The University of the State of New York

The State Education Department
State Review Officer
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No. 12-026

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 New York City Department of Education

Appearances:
Educational Advocacy Services, attorneys for petitioner, Jennifer A. Tazzi, Esq., of counsel

Michael Best, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of her son's tuition at the Kulanu Academy (Kulanu) for the 2010-11 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that Kulanu was an appropriate placement for the student for the 2010-11 school year. The appeal must be dismissed. 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, at least one psychologist, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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; ensures that the procedures at the hearing were consistent with the requirements of due process; seeks additional evidence if necessary; and renders 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the CSE convened on December 16, 2009, to conduct the student's annual review and to develop his IEP for the 2010-11 school year (Dist. Ex. 1 at pp. 1-2). Finding that the student remained eligible to receive special education and related services as a student with autism, the CSE recommended placing the student in a 6:1+1 special class in a specialized school; a 12-month school year program; related services of speech-language therapy, occupational

therapy, and physical therapy; door-to-door special education transportation services; adapted physical education; assistive technology; and monolingual services (id. at pp. 1-2, 5, 13).[1]

In May or June 2010, the parent decided that the student would remain at Kulanu for the 2010-11 school year, and executed a reenrollment contract by the end of June 2010 (see Tr. pp. 104-05, 110-12; Parent Exs. E at pp. 1-2; F at p. 1).[2]

In a final notice of recommendation (FNR) to the parent dated June 15, 2010, the district summarized the student's recommended placement for the 2010-11 school year, and identified the particular school to which the district assigned the student (Dist. Ex. 5 at p. 1).[3] The FNR listed an address and telephone number for the assigned school, as well as a particular classroom the student would attend; in addition, the FNR listed the name, address, and telephone number of the individual to contact in order to arrange a visit of the assigned school (id.).

By letter dated August 18, 2010, the parent notified the district of her intention to unilaterally place the student at Kulanu for the 2010-11 school year, asserting that she "could not observe the recommended placement because the school was not in session" (Parent Ex. B at p. 1).[4] According to the letter, if the parent "already received or d[id] receive a letter recommending that their child attend a specific public school, [the parent] w[ould] make every effort to observe the offered program in September 2010" (id.). In addition, the parent indicated her intention to seek an impartial hearing for tuition reimbursement if the recommended placement was not appropriate for the student, but clarified that the letter served only as the required 10-day notice and not as a request for an impartial hearing (id.). The Commissioner of Education has not approved Kulanu as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).[5]

On or about September 7, 2010, the parent called the telephone number listed on the FNR for the assigned school and was told that the school did not offer 6:1+1 special classes (see Tr. pp. 62-65, 101-02, 106-07; see also Tr. pp. 10, 47-48, 120-21; Parent Ex. C at pp. 1-2). By facsimile dated September 14, 2010, the parent—through her advocate—returned the FNR to the district with a handwritten notation dated September 13, 2010, indicating that she had "attempted to visit the placement but there was no 6:1:1 there," that the student would attend Kulanu, and that she

[1] At the impartial hearing, the parent affirmatively indicated that she did not dispute the student's classification of autism (see Tr. pp. 9, 17-18; see also 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] During July and August 2010, the student attended a "camp" at Kulanu (see Tr. pp. 104-05, 113-14).

[3] The parent acknowledged receiving the FNR on or about June 15, 2010 (see Tr. pp. 10, 120).

[4] Unrebutted testimony at the impartial hearing revealed, however, that the particular school identified on the FNR—which operated a 12-month school year program—was, in fact, in session during summer 2010 (see Tr. pp. 45-54; compare Dist. Ex. 5 at p. 1, with Tr. p. 47).

[5] The student has never attended a public school program (see Tr. pp. 112-13).

would request an impartial haring seeking tuition reimbursement for the 2010-11 school year (Parent Ex. C at pp. 1-2; see Tr. pp. 63-65).[6]

A. Due Process Complaint Notice

In a due process complaint notice dated February 17, 2011, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year because the student's IEP was not reasonably calculated to enable him to receive educational benefits (Parent Ex. A at p. 1). The parent asserted that upon receiving the FNR, she attempted to observe the "recommended program," but was told that it had no 6:1+1 special class (id. at p. 2). The parent indicated that on September 13, 2010, she notified the district that the "recommended site" had no 6:1+1 special class and that she would seek an impartial hearing to obtain tuition reimbursement, or prospective funding, for the student's tuition at Kulanu for the 2010-11 school year, as well as an order from the IHO directing the district to provide transportation services and related services (id.). In addition, the parent reserved the "right to contest both the appropriateness of her son's IEP, including but not limited to, the classification, program placement, student to staff ratio, any and all comments concerning [the student] included in the IEP, the academic management needs, related service recommendations," and "the availability and appropriateness of any alleged placement" (id.).[7] As relief, the parent proposed terms to settle the matter, including reimbursement or prospective funding for the student's tuition at Kulanu, the provision of related services pursuant to the last agreed upon IEP, the reimbursement or direct payment of related services obtained by the parent, and the provision of transportation for the 2010-11 school year (id.).

B. Impartial Hearing Officer Decision

On September 14 and November 16, 2011, the parties presented testimonial and documentary evidence at an impartial hearing, and reconvened on November 21, 2011 to present closing statements (Tr. pp. 1, 6, 35, 115, 117-28; Dist. Exs. 1-6; Parent Exs. A-M). In a decision

[6] A second handwritten notation also appears on the June 15, 2010 FNR, dated June 24, 2010, indicating: "I cannot accept or reject this placement until I can visit in September" (Parent Ex. C at p. 1). However, despite the parent's advocate arguing in her closing statement at the impartial hearing that the parent "notified [the district]" on June 24, 2010 that she "could not . . . accept or reject the placement until she could visit in September," the hearing record does not contain any evidence to support the conclusion that the district received this notice, as the hearing record includes only one facsimile document transmitting the FNR to the district on September 14, 2010 (see Parent Ex. C at p. 2; see also Tr. pp. 1-129; Dist. Exs. 1-6; Parent Exs. A-M). Upon learning in September 2010 that the assigned school identified in the FNR did not have 6:1+1 special classes, the parent did not notify the district directly, but instead, called her advocate's office, sent the FNR with the September 13, 2010 handwritten notation to her advocate's office, and the advocate sent the FNR to the district via facsimile on September 14, 2010 (see Tr. pp. 101-02, 106-07; Parent Ex. C at p. 2; see also Tr. pp. 63-65, 120-21).

[7] One U.S. district court in New York has recognized, however, that to allow the parents to raise additional issues without the district's agreement pursuant to a reservation of rights clause would render the IDEA's statutory and regulatory provisions meaningless (see B.P. v. New York City Dep't of Educ., 2012 WL 33984, at * 5 [E.D.N.Y. Jan. 6, 2012]; 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; Application of the Dep't of Educ., Appeal No. 11-154; Application of a Student with a Disability, Appeal No. 11-141; Application of a Student with a Disability, Appeal No. 11-010).

dated December 22, 2011, the IHO concluded that the district offered the student a FAPE for the 2010-11 school year, and specifically found that no procedural errors occurred in the development of the student's IEP, that the parent had not disputed the recommendations in the student's IEP, and that the assigned school identified in the FNR could implement the IEP (see IHO Decision at pp. 7-8). In addition, the IHO agreed with the district's argument that the parent received the FNR in a timely manner, and found that the parent acted unreasonably by waiting until September 2010 to arrange a visit to the assigned school (see id.). The IHO also noted that the parent's failure to follow the instructions on the FNR to arrange a visit to the assigned school ultimately resulted in the parent calling the wrong school (see id. at p. 8).[8] Finally, the IHO was not persuaded by the parent's argument that the district failed to offer another school after receiving notice in September 2010 that the assigned school identified in the FNR did not have the recommended program, and furthermore, the IHO found that the evidence indicated that the parent did not intend to enroll the student in the recommended placement or in a public school (id.).

Although the IHO determined that the district offered the student a FAPE, she briefly addressed whether the student's unilateral placement at Kulanu for the 2010-11 school year was appropriate to meet his special education needs, as well as equitable considerations (see IHO Decision at pp. 8-10). The IHO concluded that Kulanu was appropriate, but that equitable considerations precluded an award of tuition reimbursement (id. at pp. 9-10). In this instance, the IHO determined that the parent delayed contacting the assigned school identified in the FNR until September 2010, even though she received the FNR in June 2010; that the parent had already reenrolled the student at Kulanu before contacting the assigned school; that the student was already attending Kulanu in September 2010 when the parent attempted to contact the assigned school; and that the parent did not intend to enroll the student in the recommended placement or any other public school (id.).

IV. Appeal for State-Level Review

The parent appeals, and contends that the IHO erred in finding that the district offered the student a FAPE for the 2010-11 school year and that equitable considerations did not support an award of tuition reimbursement. The parent argues that the district's failure to provide her with a correct notice of placement deprived her of a meaningful opportunity to participate in the placement process. The parent also contends that the IHO erroneously placed an additional burden on the parent in finding that it was "'incumbent upon the parents to contact the proposed placement in a timely manner and not wait until the beginning of the 2010-2011 school year to first inquire about the placement'" (Pet. ¶¶ 55-56). Next, the parent argues that the IHO erred in concluding that the parent had no intention to place the student in the assigned school or in any other public school, and therefore, equitable considerations precluded an award of tuition reimbursement. The parent seeks to reverse the IHO's decision on both issues.

[8] Testimony at the impartial hearing revealed that the telephone number listed on the FNR for the assigned school—which the parent called in September 2010 to arrange a visit—was not the correct telephone number for the assigned school (see Tr. pp. 38, 40-41, 45-51, 63-65; Parent Ex. C at p. 1). It appears from a review of the hearing record that the parent first discovered this error at the impartial hearing (see Tr. pp. 1-129; Dist. Exs. 1-6; Parent Exs. A-M; compare Tr. pp. 9-11, and Parent Ex. A at pp. 1-4, with Tr. pp. 49-51, 120-24).

In its answer, the district responds to the parent's allegations, and asserts as defenses that it offered the student a FAPE for the 2010-11 school year and that equitable considerations preclude an award of tuition reimbursement because the evidence supports the IHO's determination that the parent never intended to place the student in the assigned school or in any public school. In addition, the district cross-appeals that portion of the IHO's decision which found that the student's unilateral placement at Kulanu was appropriate to meet his special education needs. The district argues that contrary to the IHO's decision, the parent failed to prove that the student's needs could be met in a 10-month program at Kulanu, and further, that the IHO improperly weighed testimony about the student's progress at Kulanu in reaching the conclusion that it was appropriate to meet the student's special education needs. The district seeks to reverse the IHO's determination regarding the appropriateness of Kulanu, to uphold the remainder of the IHO's decision, and to dismiss the parent's petition in its entirety.

In an answer to the district's cross-appeal, the parent responds to the district's allegations and argues that the student did not require a 12-month school year program because the hearing record was devoid of evidence that the student would suffer substantial regression. Therefore, the parent argues that the failure to enroll the student in an extended school year program did not affect the appropriateness of the student's unilateral placement at Kulanu. In addition, the parent argues that while the testimony relied upon by the IHO in reaching his conclusion about the appropriateness of Kulanu encompassed information about the student's progress at Kulanu, the testimony also revealed information about the student's program at Kulanu. The parent seeks to dismiss the district's cross-appeal.

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., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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]; 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]; 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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; 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. Dep't 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 enabling 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 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]). 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; 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 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

The parent argues on appeal that contrary to the IHO's decision, the district failed to offer the student a FAPE for the 2010-11 school year because it did not provide the parent with a correct notice of placement recommendation. She asserts that while the IDEA does not require an IEP to name a specific school location, the court in T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 (2d Cir. 2009), cert. denied, 130 S. Ct. 3277 (2010), emphasized the importance of parental participation in the placement process, and thus, she was deprived of this opportunity due to the district's failure to provide her with the correct telephone number for the assigned school identified in the FNR, the district's failure to respond to three written notices from the parent regarding the assigned school, and the district's failure to offer another public school placement to the student after receiving notice in September 2010 that the assigned school did not offer 6:1+1 special classes.

The parent also argues that the IHO erroneously concluded that she failed to contact the assigned school in a timely manner by waiting until the beginning of the 2010-11 school year to "'first inquire about the placement,'" which the parent characterized as improperly placing an "additional burden" upon her (Pet. ¶¶ 55-56).

In opposition, the district argues that the parent was not deprived of an opportunity to meaningfully participate in the placement process because T.Y. does not require an IEP to identify a specific school location, the IDEA does not provide parents with an entitlement to observe a student's current or proposed educational placement, and the IHO properly concluded that the parent received the FNR with sufficient time to contact the assigned school prior to the start of the 2010-11 school year. The district also argues that, consistent with State and federal regulations, it provided the parent with the opportunity to meaningfully participate in the development of the student's IEP, and specifically, to "'participate in meetings with respect to the identification, evaluation, and educational placement'" of the student (Answer ¶¶ 38-39). In addition, to the extent that the parent claims that the failure to provide the correct telephone number for the assigned school identified in the FNR deprived her of the opportunity to meaningfully participate in the placement process, the district contends that the parent's own actions—by waiting three months to first contact the assigned school and by calling the assigned school directly, as opposed to reaching out to the contact person identified in the FNR to arrange a visit of the assigned school—in this instance prevented her from meaningfully participating in the placement process.

For reasons discussed more fully below, however, the parent's assertion that she was deprived of the opportunity to meaningfully participate in the placement process—regardless of the underlying rationale—must be dismissed because this contention is not properly before a State Review Officer.

A. Scope of Review

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). A review of the parent's due process complaint notice reveals that the parent did not raise the issue of the lack of parental participation in the placement process as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2010-11 school year, and I decline to so broadly construe the parent's due process complaint notice to include such a claim (see Parent Ex. A at pp. 1-4). In addition, the parent's due process complaint notice cannot be reasonably read to allege that the district's failure to provide her with the correct telephone number for the assigned school identified in the FNR, that the district's failure to respond to three written notices from the parent regarding the assigned school, or that the district's failure to offer another public school to the student after receiving notice in September 2010 that the assigned school did not offer 6:1+1 special classes as violations upon which to conclude that the district failed to offer the student a FAPE (id.).[9] Furthermore, the hearing record does not reflect that the parent requested to amend the February 2011 due process complaint notice, that the IHO otherwise authorized an amendment to the February 2011 due process complaint notice, or that the district consented to expand the scope of the impartial hearing to include the resolution of these issues (see Tr. pp. 1-129; Dist. Exs. 1-6; Parent Exs. A-M).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at *4-*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled

[9] Even an FNR with an incorrect location rather than just an incorrect telephone number may not per se result in a loss of educational opportunity for the student (C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *9 [S.D.N.Y. Oct. 28, 2011] citing A.S. v. New York City Dep't of Educ., No. 10–CV–9, slip op. at 18–19 [E.D.N.Y. May 25, 2011] [rejecting the parents' claim based upon a deficient FNR and further noting that the mistake on the FNR was not discovered until during the hearing]).

children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Moreover, the IHO properly did not reach these issues in her decision; accordingly, I find that the parent's alleged lack of meaningful participation in the placement process, as well as the underlying rationales, have been raised for the first time on appeal and are, therefore, outside the scope of my review and I decline to consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also IHO Decision at pp. 1-10; Application of a Student with a Disability, Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

B. Assigned School

Even assuming, however, that the parent properly raised these issues, her argument that the district's actions—either individually, or collectively, as procedural violations—deprived her of the opportunity to participate in the placement process is without merit as a matter of law.[10]

Generally, the IDEA requires parental participation in determining the educational placement of a student (see 34 CFR §§ 300.116, 300.327, 300.501[c]; 501[b][1][i]). The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *11 [S.D.N.Y. Aug. 19, 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). In T.Y., the student's IEP did not "name the school [the student] would attend," but rather, the parents received notice "in the mail that recommended a specific school placement" (T.Y., 584 F.3d at 416). The parents visited the recommended site, but thereafter rejected it; the district recommended a second site, which the parents "called" but did not visit, and thereafter unilaterally placed the student in a nonpublic school (T.Y., 584 F.3d at 416). Pointing to the IDEA and its implementing regulations, the parents argued in T.Y. that "'procedural safeguards . . . make clear that parents are to be

[10] A procedural violation rises to the level of a denial of 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, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H, 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

afforded meaningful participation in the decision-making process as to the location and placement of their child's school and classroom'" (T.Y., 584 F.3d at 419). The T.Y. court, however, relied upon precedent establishing that the "the term 'educational placement'" did not refer to the specific school, and expressly rejected the parents' argument (T.Y., 584 F.3d at 419-20).[11]

For the same reasons, the parent's argument on appeal must also be rejected because the parent's right to meaningfully participate in the educational placement process—that is, the development of the student's IEP—does not extend to the selection of the student's specific school or classroom, which is the crux of the parent's arguments in this case (T.Y., 584 F.3d at 416, 419-20).[12]

In addition, although the district offered the parent the opportunity to visit the assigned school, neither the IDEA nor State regulations—as correctly argued by the district—confers upon parents the right to visit a recommended school and classroom.[13] The U.S. Department of Education's Office of Special Education (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013).

Therefore, based upon the foregoing, the parent could not be deprived of the opportunity to participate in the selection of the student's specific school because neither the IDEA nor its implementing regulations entitles her to such right.

C. Equitable Considerations

Finally, even if the parent's contention that she was deprived of the opportunity to participate in the placement process constituted a procedural violation upon which to conclude that

[11] The USDOE has clarified that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).

[12] Subsequent to the T.Y. decision, the Second Circuit found that the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents, 629 F.2d at 756; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063).

[13] Nothing in this decision, however, is intended to discourage districts from offering parents the opportunity to view school or classroom placements as such opportunities can only foster the collaborative process between parents and districts. If parents visit a particular classroom and, at that point, have new concerns, the IDEA and the Education Law contemplate that the collaborative process for revising the IEP will continue—that the parents will ask to return to the CSE and share those concerns with the objective of improving the student's IEP.

the district failed to offer the student a FAPE for the 2010-11 school year, equitable considerations preclude an award of tuition reimbursement under the facts of this case.

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

As noted in the IHO's decision, the parent did not contact the assigned school until September 7, 2010—approximately three months after receiving the FNR—and after notifying the district in August 2010 of her intention to unilaterally place the student at Kulanu for the 2010-11 school year, executing a reenrollment contract with Kulanu in June 2010, and after the student was

already attending Kulanu for the 2010-11 school year (IHO Decision at pp. 9-10).[14] For these reasons, the IHO concluded that the parent did not intend to enroll the student in the recommended placement or any other public school, and thus, equitable considerations precluded an award of tuition reimbursement (id.). Upon review of the hearing record, I find no reason to disturb the IHO's conclusion.

VII. Conclusion

Having considered the parties' remaining contentions, I find that in light of the determinations made herein, I need not address them.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 10, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

[14] Since neither the IDEA nor State regulations require a district to maintain a particular classroom opening for a student while the student is enrolled elsewhere in a private school, the district was no longer obligated to maintain an opening in the 6:1+1 special class recommended in the student's IEP after the parent notified the district in August 2010 of her intention to unilaterally place the student at Kulanu (see Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 11-008 [noting that districts may modify class assignments in light of changing circumstances]). Thus, the parent's contention that the district failed to offer the student another public school after receiving notice in September 2010 that the recommended placement did not offer 6:1+1 special classes, is irrelevant.