The University of the State of New York

The State Education Department
State Review Officer
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No. 14-076

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

Appearances:
Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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 be reimbursed for their son's tuition costs at the Park Avenue Christian Church Day School (Park Avenue) and other educational services for the 2013-14 school year. The appeal must be sustained in part.

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 March 13, 2013, the CSE convened to conduct the student's initial review and to develop an IEP for the 2013-14 school year (Parent Ex. C at pp. 1, 11).[1] Participants at the March 2013 CSE included the parents, a district social worker, who also served as the district representative, a district special education teacher, a district school psychologist, the student's then-current regular education preschool teacher and special education itinerant teacher (SEIT),

[1] At the time of the March 2013 CSE meeting, the student attended Park Avenue pursuant to a December 7, 2012 IEP developed by the CPSE (see, e.g., Tr. p. 343; Parent Ex. B). The Commissioner of Education has not approved Park Avenue as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

and the director of the student's private preschool (Parent Ex. C at p. 14). Finding the student eligible for special education as a student with a speech or language impairment, the February 2013 CSE recommended placement in a general education classroom with integrated co-teaching (ICT) services for English language arts, mathematics, and social studies (id. at pp. 1, 7). In addition, the March 2013 CSE recommended the following related services to be delivered in 30-minute sessions on a weekly basis: one individual occupational therapy (OT) session; one group OT session (group of two); one individual speech-language therapy session; and two group speech-language therapy sessions (group of three) (id. at p. 8). The CSE also recommended 16 annual goals targeted to address the student's needs in the areas of academics, speech-language therapy, and OT (id. at pp. 3-7).

By final notice of recommendation (FNR) dated May 24, 2013, the district summarized the general education placement with ICT and related services recommended in the March 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Parent Ex. I).

In a letter dated August 15, 2013, the parents rejected the March 2013 IEP and indicated their intent to place the student at Park Avenue for the 2013-14 school year (Parent Ex. N at p. 1). The parents also identified services that they unilaterally obtained for the student and indicated that they would seek reimbursement of these costs from the district (id.).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated September 3, 2013, the parents contended that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year, that the unilateral placement and services selected by the parents were appropriate, and that equitable considerations supported the parents' sought relief (Parent Ex. A at pp. 1-16).

The parents' due process complaint notice contained a large number of factual allegations embodied within 128 numbered paragraphs (see Parent Ex. A at p. 1-16). The IHO issued findings as to what she determined to be the main issues in dispute, finding that several of the claims overlapped or were abandoned at the impartial hearing (IHO Decision at p. 17). Because the parents have not appealed this finding—which has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v])—I will summarize only those due process complaint notice allegations germane to the IHO's decision and/or the issues presented by the parties on appeal (see Application of a Student with a Disability, Appeal No. 13-083; Application of a Student with a Disability, Appeal No. 14-152).

Regarding the process by which the March 2013 IEP was developed, the parents contended that they were denied participation in the CSE meeting because the CSE "failed to meaningfully consider [the student's] autism diagnosis" (Parent Ex. A at p. 6). The parents also asserted that the district failed to provide prior written notice regarding the CSE's recommendations (id. at p. 3).

[2] The hearing record also contains two letters from the parents to the district pertaining to the assigned public school site (Parent Exs. J, M). In a June 5, 2013 letter, the parents posed 23 questions to the district regarding the assigned public school site (Parent Ex. J at p. 1). In an August 2, 2013 letter, the parents identified several reasons why they believed the assigned public school site was inappropriate for the student (Parent Ex. M at pp. 1-2).

As for the March 2013 IEP, the parents argued that it denied the student a FAPE because it "misclassifie[d]" the student, thereby "denying [him] the special protections under the IDEA for students classified with autism" (id. at p. 4). The parents further contended that the March 2013 IEP did not address the student's needs relating to special factors; specifically, his need for an functional behavioral analysis (FBA) and a behavioral intervention plan (BIP) (id. at p. 3). The parents further averred that the IEP was invalid because it did not prescribe parent counseling and training (id. at p. 5). The parents also argued that the IEP's recommended placement did not constitute the least restrictive environment (LRE) (id. at pp. 10, 12). Finally, the parents contended that the IEP did not provide the student with the "consistent 1:1 teaching" he required (id. at p. 6; see id. at p. 9).

The parents further argued that Park Avenue and the services unilaterally obtained by the parents were appropriate and that no equitable considerations affected an award of reimbursement to the parents (Parent Ex. A at pp. 2, 14). For remedies, the parents sought the costs of the student's education at Park Avenue as well reimbursement for certain services unilaterally obtained by the parents (id. at p. 14).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 10, 2013 and concluded on February 4, 2014 after five days of proceedings (see Tr. pp. 1-538). In a decision dated April 27, 2014, the IHO found that the district offered the student a FAPE for the 2013-14 school year and denied the parents' requested relief (IHO Decision at pp. 16-21).

First, as mentioned above, the IHO found that several of the claims "overlap[ped]" or were "abandoned during the course of the hearing" (id. at p. 17).

With regard to the procedure by which the March 2013 IEP was developed, the IHO found that the March 2013 CSE was not required to include an additional parent member (IHO Decision at p. 20). The IHO also found that no procedural errors with the March 2013 IEP or its development resulted in a denial of FAPE to the student (id. at p. 21).

The IHO next considered the parties' dispute over the student's classification and found that the March 2013 appropriately found the student eligible for special education as a student with a speech or language impairment (id. at p. 17). The IHO acknowledged that a diagnosis of pervasive developmental disorder–not otherwise specified (PDD-NOS) was discussed at the CSE meeting, but found that "[d]iagnosis and classification are two different things" and, further, that the student's "predominant" needs related to "expressive/receptive language issues" thus rendering the student's classification appropriate (id. at pp. 17-18).

With regard to special factors, the IHO found that, at the time of the March 2013 CSE meeting, the student did not evince behaviors necessitating the creation of an FBA or BIP (IHO Decision at p. 18). While the student engaged in behavior that was "sometimes disruptive" during the 2012-13 school year, the IHO found that classroom teachers were able to address these behaviors and/or redirect the student without an FBA or BIP (id. at p. 18). The IHO further found no evidence that the student engaged in behavior that interfered with other students' education or presented a risk of injury (id.).

As for the parents' claim regarding the March 2013 CSE's failure to prescribe parent counseling and training on the IEP, the IHO found that the district offered parent counseling and training to the parents (IHO Decision at p. 20). The IHO further found that the assigned public school site to which it assigned the student to attend for the 2013-14 school year "was flexible" as to the services it offered to the student and "was willing to tailor the setting to meet the comfort level of [the] [p]arents" (id.). In any event, the IHO noted that a failure to provide parent counseling and training "ordinarily will not result in a FAPE denial or warrant tuition reimbursement" (id., quoting M.W. v. New York City Dep't of Educ., 725 F.3d 131, 142 [2d Cir. 2013]).

Finally, the IHO rejected the parents' contention that a general education placement with ICT services provided insufficient amount of 1:1 instruction (IHO Decision at pp. 18-19). First, citing testimony from the student's SEIT as well as his speech-language therapy and OT providers, the IHO rejected the parents' position that the private general education preschool classroom was the student's LRE, concluding that the student was only able to succeed in this setting with the support of these providers (id. at p. 19). The IHO next found that ICT services were an "appropriate support[]" for the student and "would meet [his] needs while enabling him to be educated with his non-disabled peers" (id.). The IHO also found that there would have been "eight IEP students" in the assigned public school classroom as well as a special education teacher "who could provide . . . one to one attention when [the student] needed it" (id.).

Based upon these findings, the IHO concluded that the district offered the student a FAPE for the 2013-14 school year (IHO Decision at p. 21). Accordingly, the IHO did not consider whether the services obtained by the parents were appropriate or whether equitable considerations supported their requested relief (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in determining that the district offered the student a FAPE for the 2013-14 school year. The parents further contend that the services selected by the parents were appropriate and that equitable considerations support the parents' request for reimbursement.

First, the parents contend that the IHO inappropriately shifted the burden of proof and production to the parents. The parents further contend that the IHO relied upon retrospective testimony in reaching her conclusions.

With regard to the student's classification, the parents contend that the IHO erred by finding that the March 2013 CSE properly classified the student as a student with a speech or language impairment. The parents assert that a classification of autism would have been more appropriate and that the CSE's failure to adopt this classification resulted in a denial of FAPE. The parents further contend that this violation was "compounded" by the district's failure to issue prior written notice as to its recommendations.

Next, the parents contend that the IHO erred by finding that the student's behaviors at the time of the March 2013 CSE meeting did not require the creation of an FBA or BIP. The parents

aver that the student demonstrated interfering behaviors that could not be managed without an FBA or BIP.

The parents further allege that the IHO's findings pertaining to parent counseling and training were in error as they relied upon retrospective testimony as to what the assigned public school would have offered. Without this retrospective testimony, argue the parents, there is no evidence that the March 2013 CSE considered parent counseling and training services. Accordingly, the parents argue that the CSE's failure to do so contributed to a denial of FAPE.

With regard to LRE considerations, the parents argue that the IHO erred by interpreting the student's then-current placement—a general education setting with 1:1 support—as "unduly restrictive" (Pet. ¶ 29). The parents further contend that a general education setting with 1:1 SEIT support represented the LRE for the student and, accordingly, the March 2013 CSE's ICT recommendation violated the IDEA's LRE mandate. Relatedly, the parents argue that the March 2013 IEP's failure to prescribe "one-to-one teaching or behavioral support" resulted in a denial of FAPE to the student. The parents contend that the district failed to demonstrate that the student could receive educational benefit without 1:1 support. Additionally, in a memorandum of law, the parents argue that the assigned public school classroom would have been inappropriate for the student.

The parents also contend that the unilateral placement, consisting of attendance at Park Avenue and the services they selected, was appropriate and met the student's needs. The parents tout the mainstreaming opportunities available at Park Avenue, as well as the educational benefit provided by a 1:1 instructor who helped the student focus and participate in social interactions. The parents also contend that the student received speech-language therapy and OT services that met the student's speech, gross motor, and sensory needs for the 2013-14 school year. Also, the parents indicate that Park Avenue offered parent counseling and training services. The parents further indicate that no equitable considerations should preclude or diminish an award of reimbursement.

For relief, the parents seek reversal of the IHO's decision and reimbursement for the costs of the student's education at Park Avenue for the 2013-14 school year. The parents further request that the district "continue to fund or reimburse" the parents for three 45-minute sessions of speech-language therapy and three 45-minute sessions of OT delivered after school. The parents also seek delivery of, or reimbursement for, "up to four hours per month" of parent counseling and training and "up to fifteen hours of SEIT support." The parents also seek an award of "fund[ing] or reimbursement" pertaining to the student's transportation costs.

In an answer, the district denies the parents' material assertions and argues that the IHO correctly determined that it offered the student a FAPE for the 2013-14 school year. The district additionally argues that the parents' contentions regarding the assigned public school site should not be considered because they were not presented in the parents' petition in accordance with State regulatory requirements. Even if such considerations were properly raised on appeal, argues the district, they are speculative and without merit. Additionally, the district contends that, although the IHO reached a correct conclusion regarding parent counseling and training, in the alternative, the evidence does not show that the failure to provide such services resulted in a denial of FAPE. The district also argues that the services unilaterally obtained by the parents were inappropriate

because they did not offer a sufficient amount of related service sessions to meet the student's needs.

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. Preliminary Matters

1. Sufficiency of IHO Decision

First, the parents argue that the IHO inappropriately placed the burden of proof on the parent regarding the appropriateness of the district's recommended program. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, as noted above, under State law, the burden of proof has been placed 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., 2010 WL 3398256, at *7). Here, there is no evidence that the IHO misapplied the parties' respective burdens of proof (see IHO Decision at pp. 16-21). Instead, a review of the IHO's decision indicates that she carefully weighed the evidence adduced at the impartial hearing and resolved the disputed issues in the district's favor (see id.). The parents' protestations to the contrary, therefore, are without merit.[3]

Next, the parents argue that the IHO utilized retrospective testimony to support some of her legal conclusions. The parents are correct that portions of the IHO's decision relied upon retrospective testimony and that this was improper (IHO Decision at pp. 19, 20; see R.E., 694 F.3d at 186 ["retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered in a Burlington/Carter proceeding"]). Specifically, the IHO relied upon retrospective testimony to conclude that the assigned public school site would have provided parent counseling and training services and that an ICT classroom within the assigned public school site would have been appropriate for the student (IHO Decision at pp. 18-19, 20; see R.E., 694 F.3d at 193). These portions of the IHO's decision, therefore, are reversed.

2. Scope of Review

The district also contends that the parents' contentions regarding the assigned public school site may not be considered because they were not included in their petition but, instead, in a memorandum of law. A review of the parent's petition and its accompanying memorandum of law

[3] Even assuming for purposes of argument that the IHO allocated the burden of proof to the parents, the harm would be only nominal insofar as there is no indication that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H., 685 F.3d at 225 n.3; A.D. v. New York City Dept. of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]).

supports the district's argument. It has long been held that a memorandum of law is not a substitute for a petition for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[a][3], [b]; Application of a Student with a Disability, Appeal No. 12-113; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-112). To hold otherwise would permit parties to circumvent the page limitations set by State regulation (8 NYCRR 279.8[a][5]). Therefore, this issue is not properly presented and will not be addressed.

B. March 2013 IEP

1. Classification and Parental Participation

On appeal, the parents argue that the IHO erred in her determination that the March 2013 CSE properly found the student eligible for special education as a student with a speech or language impairment. As a result, argue the parents, they were not afforded participation in the March 2013 CSE meeting. The evidence in the hearing record reveals no error in the IHO's disposition of this claim.

The IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3][B] ["Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability . . . and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in the original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]).

In the present case, a review of the evidence in the hearing record reveals that the IHO properly determined that the classification of speech or language impairment was appropriate, as the student exhibited deficits in expressive and receptive language that adversely affected his educational performance (34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]). Specifically, the evaluative records reviewed by the March 2013 CSE reflected significant and specific concerns regarding the student's speech and language functioning across multiple domains (Dist. Ex. 3 at p. 1; Parent Exs. E at p. 4; H at p. 2). For example, in a January 2013 parent survey, the parents reported that the student "ha[d] difficulty engaging in meaningful interactions with his peers . . . [b]ecause of his language delay" (Dist. Ex. 3 at p. 1). Furthermore, in a November 2012 SEIT report authored shortly after the student's fourth birthday, in addition to difficulties maintaining focused attention, it was reported that the student demonstrated significant deficits in "syntactic, pragmatic and intraverbal abilities," with his greatest challenge in consistently and appropriately expressing his needs or wants (Parent Ex. E at pp. 1, 4). When questioned regarding the CSE's

decision to adopt the classification of speech or language impairment, the district representative explained that the committee "usually look[s] at the predominant issues, and [the student] seemed to have expressive/receptive language issues," adding that the CSE members did not express disagreement with the classification (Tr. p. 65).

Although the parents argue that the student would have been more appropriately deemed eligible for special education as a student with autism, they do not argue that the classification of speech or language impairment was inappropriate. Moreover, the evidence in the hearing record indicates that the March 2013 CSE was aware of, and discussed, the student's receipt of a diagnosis of PDD-NOS (Tr. pp. 62-65, 355-356).[4] As such, the parents' claim regarding the student's classification is without merit.

2. Special Factors—Interfering Behaviors

Next, the parents argue that the March 2013 CSE was remiss in failing to conduct an FBA and develop a BIP. A review of the evidence in the hearing record indicates that the student did not demonstrate interfering behaviors necessitating an FBA or BIP.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]).

In New York State, policy guidance explains that "[t]he IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP" and, if necessary, the "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]).

An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the

[4] Given the appropriateness of the student's classification, the hearing record does not support a finding that the district's failure to issue prior written notice explaining its classification decision resulted in a denial of FAPE to the student (20 U.S.C. § 1415[b][3], [c][1]; 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Here, the information considered by the March 2013 CSE did not reveal that the student demonstrated interfering behaviors that required the development of an FBA or BIP (Parent Ex. C at pp. 1-2; see also Dist. Ex. 3; Parent Ex. H at pp. 1-2). A November 2012 SEIT report depicted the student as having "difficulties with transitions and/or increased demands/requests" and stated that his coping skills were an "area of focus," but also described the student as a "delightful little boy," who was working on expressing his wishes and learning to share with peers (Parent Ex. E at p. 2, 6-7). In the January 2013 parent summary report, the parent reported that the student enjoyed positive relationships with his younger sibling, both parents, and his therapists, and had "regular playdates with his current classmates" (Dist. Ex. 3 at p. 1; see Parent Ex. C at p. 2). The March 2013 IEP also cited comments drawn from a teacher student progress report that described the student as "an adorable boy who loves school and all his peers. He is very cooperative and does well with teacher help and peer modeling" (Parent Ex. C at p. 2).

In February 2013, the district representative observed the student in his preschool class at Park Avenue, which included 15 students, a classroom teacher, an assistant teacher, and the student's SEIT (Parent Ex. H at pp. 1-2). The observation lasted approximately one hour, during which time the student participated in a variety of activities, including individualized puzzle play, group block building with five other children, an adult-led group baking lesson, sandbox play with a female classmate, and a whole group lesson by a science teacher (id.). Throughout the observation, the student was responsive to the gentle support of his SEIT, who provided scaffolding during social interactions and structured lessons, and who accompanied him when the student needed to take a "movement break" (id. at pp. 1-2). As observed by the district representative, the student presented as cooperative, considerate, "gentle [and] pleasant" (id. at p. 2).

This information did not obligate the CSE to conduct an FBA or develop a BIP (Parent Ex. C at pp. 1-2; see also Dist. Ex. 3; Parent Ex. H at pp. 1-2). Moreover, the parent testified that the March 2013 CSE discussed the student's behaviors and that the student's then-current classroom teacher informed the CSE that she would not "characterize [the student] as a generally disruptive kid but that he did have things that he did that got in the way of his participation" (Tr. pp. 356-57). Nevertheless, the parents argue that the IHO erred in her determination because a consultant who worked with the student's team of service providers testified at the impartial hearing that the student required an FBA and a BIP (see Tr. pp. 459-62). This individual, however, did not participate in the March 2013 CSE meeting; accordingly, the CSE cannot be faulted for failing to

consider her views (see Parent Ex. C at p. 14; see also C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE . . ."]). The parents further argue that the information described in the November 2012 SEIT report revealed the student's need for an FBA and BIP. However, a review of the March 2013 IEP reveals that the CSE appropriately relied upon more current information—including the February 2012 classroom observation—to assess the student's behavioral needs instead of the November 2012 SEIT report, which was over four months old at the time of the March 2013 CSE meeting (compare Parent Ex. C at p. 11, with Parent Ex. E at p. 1; see generally Parent Ex. C at pp. 1-2). Therefore, the IHO correctly determined that the March 2013 CSE was not required to undertake an FBA or develop a BIP (IHO Decision at p. 18).

3. Parent Counseling and Training

On appeal, the parents contend that the district's failure to include parent counseling and training on the March 2013 IEP resulted in a denial of FAPE to the student. The district does not dispute that it failed to recommend this service but argues that this did not result in a denial of FAPE to the student. The hearing record supports that the IEP should have included a provision for parent counseling and training and that the district violated the procedures mandating its inclusion.[5] However, a review of the hearing record nevertheless supports the district's position that the violation did not result in a denial of a FAPE.

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, the presence or absence of parent counseling and training on an IEP does not necessarily have a direct effect on the substantive adequacy of the plan (see R.E., 694 F.3d at 191).

Although the hearing record is unclear as to whether the March 2013 CSE considered parent counseling and training services, there is no evidence that this violation, by itself, resulted in a denial of FAPE to the student (Tr. pp. 94-95; see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *10 [S.D.N.Y. Dec. 3, 2014] ["the failure to include parent counseling and training is insufficient, on its own, to amount to a FAPE denial"]). Nevertheless, given the district's unexplained failure to consider parent counseling and training services (Tr. pp. 94-95), it is hereby ordered that, when the next CSE convenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural

[5] The IHO's reliance on retrospective testimony on this point neglected to note the district's failure to include parent counseling and training on the IEP and can be read to suggest the district's compliance with State regulation, which is not accurate. Only the IHO's conclusion that it was not a denial of FAPE is upheld.

safeguards of the IDEA and State regulations (20 U.S.C. § 1415[b][3]; 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo]; 200.5[a]).[6]

4. ICT Services

Finally, the parents assert that the IHO erred in failing to "consider the evidence that [the student] could not manage without adequate 1:1 support" (Pet. p. 6). In response, the district contends that the IHO correctly determined that ICT services within a general education classroom with were reasonably calculated to support the student's needs. While the IHO impermissibly relied, in part, upon retrospective testimony to support her determination, the hearing record nonetheless supports her conclusion that the recommended program and services identified in the March 2013 IEP were appropriate to meet the student's needs (IHO Decision at p. 19).[7]

At the time of the March 2013 CSE meeting, the student received SEIT services pursuant to an IEP dated December 7, 2012 (Parent Ex. B at 16). This IEP recommended SEIT services to be provided in a "[c]lassroom" for 15 one-hour sessions per week (id. at p. 12). While the IEP recommend this as a "[d]irect" service, it did not indicate that these services were required on a 1:1 basis (id.). The SEIT services recommended in the December 2012 IEP were implemented at Park Avenue (Tr. pp. 343, 346). In addition, the parents arranged for an additional 15 weekly hours of 1:1 support to be provided at home (Tr. pp. 348-49). Thus, due to a combination of the way in which the December 2012 IEP's SEIT recommendation was implemented and the private services obtained by the parent, the student received 1:1 support from a SEIT for 30 hours per week at the time of the March 2013 CSE meeting (Tr. pp. 348-49).[8]

The district representative testified that the March 2013 CSE considered the available reports, along with input from the meeting participants, and developed the IEP based " predominantly [on] what the providers [we]re telling us" (Tr. pp. 87). In addition, the district representative attested that the student's preschool teacher completed a "teacher report," in which she "recommended an integrated co-teaching class" (Tr. p. 102).[9] When asked at the impartial hearing if the level of SEIT support that the district representative had detailed in his classroom observation would support the need for "a paraprofessional or a SEIT," the district representative

[6] This prior written notice shall also address, as required by the IDEA as well as federal and State regulations, any proposal or refusal to initiate an action pertaining to "the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to the child" (20 U.S.C. § 1415[b][3]; 34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a]).

[7] Specifically, the IHO improperly relied, in part, upon the number of students and adults who would have comprised the student's assigned public school classroom as a basis for concluding that the placement was appropriate (see IHO Decision at p. 19).

[8] To the extent the parents argue that the additional 15 hours of services obtained by the parents evinced a need for 1:1 support, parents cannot use educational services obtained unilaterally outside of the CSE process as evidence of the district's alleged shortcomings in designing an appropriate program for a student.

[9] The document to which the district representative refers to in this statement was not included in the hearing record (see Tr. p. 102).

reiterated that the CSE based its recommendation upon a review of the documents and input from the meeting participants (Tr. p. 103).

When the parent was queried about this discussion, she confirmed that the district representative asked for her opinion as well as the opinion of the student's then-current classroom teacher regarding the recommended program (Tr. pp. 508-09). The parent recalled that the classroom teacher said that an ICT setting "could . . . work for [the student]" depending on the class size, "the teachers," and the level of 1:1 support that would be available (Tr. pp. 508-09). The parent reported that the district representative also asked the private school currculum director for input, who responded that an ICT setting would be "a possibility," but felt that the student would nevertheless need 1:1 support (Tr. pp. 508-09). The parent further testified that, when she questioned one of the district CSE participants about individualized support, the parent was informed that an ICT classroom includes both "a general education teacher and a special education teacher," and the special education teacher would be the one to "serve th[e] role" currently served by the student's SEIT (Tr. pp. 509-510).

Although certain information considered by the March 2013 CSE suggested that the student might benefit from continued 1:1 support, other information—most notably, the opinions of the parents and the student's then-current classroom teacher—suggested otherwise (see Tr. pp. 508-10). Given this conflicting evidence, the March 2013 CSE elected to prescribe ICT services in a general education classroom rather than 1:1 support within a general education classsroom (see Tr. pp. 87, 102-03).[10] After a review of the evidence in the hearing record, there is no reason to disturb the IHO's disposition of this issue. While 1:1 support may have proved beneficial to the student, placement in an ICT setting was reasonably calculated to bolster the student's independence, which was the targeted outcome of many of the IEP annual goals and, according to a consultant who worked with the student's team of service providers during the 2012-13 school year, the "main focus" of the student's SEIT services (see Tr. pp. 431, 434; Parent Ex. C at pp. 4-6).[11] Therefore, the IHO did not err in finding that ICT services in a general education classroom offered the student a FAPE.

VII. Conclusion

A review of the evidence in the hearing record supports the IHO's ultimate conclusion that the March 2013 IEP offered the student a FAPE for the 2013-14 school year. Therefore, it is not necessary to reach the issue of whether Park Avenue was appropriate for the student or whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *11 [S.D.N.Y. Aug. 21, 2014]; D.D-S. v. Southold Union Free School Dist., 2011 WL

[10] The district's proposed placement offered the student ample access to regular education peers; therefore, I need not resolve this dispute under the framework set forth in Newington, (546 F.3d 111 ; see also M.W., 725 F.3d at 146 [finding that ICT services in a general education classroom were appropriate and that the district "was not required to place [the student] in a regular classroom where he was the only IEP student"]).

[11] Further supporting this conclusion is the fact that, as the IHO observed, the March 2013 CSE was responsible for developing an IEP for "a child who was to enter kindergarten" (IHO Decision at p. 19).

3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, at the next annual review regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and shall provide the parents with prior written notice consistent with the body of this decision.

Dated: **Albany, New York**
January 23, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER