/emotional support and that he made progress in this setting. The parents further appeal the IHO's determination that equitable considerations necessitated a denial of tuition reimbursement for the 2012-13 school year, arguing that a holistic analysis of the equities compels a contrary conclusion. Accordingly, the parents request compensatory education for the 2011-12 school year, "full tuition reimbursement" for the 2012-13 and 2013-14 school years, and

reimbursement for private transportation expenses associated with the student's attendance at Westfield for the 2013-14 school year.

In an answer, the district denies the parents' material allegations and argues that the IHO correctly found that the district offered the student a FAPE for the 2011-12, 2012-13, and 2013-14 school years. The district also contends that the parents' petition was not served in a timely manner. The district further argues that the IHO correctly determined, in the alternative, that Westfield was an inappropriate unilateral placement and that equitable considerations necessitated a denial of tuition reimbursement for the 2012-13 school year. Finally, the district contends that certain determinations made by the IHO not appealed by the parents have become final and binding and cannot be reviewed by the SRO.[10]

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.,

[10] Additionally, I note that in submitting the certified record of this appeal, the district inadvertently included material pertaining to other impartial hearings involving other students. There materials have not been reviewed or considered.

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 LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

On appeal, both parties have submitted additional evidence together with their pleadings. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Upon review of this evidence, I accept the additional evidence proffered by the district, which was not available at the time of the impartial hearing and is relevant to the district's procedural defense that the petition was not served in a timely manner. I decline to accept the parents' additional evidence, however, as it is not necessary to adequately address the disposition of the parties' claims.

2. Timely Service of Petition

On appeal, the district contends that the parents failed to properly initiate this appeal by failing to serve the petition a timely manner. A petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that, if the IHO's decision was served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (8 NYCRR 279.2[b], [c]). The party seeking review shall file with the Office of State Review the petition and notice of intention to seek review, where required, together with proof of service upon the other party to the hearing, within three days after service is complete

(8 NYCRR 279.4[a]; see 8 NYCRR 279.2). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11). State regulations provide an SRO with the authority to dismiss sua sponte an untimely petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (8 NYCRR 279.13).

Here, it appears that the IHO transmitted her decision to the parties by mail on February 21, 2014 (see Answer Ex. A). Therefore, the 35-day filing deadline began on February 26, 2014. The parents served their petition, pursuant to a prior agreement with the district, via e-mail on April 2, 2014. Therefore, the parents' service of their petition in this matter was timely.

3. Scope of Review

The parents' petition in this matter offers a jumble of factual allegations and grounds for appeal, many of which were not raised in the parents' second amended due process complaint. While I have carefully reviewed the entire hearing record to consider those claims that the parents have specifically identified in their petition (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]) and which appear to have been properly raised in the parents' due process complaint notice, I will not further sift through the second amended due process complaint notice, the hearing record, and the IHO decision for the purpose of asserting claims on their behalf, and I find the petition insufficient with respect to those factual allegations that the parents have not taken the care to specifically identify as disputed issues (8 NYCRR 279.4[a]; see Application of a Student with a Disability, Appeal No. 12-032; Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127).

Two claims presented by the parents on appeal warrant further discussion. First, the parents contend on appeal that the student received educational benefit during the 2011-12 and 2012-13 school years only due to private tutoring services unilaterally obtained by the parents. This claim was arguably raised in the parents' due process complaint notice and not addressed by the IHO (IHO Ex. 10 at pp. 8, 9). Under the circumstances of this case, the parents cannot use tutoring services obtained unilaterally outside of the CSE process as evidence of the district's alleged shortcomings in designing an appropriate program for the student.[11] Moreover, the parents rely solely on the student's academic progress in support of this claim and, as one District Court cogently stated, "academic progress is not the sole measure of a FAPE" (Alleyne v. New York State Educ. Dep't, 691 F. Supp. 2d 322, 334 [N.D.N.Y. 2010]).

Second, the parents contend that their claim regarding allegedly delayed district evaluations for the 2013-14 school year may be considered on appeal as the district opened the door to this claim during the impartial hearing (see, e.g., B.M. v. New York City Dep't of Educ.,

[11] Additionally, the student's private psychologist provided testimony at the impartial hearing suggesting that the parents requested that she delay informing the district that the parents obtained private tutoring services (Tr. pp. 2213-14).

2014 WL 2748756, at *2 [2d Cir. Jun. 18, 2014]; M.H., 685 F.3d at 250-51).[12] The hearing record reveals that the district solicited testimony on this issue as background information relevant to the provision of FAPE to the student during the 2013-14 school year, and not "in support of an affirmative, substantive argument" (B.M., 2014 2748756, at *2; see Tr. pp. 1539-40, 1544-46). But even assuming for the sake of argument that the district opened the door to this claim, the evidence in the hearing record amply supports the IHO's finding that the parents were "at least partially responsible for the delay in evaluations being conducted" (IHO Decision at p. 71). The evidence in the hearing record introduced by the parents reveals that the parents actively sought to delay the district's efforts at conducting updated evaluations and in once instance the parent even wrote to district personnel stating "I am trying to delay any [district] testing so it won't interfere with [the student's] school work or Regents, etc." (see Parent Ex. QQ at p. 35; see also Parent Ex. QQ at pp. 36-37; Joint Ex. 31 at p. 2). Therefore, the parents would not prevail on this claim even if had been properly presented on appeal.

B. Design and Implementation of 2011-12, 2012-13, and 2013-14 IEPs

Regarding the parents' contentions in their petition, upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly held that the district sustained its burden to establish that the district designed and implemented appropriate IEPs throughout the 2011-12, 2012-13, and 2013-14 school years (see IHO Decision at pp. 63-72). The IHO accurately recounted the facts of the case, addressed the specific issues identified in the parent's due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE for the disputed school years, and applied that standard to the facts at hand (id. at pp. 2-80). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify these particular determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the findings and conclusions of the IHO relating to the design and implementation of the student's IEPs throughout the 2011-12, 2012-13, and 2013-14 school years are hereby adopted. In particular, the findings and conclusions of the IHO with respect to the following findings are adopted without further discussion: the IEPs developed during the 2011-12, 2012-13, and 2013-14 school years offered the student a FAPE; the student's June 2011, December, 2011, January 2012, and April 2012 IEPs were appropriately implemented; the June 2012 FBA and BIP were developed in conformity with State regulations; the district reasonably declined to recommend additional resource room services; the district was not obligated to develop a formal schedule of teacher availability; and parental observations of a district special class were not relevant as to whether the district offered the student a FAPE for the 2012-13 school year.[13]

[12] The parents do not aid their case by failing to identify a single citation to the hearing record in support of this contention.

[13] I also adopt the IHO's conclusion pertaining to transportation reimbursement for the 2013-14 school year as the parents admitted at the impartial hearing that the district offered, and they refused, bus transportation for the student (Tr. pp. 2488-89).

On appeal, the parents contend that the district failed to demonstrate that it implemented the student's BIP during the 2012-13 school year. While the IHO touched upon this issue in her decision, it is addressed here in greater detail only out of an abundance of caution (see IHO Decision at p. 68). A review of the hearing record sufficiently demonstrates that the district implemented the student's BIP for the 2012-13 school year at the start of said school year. The hearing record also shows the district sought the parents' assistance in implementing the BIP during that time, but that the parents were not amenable to participating in this process.

Testimony by the school psychologist who developed the FBA/BIP indicated that, prior to the student leaving the district high school to attend Westfield, she worked with the student during the first five weeks of the 2012-13 school year (Tr. pp. 489, 517). The school psychologist testified that during those five weeks the student attended the district high school his attendance was "not stellar," whereby the frequency of his attendance at counseling sessions was affected (Tr. p. 518). Although she saw the student for only three individual sessions and three group sessions, the school psychologist noted that the student's performance appeared better than at the end of the previous school year (Tr. p. 518). The school psychologist also indicated that the student's mood and affect appeared more positive, that he seemed more available for counseling, that he no longer displayed rudeness, and that he was able to engage with the school psychologist (Tr. p. 518). The school psychologist testified that she reviewed the student's behavior plan with his then current English, mathematics, Latin, science, and resource room teachers, as well as with his guidance counselor, in September of 2012 (Tr. pp. 520-21; see Dist. Ex. 45).

According to the school psychologist, the student's BIP developed at the end of the previous school year was amended at the beginning of the 2012-13 school year, with minor changes made to strategies and interventions for the student (Tr. pp. 521-23; see Dist. Ex. 6 and Joint Ex. 21).[14] In addition, testimony by the parents indicated that they were in contact with the school psychologist from the beginning of the 2012-13 school year (Tr. p. 2362; Parent Ex. FFF). Testimony by the parents also suggests that it was the parents' understanding that the BIP was implemented because the school psychologist called them about identifying appropriate rewards

[14] The school psychologist testified about specific changes made to the student's BIP to meet the student's needs at the beginning of the 2012-13 school year (Tr. pp. 526-33). For example, the BIP changed in response to current teachers' input specific to the student's work plan (Tr. p. 527). As written in the spring 2012 BIP, the "work plan" was eliminated in an effort not to draw attention to the student that might make him uncomfortable in his general education classes (Tr. p. 527; compare Dist. Ex. 6 at p. 3 and Joint Ex. 21 at p. 3). BIP changes in regards to "rewards" occurred to clarify what the student needed at the time and because the parent was having difficulty finding an appropriate reward for the student (Tr. pp. 528-29; Dist. Ex. 6 at p. 4; Joint Ex. 21 at p. 4). Additionally, the section on "consequences" was changed because the district used behavior report cards to "drive any consequences" so that the student would have natural consequences at school rather than punitive consequences (Tr. pp. 529-31; Dist. Ex. 6 at p. 4; Joint Ex. 21 at p. 4). The BIP section on "time away" was changed to more accurately reflect the various people that would implement that aspect of the BIP, because, at that point during the 2012-13 school year, the student spent most of his time with the school psychologist and his classroom teachers rather than with the assistant principal and school counselor (Tr. p. 531; Dist. Ex. 6 at p. 4; Joint Ex. 21 at p. 4). The parents were eliminated from implementing the "time away" portion of the BIP because "time away" was [a strategy] more appropriate to use in school (Tr. pp. 531-32; Dist. Ex. 6 at p. 4; Joint Ex. 21 at p. 4). In the BIP sections involving "psychoeducation," "contingency management," and "problem solving," the student's outside providers (including his private therapist) were added to the people responsible for implementing those parts of the BIP because they were also working on those areas with the student (Tr. pp. 532-33; Dist. Ex. 6 at pp. 5-6; Joint Ex. 21 at pp. 5-6).

for the student for use in the BIP (Tr. pp. 2363-64). According to the parents, the school psychologist also communicated with them about the student failing to hand in his chemistry lab work (Tr. pp. 2366-68).

In response to the school psychologist's request for the parents' cooperation in fashioning appropriate rewards for the student, the parents' testimony reveals that they were not receptive to the district's attempt to refine the student's BIP and, thus, reward his success in school (Tr. p. 2364). The parents testified that there were never any rewards for the student, except for chocolate, and that rewarding him with chocolate would be "silly" and a "ridiculous thing to do" (Tr. p. 2364). The parents further testified that they told the psychologist they would try to identify an appropriate reward but were unable to do so (Tr. p. 2364). Instead, the parents indicated that they expected the district to come up with "some other reward, punishment system or something" (Tr. p. 2364).

In consideration of the above noted discussion, I find that the evidence in the hearing record demonstrates that the district implemented the student's BIP during the portion of the 2012-13 school year that the student attended the public school and the parents' claim to the contrary must be rejected.

VII. Conclusion

Having affirmed the IHO's conclusion that the district demonstrated it offered the student a FAPE for the 2011-12, 2012-13, and 2013-14 school years, it is not necessary to reach the issue of whether Westfield was appropriate for the student or whether equitable considerations support the parents' claim (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 30, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER