The University of the State of New York

The State Education Department
State Review Officer
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No. 15-004

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Pittsford Central School District

Appearances:
Joyce B. Berkowitz, Esq., attorney for petitioner

Harris Beach, PLLC, attorneys for respondent, David W. Oakes, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Norman Howard School (Norman Howard) for the 2013-14 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The hearing record shows that the student attended a district elementary school through the fourth grade (2012-13 school year), where he received special education as a student with a disability (Tr. p. 864; see Dist. Exs. 6 at p. 1; 10 at pp. 1-4). On April 23, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Exs. 5 at pp. 1-4; 7 at pp. 41-54).[1] The CSE adjourned in order to allow time for the student to undergo an assistive technology evaluation (Tr. p. 299; see Dist. Ex. 5 at p. 4). The CSE

[1] This decision will cite the pagination written on the district's exhibit "7," which does not include the cover page and table of contents included in the "annual review packet" (see generally Dist. Ex. 7).

reconvened on July 17, 2013 to finalize the student's IEP for the 2013-14 school year (Dist. Ex. 4 at p. 1; see also Dist. Ex. 5 at pp. 1, 4). Finding that the student remained eligible as a student with autism, the CSE recommended: one weekly three-hour session of resource room; one weekly two-hour session of direct and indirect consultant teacher services in the student's English language arts class; one weekly 30-minute session of individual counseling; two weekly 30-minute sessions of small group occupational therapy (OT); two weekly 30-minute sessions of small group speech-language therapy; and ten yearly 30-minute sessions of speech-language therapy in the general education classroom (Dist. Ex. 4 at pp. 1, 10-11). The July 2013 IEP also recommended various supports for the student's management needs, assistive technology, seven annual goals, parent counseling and training, homework accommodations, testing accommodations, and supports for school personnel on behalf of the student (including team meetings and use of a service coordinator, as well as autism, behavioral intervention, OT, and assistive technology consultations) (id. at pp. 8-14). According to the CSE meeting minutes, the parent disagreed with the recommended program (Dist. Ex. 5 at p. 8).

A. Due Process Complaint Notice

In a due process complaint notice, dated August 14, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see generally Dist. Ex. 1). The parent alleged that the general education class placement with resource room and consultant teacher services recommended in the July 2013 IEP offered insufficient support to address the student's needs (id. at pp. 2, 3). Instead, argued the parent, the CSE should have recommended more individualized attention and support for the student, such as integrated co-teaching (ICT) services or the assignment of a 1:1 paraprofessional (id. at pp. 3-4). The parent also asserted that the student needed "a more specifically-tailored environment" than that which the district could provide at the public school (id. at p. 2). Therefore, the parent argued that the July 2013 CSE's refusal to recommend that the student attend Norman Howard for the 2013-14 school year resulted in a denial of a FAPE (id.). The parent also asserted that the district could not provide sufficient assistive technology supports (id. at pp. 4-5). As relief, the parent requested that the IHO order the district to pay for the costs of the student's tuition at Norman Howard for the 2013-14 school year (id. at p. 5).

B. Impartial Hearing Officer Decision

On October 2, 2013, the IHO conducted a prehearing conference and, subsequently, on January 9, 2014, issued a prehearing conference summary and order that, among others things, summarized the issues to be addressed at the impartial hearing (IHO Ex. A at p. 2).[2] Specifically, the IHO summarized the issues as follows: whether the July 2013 IEP and the particular school site to which the student was assigned to attend failed to provide for: "1) sufficient special education teaching hours; 2) 1:1 teaching; 3) a 1:1 aide; 4) a small class size; 5) a quiet environment that [wa]s distraction-free; 6) sufficient interventions in terms of the [s]tudent's learning disability and attentional issues; 7) assistive technology interventions" (id.).

[2] The IHO issued an amended prehearing conference summary and order on January 28, 2014, but did not amend the order with respect to the issues to be determined or the remedy sought (see IHO Ex. B at p. 2).

An impartial hearing convened on January 9, 2014 and concluded on October 9, 2014 after five days of proceedings (see Tr. pp. 1-1127). In a decision, dated December 5, 2014, the IHO determined that the district offered the student a FAPE for the 2013-14 school year (IHO Decision at p. 19). Specifically, with respect to the student's unhappiness during the 2012-13 school year, the IHO determined that, while understandably concerning to the parent and the student, social contentedness did not, alone, stand as a basis for a denial of a FAPE (id. at pp. 12-13). Moreover, the IHO found that, with respect to his social/emotional needs, the student received benefit from various supports utilized during the 2012-13 school year, including preferential seating, sensory breaks, an individual behavior plan, and counseling (id. at pp. 14-15). The July 2013 IEP, observed the IHO, recommended "the same kind of interventions," as well as three annual goals targeted to address the student's social/emotional and behavioral needs (id. at p. 15). Similarly, as to the student's writing needs, the IHO found that, during the 2012-13 school year, "the [d]istrict provided meaningful interventions," including a resource room, use of a laptop, and use of a graphic organizer, and that the student made progress in this area (id. at p. 13). The IHO observed that the July 2013 continued those supports and added consultant teacher services and access to particular software (id. at pp. 13-14).

Next, the IHO determined that July 2013 IEP offered an appropriate educational placement and that the student did not require an individual aide, an individual teacher, or a smaller class setting in order to receive educational benefit (IHO Decision at pp. 16-17). In so finding, the IHO determined that the student had demonstrated his ability to participate in large group instruction, benefitting from preferential seating (id. at pp. 15-16). The IHO also found that, although a private evaluator recommended the student receive 1:1 assistance to improve organizational needs, the July 2013 IEP sufficiently provided for supports in this area by recommending "regular desk checks and reminders to put items in their proper place" (id. at pp. 16-17). Further, the IHO observed that a 1:1 aide would likely have made the student uncomfortable as he "did not like to be singled out in the classroom" (id. at p. 17). The IHO also found that July 2013 IEP recommended sufficient assistive technology, as well as the assistive technology consultation (id. at pp. 17-18). Based on these findings, the IHO determined that the student had made progress in and could continue to receive educational benefit in a general education setting with the supports included in the IEP and that such a setting constituted the student's least restrictive environment (LRE) (id. at pp. 18-19).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in his determination that the district offered the student a FAPE for the 2013-14 school year and in his lack of a determination as to the appropriateness of Norman Howard and whether equitable considerations favored an award of tuition reimbursement. The parent alleges that the IHO mischaracterized the hearing record and improperly placed the burden of proof on the parent. To the extent that the petition can be reasonably construed in favor of the parent, the parent appears to assert that the student did not make progress in educational program provided by the district during the 2012-13 school year and, therefore, the July 2013 IEP, which recommended a similar program, was not appropriate. Specifically, the parent asserts that the student did not make more than trivial progress in several areas of need and did not achieve seven of his nine IEP annual goals during the 2012-13 school year and that the annual goal progress report prepared by the district was "unsubstantiated," "conclusory," and "subjective" (Pet. ¶¶ 63-64). In addition, the parent asserts that the IHO erred

in determining that the student was unhappy during the 2012-13 school year due to social concerns, that his writing skills were up to speed, and that the district's interventions during the 2012-13 school year had a positive impact. Therefore, the parent argues that, for the 2013-14 school year, the student required a smaller learning environment than the recommended general education class placement. The parent asserts that the IHO erred in finding the July 2013 IEP appropriate and in finding the parent's position at odds with the LRE concept.

The district answers the parent's petition by variously admitting or denying the particular allegations made. The district also asserts that the allegations in the parent's petition asserted "upon information and belief" are insufficient in that they fail to set forth a basis for finding that the IHO erred.

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

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2013-14 school year (IHO Decision at pp. 3-19). The IHO accurately recounted the facts of the case, addressed all of the specific issues identified as a result of the prehearing conference, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2013-14 school year, and applied that standard to the facts at hand (id.). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that he weighed the evidence and properly supported his conclusions (id.).[3] Contrary to the parent's argument, review of the IHO's decision does not reveal that the IHO misapplied the burden of proof (see id.).[4] 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 the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while I will briefly discuss the parent's allegations on appeal, the conclusions of the IHO are hereby adopted.

With respect to the student's progress, the parents assert that the student failed to make progress in the general education class setting with special education supports and related services during the 2012-13 school year and, therefore, the similar program recommended in the July 2013 IEP was not appropriate. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24,

[3] To the extent the parent cites specific instances where she disagrees with the IHO's characterization of the hearing record, no such examples warrant a reversal of the IHO's determinations in this instance.

[4] 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 v. Weast, 546 U.S. 49, 58 [2005]; 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]).

2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. [December 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/ IEPguideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir. 2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

Here, for purposes of evaluating the adequacy of the disputed July 2013 IEP, the student's prior June 14, 2012 IEP recommended a similar but not identical placement consisting of resource room, OT, speech-language therapy, counseling, and assistive technology (Dist. Ex. 14 at pp. 1, 11). Among other changes, the July 2013 IEP added direct and indirect consultant teacher services in ELA and additional assistive technology (Dist. Ex. 4 at pp. 1, 11-12). Given the variations in the recommended placement and services between the two IEPs, the student's rate of progress during the 2012-13 school year is not the sole factor to consider regarding appropriateness of the July 2013 IEP. Notwithstanding the weakness in the approach of simply comparing the two IEPs, contrary to the parent's assertions, the IHO nevertheless correctly determined that the student actually made progress during the 2012-13 school year, thus further undermining the parent's argument that the July 2013 IEP should be found inappropriate due to a lack of progress under the student's prior IEP.

The parent also argues, for the first time on appeal, that the reports showing the student's progress toward his annual goals were unsubstantiated and conclusory. The IDEA requires the district to produce reports of a student's progress towards annual goals in an IEP (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3][ii]; 8 NYCRR 200.4[d][2][iii][c]). In addition, a CSE is required to revise a student's IEP as appropriate to address, among other things, "any lack of expected progress toward the annual goals and in the general education curriculum" (20 U.S.C. § 1414[d][4][A][ii][I]; 8 NYCRR 200.4[f][2][i]). In this case, the district followed the regulatory requirements, providing progress reports covering the reporting periods of November 2012, March 2013, and June 2013 (see generally Dist. Ex. 12). Further, there is no requirement, as the parent

would prefer, that the district provide specific data or anecdotal evidence of the student's progress toward annual goals in such reports (see 34 CFR 300.320[a][3][ii]; 8 NYCRR 200.4[d][2][iii][c]).[5]

With respect to the progress described, the March 2013 annual goals progress report—which was considered by the July 2013 CSE—reported on six of the nine annual goals found in the July 2012 IEP and indicated that the student was making satisfactory progress toward achieving such goals (see Dist. Exs. 5 at p. 8; 7 at pp. 17-20).[6] Moreover, referring to the June 2012 annual goals progress report, to the extent the parent asserts that the student only "achieved" two of the goals (see Pet. ¶ 62), the proper focus is not the number of goals the student "achieved" during the 2012-13 school year, but rather the extent to which the student progressed (see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]).

In addition, the student's 2012-13 report card—also available to the July 2013 CSE—reflected growth in most areas (Dist. Exs. 5 at p. 8; 7 at pp. 23-25). The July 2013 CSE also had available, among other things, a July 2013 neuropsychological evaluation, as well as materials included in the 2013-14 annual review packet, including an April 2013 counseling summary, an April 2013 assistive technology report, an April 2013 OT report, a March 2013 physical therapy (PT) report, and an April 2013 teacher statement (Dist. Exs. 5 at p. 8; 6 at pp. 1-22; 7 at pp. 21, 29-31, 33, 39-40). Within the counseling summary, the school counselor noted that the student appeared more mature and focused during the 2012-13 school year (Dist. Ex. 7 at p. 33). Further, in the OT report, the therapist stated that the student was learning to monitor his own time and return to the classroom in a timely manner (id. at p. 30). In the PT report, the therapist noted that gross motor concerns had not been expressed by the team and that, based on the student's level of performance, PT consultation was no longer indicated (id. at p. 31).

As to the student's progress in writing, within the April 2013 teacher statement, the student's then-current teacher indicated that the student was taking more chances with his writing and was utilizing word prediction software to help with the process (Dist. Ex. 7 at p. 21). In the OT report, the therapist noted that, though the legibility of the student's writing continued to be variable, his keyboarding skills had improved during the school year (id. at p. 29). Within the counseling summary the school counselor indicated that the student seemed to be adopting a "just do it" attitude around challenging activities such as writing (id. at p. 33). The assistive technology

[5] Moreover, to the extent that the parent asserts that the annual goals progress reports were insufficient or inaccurate, she did not include such a claim in her due process complaint notice and, as such, may not raise it for the first time on appeal (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]).

[6] While it appears from its date that the June 2013 annual goals progress report would have been available to the July 2013 CSE and although the parent directs her allegations on appeal at the June 2013 report, the hearing record is unclear as to whether the CSE considered this report in addition to the November 2012 and March 2013 annual goal progress reports (see Dist. Ex. 5 at p. 8; Pet. ¶¶ 62-73; see also Dist. Exs. 7 at pp. 17-20; 12 at pp. 1-6). In any event, the completed progress report shows that, during the final reporting period of the 2012-13 school year, the student continued to make progress in seven of the reported goals and achieved two (Dist. Exs. 7 at pp. 17-20; 12 at pp. 2-6).

coordinator stated in her report that the student demonstrated less resistance to writing with the support of the word processor and particular software (id. at p. 39).

Turning to the recommendations in the July 2013 IEP, a review of the hearing record reveals that the IHO correctly identified the student's needs—written expression, anxiety stemming from writing assignments and impressions of fairness, attention and focus, sensory integration, organization, social/emotional struggles—described in the evaluative information available to the April and July 2013 CSEs and included in the present levels of performance of the student's July 2013 IEP (IHO Decision at pp. 13-14; see Dist. Exs. 4 at pp. 2-9; 6 at pp. 3-5; 7 at pp. 1-40). In addition, the hearing record reflects that both the April 2013 and the July 2013 CSEs discussed the student's needs and that the July 2013 IEP included related services, annual goals, management needs, and accommodations designed to address these needs (Dist. Exs. 4 at pp. 2-15; 5 at pp. 1-8). Furthermore, the parent did not challenge in her due process complaint notice the sufficiency or accuracy of the present levels of performance or the annual goals found within the IEP (see generally Dist. Ex. 1).

The parent claims that the district knew that the student learned better, was calmer, and demonstrated better social skills in small groups and that the student required a small learning environment. The April 2013 teacher statement indicated that the student's work habits were better in a small group; yet, the teacher noted that, while at times it appeared that the student was not listening, she found that he actually was (Tr. pp. 141-42; Dist. Ex. 7 at p. 21). As discussed above, all of the student's year end reports indicated that the student was learning and making progress in the general education classroom during the 2012-13 (see Dist. Exs. 7 pp. 1-56; 12 at pp. 1-6). In her end of the year report, the behavior support consultant stated that the student would continue to benefit from a structured classroom environment with clear expectations for behavior (Dist. Ex. 7 at p. 30). The July 2013 IEP included a large number of supports for the student's management needs, which, among other things, provided for a structured learning environment, preferential locations, and small group opportunities (Dist. Ex. 4 at pp. 8-9).[7] A review of the July 2013 IEP reveals that it included nearly all of the accommodations recommended in the July 2013 pediatric neuropsychological evaluation report (compare Dist. Ex. 6 at p. 5, with Dist. Ex. 4 at pp. 8-15).[8] Further to support the student in writing and organization, the July 2013 IEP provided for small group support by including three hours per week of resource room and two hours per week of consultant teacher services (Tr. pp. 50, 212-13; Dist. Ex. 4 at pp. 10-11).

Finally, I acknowledge the parent's legitimate concerns regarding the student, as did the IHO, as well as the student's self-advocacy with regard to matters involving his education, including his participation in the impartial hearing; however, it was the CSE's obligation to

[7] In addition, regarding the student's attentional needs which were identified by the parent, the July 2013 IEP satisfactorily recognized and addressed these with appropriate management needs (e.g., verbal prompts and cues; preferential locations; movement, stretch and sensory breaks; and copy of class notes provided), an annual goal involving maintaining an appropriate level of alertness, and testing accommodations (e.g., extended time, setting with minimal distractions, and on-tasks focusing prompts) (Dist. Ex. 4 at pp. 8-10, 14).

[8] While the July 8, 2013 pediatric neuropsychological evaluation did not contain any specific recommendation for a small class, in an email to the parent dated July 17, 2013—which was also the date of the student's CSE meeting—the evaluator indicated that he had "revised" the recommendations to reflect "the small class size and rationale" and further wished the parent "[g]ood luck with the CSE!" (Dist. Ex. 6 at pp. 5, 22, 23).

determine what the student required based on the information before it and, in this instance, the district produced a substantively appropriate IEP.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's decision that the district offered the student a FAPE in the LRE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Norman Howard was appropriate or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 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 *10 [S.D.N.Y. Aug. 21, 2014]; D.D-S., 2011 WL 3919040, at *13).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 6, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER