



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-230

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 XXXXXXXXX

Appearances:

Susan Luger Associates, Inc., attorneys for petitioner, Lawrence D. Weinberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 for prospective payment of her son's (the student's) tuition at Yeshiva Education for Special Students (YESS!) for the 2011-2012 school year on the basis of standing and certain equitable considerations. Respondent (the district) cross-appeals to the extent the IHO did not address the merits of the parent's contentions regarding the appropriateness of the offered program or the unilateral placement. The appeal must be sustained in part and the matter remanded to the IHO. The cross-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

This matter involves a student who, at the time that the IEP at issue was developed, was seven years old and classified as a student with a learning disability (Dist. Ex. 4 at p. 1).¹ For the

¹ The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this matter (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

2010-2011 school year, the student was enrolled in a nonpublic school which the record indicates has since closed (the NPS) (Tr. pp. 16-17, 69-70).

On May 4, 2011, while the student was attending the NPS, a CSE convened to conduct an annual review (Dist. Ex. 4 at p. 1). From this review, an IEP was developed for the 2011-2012 school year which, among other things, recommended that the student be placed in a 12:1+1 special class in a community school (*id.*). The hearing record reflects that the CSE developed the IEP after considering a psychoeducational evaluation conducted in February 2009, an April 2011 progress report from the NPS, input at the CSE meeting from the parent and a school psychologist from the NPS, and the student's prior IEPs (Tr. pp. 17, 21, 45-46; Dist. Exs. 3; 8). The May 2011 IEP recommended the continuation of various related services, including counseling, speech-language therapy, occupational theory (OT), and physical therapy (PT) (*id.* at p. 14). The IEP also set forth a number of annual goals and short-term objectives for the student (*id.* at pp. 6-11).

By "Final Notice of Deferred Placement," dated May 4, 2011, the district notified the parent of the CSE's program and placement recommendations and indicated that it was prepared to implement the student's IEP but requested that the parent consent to delaying implementation of the May 2011 IEP until September so that the student could remain in the NPS until the end of the school year.²

On August 29, 2011, the parent entered into a contract with YESS! for the 2011-12 school year and soon thereafter paid a deposit toward the costs of the student's attendance (Parent Exs. C; D).

A. Due Process Complaint Notice

By a due process complaint notice dated January 19, 2012, the parent challenged the May 2011 IEP and requested an impartial due process hearing (Dist. Ex. 1). Initially, the parent asserted that the CSE was not properly constituted (*id.* at p. 3). With regard to the program developed for the student, among other things, the parent argued that the goals contained in the May 2011 IEP did not meet all of the student's needs and were not measurable (*id.* at p. 2). The parent also maintained that the recommended program and placement offered an inappropriate student-to-teacher ratio for the student and would not provide sufficient 1:1 instruction to permit the student to receive educational benefits (*id.* at pp. 2-3). The parent further alleged that the IEP was not developed at the CSE meeting and that although she raised concerns with regard to the recommendation at the CSE meeting, she was ignored, depriving her of the opportunity to meaningfully participate in the development of the student's IEP (*id.* at p. 2). The parent also contended that the district failed to offer an appropriate public school site for the student, in that the students at the assigned public school site were higher functioning than the student and the classroom was too "small, cluttered[, and] distracting" for the student (*id.* at pp. 3-4). As relief, the parent requested, among other things, payment of the student's tuition for the 2011-12 school

² The district apparently issued a Final Notice of Recommendation on June 24, 2011, informing the parent of the specific public school site to which the district had assigned the student and at which the May 2011 IEP would be implemented during the 2011-12 school year; however, this document does not appear in the hearing record (Tr. pp. 10, 77-78; Dist. Ex. 1 at p. 3).

year at YESS!, district funding for or compensatory education for related services as specified on the May 2011 IEP, and door-to-door special education transportation (id. at p. 5).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 16, 2012, and following three non-consecutive days of testimony, concluded on June 28, 2012. In a decision dated November 9, 2012, the IHO denied the parent's requests for relief (IHO Decision). The IHO, however, did not address the merits of the claims raised by the parent in her due process complaint notice. Rather, he first addressed the parent's standing to bring a claim for tuition reimbursement and found that there was "no evidence in the hearing record indicating that the [p]arent has made any payments to [YESS!], or that [YESS!] has ever sought payment of the student's tuition for the 2011-2012 school year from the [p]arent, or that it has any intention of doing so," other than the initial registration fee (IHO Decision at pp. 15-17). The IHO, therefore, held that the parent lacked standing to seek tuition reimbursement in this matter (id. at pp. 17-18). In addition, the IHO found that the parent did not give the district proper notice of the student's unilateral placement at YESS! which, whether considered as a statutory requirement or under general principles of equity, weighed against the parent's request (id. at pp. 18-19). Furthermore, the IHO noted that the "timeliness of a claim for tuition reimbursement is one of the elements which may be considered in determining whether the Parent's claim is supported by equitable considerations" (id. at pp. 19-20). With respect to the timing of the parent's claim, the IHO noted that the parent filed her due process complaint notice "mid-way through the 2011-2012 school year," prior to which she "did not seek tuition payment from the DOE, did not make payments to [YESS!], and [YESS!] did not suspend or terminate the student's enrollment or pursue any claim against the parent for non-payment" (id. at p. 20). Accordingly, the IHO denied the parent's request for public funding of the student's placement at YESS! for the 2011-12 school year (id.). Finally, the IHO determined that there was no evidence in the hearing record to support the parent's requests for compensatory education or special education transportation (id.).

IV. Appeal for State-Level Review

By petition dated December 14, 2012, the parent appeals from the IHO's decision. In her petition, the parent contends that the IHO erroneously found that she lacked standing to bring a complaint under the IDEA. The parent also contends that she provided sufficient notice to the district, and that in any event lack of notice does not constitute grounds to deny entirely her claim for relief. In addition, the parent contends that the May 2011 IEP was not reasonably calculated to enable the student to receive educational benefits. In this regard, the parent alleges that (a) the goals in the IEP are not measurable; (b) the annual goals contained in the IEP were "copied and pasted directly from a previous year's IEP," and therefore were developed without participation by the parent or consideration of the student's present levels of functional performance, (c) the recommended 12:1+1 special class placement was not appropriate for a number of reasons, and (d) the district did not offer any "objective evidence" that the student was likely to make progress at the public school site to which he was assigned. In addition, the parent complains that the 12:1+1 special class placement recommended by the CSE was developed, in part, based on a report from the NPS that a district witness indicated was not satisfactory, and a 2009 evaluation that he may not have read. Finally, the parent contends that YESS! is an appropriate placement for the student. The parent seeks a reversal of the IHO's

decision, as well as an order establishing her entitlement to public funding of the student's tuition costs for the 2011-2012 at YESS!.

In its answer, the district generally denies the parent's assertions and contends that the IHO properly found that the parent does not have standing to seek public funding of the student's private school tuition. In addition, the district argues that the IHO correctly found that the parent did not provide it with proper notice of the student's unilateral placement, and further that the parent failed to establish that she cooperated with the CSE and would have accepted an appropriate public school program and placement for the student. The district further argues that the parent is not entitled to the portion of the student's YESS! tuition relating to religious instruction or meals, that the student is not entitled to compensatory services, and the parent is not entitled to reimbursement for the cost of transporting the student to YESS!. The district also cross-appeals, contending that (a) it offered the student a free appropriate public education (FAPE) for the 2011-2012 school year, and (b) that YESS! is an inappropriate placement because it is too restrictive.

The parent answers the cross-appeal with denials of the district's relevant assertions. The parent also responds to the district's contention that reimbursement may not be awarded for religious instruction by contending that the district waived such argument by not raising the defense during the impartial hearing and further asserts that religious instruction is not a basis for a reduction in an award of tuition reimbursement. To the extent that the parent purports to respond to matters outside of the district's cross-appeal that are not defenses to the parent's claims on appeal, I remind counsel for the parent that such responses are not permitted as part of a reply under State regulations and will not be considered (8 NYCRR 279.6).³ The district's reply to the parent's answer to the cross-appeal is entirely outside the permissible scope of a reply and has not been considered (*id.*).

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 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.*

³ For the most part, these additional assertions are duplicative of those contained in the petition.

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., 2010 WL 3242234, at *2 [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, 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, 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, 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. Standing

I first turn to standing as a preliminary matter. For the reasons set forth below, I find that the IHO incorrectly found that the parents lacked standing.

Under the IDEA and State law, a parent is entitled to an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). The parent was therefore entitled to file a due process complaint notice asserting that the district had failed to offer the student a FAPE on the basis that the May 2011 CSE had not complied with the procedural requirements set forth in the IDEA, or that that the May 2011 IEP was substantively inadequate and not reasonably calculated

to enable the student to receive appropriate educational benefits (see Winkelman, 550 U.S. at 531, 533; 34 CFR 507[a], 8 NYCRR 200.5[i]).

Although courts have disagreed on what is sufficient to confer standing on a parent to bring a claim under the IDEA, the only courts to have addressed this issue in New York have found that the denial of a FAPE or of a procedural right created by the IDEA is sufficient to satisfy the "injury in fact" requirement of standing (S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 358-59 [S.D.N.Y.2009] [finding that a denial of a FAPE constituted an injury in fact which was redressable by public payment of the costs of student's tuition]; see E.M. v. New York City Dep't of Educ., 2011 WL 1044905, at *6 [S.D.N.Y. March 14, 2011] [finding a denial of a FAPE or a procedural right under the IDEA was a statutorily created injury in fact sufficient to satisfy standing requirements]; see also Heldman v. Sobol, 962 F.2d 148, 154-56 [2d Cir. 1992] [holding that the IDEA created statutory rights, the violations of which may constitute injuries in fact]; Fetto v. Sergi, 181 F. Supp. 2d 53, 66 n.22 [D. Conn. 2001] [finding a denial of a FAPE was a statutorily created injury in fact]; but see Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007] [holding that parents lacked standing on claim for reimbursement for services where student's estate, rather than parents, had actually expended resources]; Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005] [finding a denial of a FAPE as an injury in fact was not redressable by tuition reimbursement, as the student's education had already been paid for by the parent's insurance carrier]; Piedmont Behavioral Health Ctr. LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006] [finding that the student and parent lacked an injury in fact because the private school had paid for education of student rather than student or parent]).⁴

Because courts in New York have determined that a denial of a FAPE by a district is an injury in fact under the IDEA, and because the parent's due process complaint notice includes such an assertion, the only other relevant factors here in determining standing are (1) whether petitioner can maintain a proceeding as a parent of the student in this case, and (2) whether the relief requested is likely to redress the injury alleged (see Raines v. Byrd, 521 U.S. 811, 818-19 [1997]; S.W., 646 F. Supp. 2d at 359, E.M., 2011 WL 1044905, at *6; Dist. Ex. 1).⁵ In this case, there is no dispute that petitioner is the parent of the student within the meaning of the IDEA (20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; see 8 NYCRR 200.1[ii]; Fuentes v. Bd. of Educ., 569 F.3d 46 [2d Cir. 2009]; Fuentes v. Bd. of Educ. 12 N.Y.3d 309, 314 [2009]). Moreover, and consistent with the court's determinations in S.W. and E.M., the parent's request for public

⁴ I note that the IHO based his decision, at least in part, on S.W. (IHO Decision at p. 17). In S.W., the court considered two arguments raised in support of claim of an "injury": (1) the existence of an alleged debt to the private school, and (2) the district's alleged failure to provide a FAPE to the student at issue (S.W., 646 F.Supp.2d at 356). With respect to the former, the Court reasoned that because the parent was relieved from any financial liability by the terms of the contract with the private school, the parent did not have a financial harm to satisfy the injury in fact requirement of standing (S.W., 646 F. Supp. 2d at 356-358). However, the S.W. court went on to find the parent had standing based on a denial of FAPE, an injury in fact created by the IDEA (S.W., 646 F. Supp. 2d at 359). Because the parent in this matter also has standing based on a claim for the denial of a FAPE as an injury in fact, I need not address whether the parent also had a financial harm sufficient to support standing (see E.M., 2011 WL 1044905, at *6).

⁵ I note that the additional element of the doctrine of standing, requiring that the alleged injury in fact be "fairly traceable to the [district's] allegedly unlawful conduct," is not at issue here as it is undisputed that the district has the obligation to offer the student a FAPE (Raines, 521 U.S. at 818-19; see 20 U.S.C. § 1412[a][1][A]; 34 CFR 300.101 [a]).

funding of the costs of the student's private school tuition would redress the denial of a FAPE to the student in circumstances where the private school has provided an education to the student (see S.W., 646 F. Supp. 2d at 359; E.M., 2011 WL 1044905, at *6). Accordingly, the inquiry regarding standing ends here, without the need for determining whether the relief requested is in fact available (S.W., 646 F. Supp. 2d at 359; E.M., 2011 WL 1044905, at *6). Furthermore, a party has standing to bring a claim under the IDEA even if the relief requested is ultimately unavailable (see New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *7-*8 [S.D.N.Y. Mar. 17, 2010]).

B. Equitable Considerations

In addition to finding that the parent lacked standing in this matter, the IHO found that certain equitable considerations, including whether the parent met the IDEA requirement of providing notice to the district of the deficiencies she perceived in the IEP and her intention to unilaterally place the student at public expense, weighed in favor of denying the parent's claim for reimbursement. However, the IDEA and New York State law specifically provide that an IHO must make a substantive determination based on whether the student "received a free appropriate public education" (20 U.S.C. § 1415[f][3][E]; 8 NYCRR 200.5[j][4]). By terminating the proceeding based on equitable considerations, the IHO did not address the alleged violations set forth in the parents' due process complaint notice or make a substantive determination on whether the district offered the student a FAPE and to address, as necessary, the relief requested.

Moreover, while the IHO considered the question of whether the parent would be entitled to direct and/or prospective funding, courts have usually reached the issue only after examining the Burlington/Carter factors and determining whether (1) the district failed to offer the student a FAPE, (2) the parent selected a unilateral placement that was appropriate for the student, and (3) equitable considerations favor the parent or the district (see P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 118 [E.D.N.Y. 2011]; Mr. and Mrs. A. v. New York City Dep't of Educ., et. al., 769 F. Supp. 2d 403, 406, 415-16, 427 [S.D.N.Y. 2011]; S.W., 646 F. Supp. 2d at 359-60, 360 n.3; Connors v. Mills, 34 F. Supp. 2d 795, 805-806 [N.D.N.Y. 1998]). In this case, the IHO considered the question of such relief without first determining the sequential Burlington/Carter factors (see IHO Decision at pp. 16-17). Furthermore, the parent offered testimony regarding sending written notice, other than noting that documentary evidence was not offered, the IHO did not explain whether he believed or disbelieved the parent's testimony or found insufficient the parent's testimonial evidence (i.e. for instance, that the parent was not credible). In this case, I will remand the matter for consideration of the issues presented by the due process complaint notice, which as described above, included challenges to the appropriateness of the resulting IEP, including whether the goals in the IEP met all of the student's needs (J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. 2012] [noting the authority to remand undecided matters to an IHO for a determination]; see P.K., 819 F. Supp. 2d at 118; Mr. and Mrs. A., 769 F. Supp. 2d at 406, 415-16, 427; S.W., 646 F. Supp. 2d at 359-60, 360 n.3). The IHO shall retain discretion to determine whether the hearing record is sufficient to determine the issues presented. To this end, I also note that the parent has proffered a document relating to the notice issue, which, upon remand, the parent may introduce and the IHO may weigh whether to admit into evidence.

VII. Conclusion

In light of the foregoing, this matter is remanded to the IHO for a determination on the merits of the parent's due process complaint notice.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the decision of the IHO, dated November 9, 2012, is vacated and the matter is remanded to the same IHO for a determination on the merits of the allegations set forth in the parent's July 2011 due process complaint notice; and

IT IS FURTHER ORDERED that, if the IHO who issued the November 9, 2012 decision is unavailable, another IHO shall be appointed in accordance with the district's rotational selection procedures.

Dated: Albany, New York
December 6, 2013



JUSTYN P. BATES
STATE REVIEW OFFICER