The University of the State of New York

The State Education Department
State Review Officer
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No. 12-039

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondent, Lawrence D. Weinberg, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered the district to issue a Nickerson letter to the parent, and to reimburse the parent to pay for the costs of the student's tuition at the Learning Spring School (Learning Spring) for the 2011-12 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

On January 14, 2011, the CSE convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 3 at pp. 1-2).[1] 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 for a 12-month school year, door-to-door special education transportation services, adapted physical education, and the following related services: one 30-minute session per week of individual speech-language therapy; two 30-minute sessions per week of speech-language therapy in a small

[1] During the 2009-10 (fourth grade) and the 2010-11 (fifth grade) school years, the student attended a 6:1+1 special class at a public school in the district (public school 1) that was staffed by the same special education teacher for both school years (see Tr. pp. 28-30; Parent Exs. A at p. 2; D at pp. 1-2; E). The student attended public school 1 from kindergarten through fifth grade (Tr. pp. 15, 308-09). The student's special education teacher for the 2009-10 and 2010-11 school years attended the January 2011 CSE meeting (see Tr. pp. 29-30; compare Parent Ex. D at pp. 1-2, with Dist. Ex. 3 at p. 2). At the completion of fifth grade in the 2010-11 school year, the student would age out of public school 1 and was expected to move on to a junior high school (see Tr. pp. 31-32, 66-68, 339).

group (3:1); two 30-minute sessions per week of individual physical therapy (PT); two 30-minute sessions per week of occupational therapy (OT) in a small group (6:1); and one 30-minute session per week of individual OT (id. at pp. 1-2, 16).[2] The IEP noted January 14, 2011 as the projected date of initiation of the IEP, and January 14, 2012 as the projected date of review of the IEP (id. at p. 2).[3]

In two separate letters, both dated April 2011, the district informed the parent that the student had the "opportunity to attend the following school for the 2011-2012 school year," and both letters listed a public school, the public school's address, and the name of a contact person (Parent Ex. F at pp. 1, 3). Although each April 2011 letter did not identify the particular public schools in an identical manner, both letters listed the same address and the same contact person for the school identified in the letter (compare Parent Ex. F at p. 1, with Parent Ex. F at p. 3).

By letter dated June 8, 2011, the parent wrote to a district placement officer, indicating that she had visited the "schools suggested" in the April 2011 letters for the 2011-12 school year, as well as other public schools (see Parent Ex. G at p. 1; compare Parent Ex. G at p. 1, with Parent Ex. F at pp. 1-3). In the letter, the parent listed each public school she had visited, explained what she had observed at each public school, and indicated that due to her concerns about regression, the parent was rejecting "ALL" of the public schools identified in the letter as not being appropriate for the student (Parent Ex. G at pp. 1-2).

By letter dated June 20, 2011, the parent wrote to the district's director of placement (Parent Ex. I). In this letter, the parent acknowledged receiving two "letters of placement recommendations," both dated April 2011, recommending placements at the "same location: [public school 2]" (id.; compare Parent Ex. G at p. 1, and Parent Ex. F at pp. 1, 3, with Parent Ex. I). The parent indicated that she had visited public school 2, and determined that it was not appropriate for the student (Parent Ex. I).[4] In addition, the parent advised that since the district had not recommended an appropriate placement "prior to the start of the new school year," she had "no choice but [to] unilaterally place" the student at Learning Spring beginning in September 2011 and that she would seek reimbursement at public expense for the 2011-12 school year (id.).[5] The parent requested that the district arrange for round-trip transportation of the student to Learning Spring (id.).

[2] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The parent testified that she received the IEP developed at the January 14, 2011 CSE meeting approximately one month later (Tr. pp. 314-15). She also acknowledged that the student's IEPs had been developed annually since kindergarten and that the IEPs had been for a "period of one year" (Tr. p. 340).

[4] With respect to public school 2, the parent previously indicated in the June 8, 2011 letter that she had observed four classrooms at public school 2 and that it was "dirty and had broken furniture" (Parent Ex. G at p. 1). She also noted that the students in the classroom had "severe mental disabilities," the classroom did not have any other "high functioning autistic students," the curriculum "was not standard" for the student, and thus, the "program" was not appropriate for him (id.).

[5] The Commissioner of Education has approved Learning Spring as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On June 21, 2011, the parent executed an enrollment contract with Learning Spring for the student's attendance from September 2011 through June 2012, and paid a registration deposit (Parent Exs. N at pp. 1-2; O).[6]

During July and August 2011, the student attended public school 1 in a classroom that was staffed with the same special education teacher who taught the student in the 6:1+1 special class during the 2009-10 and 2010-11 school years (Tr. pp. 60, 107; see Tr. pp. 28-30, 333).

By letter to the district dated August 15, 2011, the parent—referring to her June 20, 2011 letter—repeated her intention to unilaterally place the student at Learning Spring for the 2011-12 school year because the district had not offered the student an appropriate "program/placement" for the 2011-12 school year (Parent Ex. K). In addition, the parent indicated that she would seek reimbursement at public expense for the student's unilateral placement at Learning Spring and that she requested round-trip transportation to Learning Spring (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 14, 2011, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, and alleged both procedural and substantive violations (see Parent Ex. A at pp. 1-3). Relevant to this appeal, the parent alleged that the district failed to offer an appropriate placement for the student—noting specifically, however, that the district recommended public school 2, the parent visited public school 2, and the parent had rejected public school 2 after visiting it because it was not appropriate to meet the student's needs (Parent Ex. A at p. 3). In addition, the parent asserted that the district failed to have a "valid IEP and appropriate placement" in place prior to the start of the school year, which the parent identified as "June 15, 2011," resulting in a failure to offer the student a FAPE (id. at p. 4).[7]

As relief, the parent requested findings that the district failed to offer the student a FAPE, that the parent was deprived of an opportunity to meaningfully participate in the development of the student's 2011-12 IEP, that the district failed to offer the student an appropriate program, that Learning Spring was an appropriate placement for the student, that the parent was unable to pay the tuition for Learning Spring, and that equitable considerations did not preclude an award of tuition reimbursement (Parent Ex. A at pp. 4-5). As such, the parent requested reimbursement for, or prospective payment of, the costs of the student's tuition at Learning Spring from September 2011 through June 2012; the provision of door-to-door, round-trip special education transportation for the student; and any further relief deemed appropriate by the IHO (id. at p. 5).

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[6] The contract required payment of the student's tuition for the full academic year—regardless of the student's subsequent "absence, withdrawal or dismissal"—except if the parent cancelled the contract by written notice prior to July 10, 2011, which would only result in a forfeiture of the registration deposit (Parent Ex. N at p. 1). If the parent cancelled the contract on or after July 10, 2011, the parent would remain liable for the student's tuition for the full academic year (id.).

[7] The parent also reserved "the right to amend and/or modify" the due process complaint notice (Parent Ex. A at p. 4). 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).

B. Impartial Hearing Officer Decision

On October 12, 2011, the parties proceeded to an impartial hearing, and concluded on December 6, 2011 (Tr. pp. 1, 184). On January 17, 2012, the IHO rendered a decision (IHO Decision at p. 9). The IHO determined that "[n]otwithstanding the [district's] contention that [a final notice of recommendation (FNR)] was issued," the district failed to produce sufficient evidence "regarding the existence of an actual placement offer" (IHO Decision at pp. 4-5). The IHO indicated that although the hearing record contained two letters to the parent, dated April 2011, informing her that the student had the "'opportunity to attend the following school for the 2011-2012 school year,'" the letters did not "constitute a placement offer or written notice of a change in placement," the letters did not contain the "type of information needed to constitute prior written notice of a change in placement," the letters did not provide "information regarding the parental rights," and the letters did not indicate that "it was a CSE placement or request[] parental consent" (id. at p. 4).

The IHO noted, however, that the parent visited public school 2, she determined that it was not appropriate to meet the student's needs, and she provided written notice to the district explaining why public school 2 would not be an appropriate placement for the student (IHO Decision at p. 4). In addition, the IHO indicated that the student was not placed at public school 2 on July 1, 2011—the first day of the recommended 12-month school year program—but instead, the student continued to attend public school 1 through mid-August 2011, despite being listed on the special education teacher's roster to attend public school 2 (id. at pp. 4-5). The IHO further noted that the parent had not received any written notice that the student's placement "would be changed" (id. at p. 5).

In summary, the IHO concluded that based upon the evidence, the district "never made an appropriate placement offer" for the 2011-12 school year (IHO Decision at p. 5). The IHO indicated that the "'opportunity to attend' letters sent in April 2011 conflicted with each other," and did not constitute "actual offers of placement or authorizations to attend" (id.). However, to the extent that the letters "may be considered offers of possible placement," the IHO noted that parent rejected the placement and "the placement change was not implemented as of the beginning of the 2011-2012 twelve month school year" (id.). In addition, the IHO found noted the evidence revealed that during summer 2011 the student had been placed on the "roster" to attend public school 2 "without any written notice about the change" and "[n]one of the witnesses at the hearing knew how the change came about" (id.). Therefore, the IHO concluded that the district failed to sustain its burden to establish that it "actually offered" the student a "placement" (id.).

Next, the IHO concluded that the district also failed to sustain its burden to establish that public school 2 would have been an appropriate placement for the student or that the student would have been appropriately grouped for purposes of instruction in the proposed classroom (IHO Decision at p. 5). Consequently, the IHO determined that the district's "failure to issue an FNR and provide the [p]arent with timely, complete, and unambiguous notice about the CSE's proposed placement change constitute[d] grounds for directing the [district] to issue" a Nickerson letter to the parent (id.).

Turning to the unilateral placement, the IHO concluded that the parent sustained her burden to establish the appropriateness of the student's placement at Learning Spring (IHO Decision at pp. 5-7). The IHO found that the unrebutted evidence established that Learning Spring provided the student with "educational instruction . . . designed to meet [his] unique special education needs" (id. at p. 7). She also found that the parent's witnesses described the student's programs and needs,

the "overall program" addressed the student's deficits and accounted for his strengths, the student received small group instruction, and the student made progress (id.).

With regard to equitable considerations, the IHO determined that the parent cooperated during the CSE program development and placement process (IHO Decision at pp. 7-8). Specifically, the IHO noted that the parent "visited the CSE's proposed school and provided the [district] with prompt and detailed notice regarding her rejection of the suggested school" (id. at p. 8). Thus, the IHO concluded that equitable considerations did not preclude an award of tuition reimbursement in this case.

As a final matter, the IHO indicated that during the parent's closing statement she requested reimbursement for the costs of an evaluation and transportation (IHO Decision at p. 8). While the IHO found that the "request" exceeded the scope of the due process complaint notice, she found that the district was "obligated to provide [the student] with special education transportation" (id. at p. 9).

Having determined that the district failed to offer the student a FAPE and that the parent sustained her burden to establish the appropriateness of Learning Spring, the IHO directed the district to issue the parent a Nickerson letter, to provide transportation for the student, and to reimburse the parent for any funds paid for the student's enrollment at Learning Spring (IHO Decision at p. 9).

IV. Appeal for State-Level Review

The district appeals, and contends that the IHO erred in concluding that the district failed to offer the student a FAPE for the 2011-12 school year. In particular, the district argues that the IHO exceeded her jurisdiction by considering issues not raised in the parent's due process complaint notice. Alternatively, the district contends that it sustained its burden to establish that it offered the student a FAPE and that it made a timely offer of placement. In addition, the district asserts that the IHO erred in finding that the circumstances of this case rendered the student eligible to receive a Nickerson letter. With respect to the proposed classroom, the district alleges that the evidence does not support the IHO's decision, and further, that the IHO erred in reaching this issue since the student never attended public school 2. The district also contends that the IHO erred in concluding that the parent sustained her burden to establish that Learning Spring was appropriate to meet the student's special education needs and that equitable considerations did not preclude an award of tuition reimbursement.

In an answer, the parent responds to the district's allegations, and asserts additional arguments and defenses in support of her request to uphold the IHO's decision in its entirety. In particular, the parent asserts that the district failed to have the student's services in place at the beginning of the recommended 12-month school year, that the parent was not provided with proper notice that the student would remain at public school 1 during summer 2011, that the April 2011 letters did not clearly indicate that public school 2 was the student's "definitive placement," that the student would not have been appropriately grouped in the proposed classroom, and that the issue related to the student's placement at public school 2 was not speculative.

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], 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 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 105 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

A. Scope of Impartial Hearing

The district argues that the IHO exceeded her jurisdiction by considering the issues of whether the district issued an FNR and whether the parent was entitled to a Nickerson letter as relief because these issues were not properly raised in the due process complaint notice. Upon review of the hearing record and the IHO's decision, however, the evidence does not support the district's argument.

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]; see R.B. v. Dep't of Educ. of The City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8); Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140).

In this case, prior to receiving testimony on the first day of the impartial hearing the parent's attorney orally presented a motion to the IHO seeking to enjoin the district from presenting evidence regarding a "recommendation, to any placement, program or school, on the grounds that [the district] failed, in a timely manner, to make an offer of a recommendation for placement" for the 2011-12 school year (Tr. p. 17). The parent's attorney also sought to compel the district to issue a Nickerson letter to the parent allowing the student to attend a State-approved nonpublic school from July 1, 2011 through June 30, 2012—stating that the district, in this case, failed to issue the parent an FNR (Tr. pp. 17-18).

After considering the objections and arguments offered by the district's attorney in response, the IHO denied the parent's motion (Tr. pp. 18-24). The IHO noted that the parent had specifically referenced public school 2 in her due process complaint notice; therefore, she declined to enjoin the district from presenting evidence regarding "that placement" (Tr. p. 24). She also noted that basic due process rights allowed the district to submit evidence on the issue of placement (id.).

With respect to compelling the district to issue a Nickerson letter to the parent, the IHO determined that she could not direct such relief prior to hearing all of the evidence (Tr. p. 24). Furthermore, the IHO explained that while an impartial hearing was limited to issues raised in the due process complaint notice, she construed the parent's due process complaint notice in this case to raise the issue of funding of the student's unilateral placement at a particular State-approved nonpublic school, and although not specifically requested in the due process complaint notice, the IHO stated that a Nickerson letter was "a type of funding, therefore it [was] within the scope of the type of relief that c[ould] be requested in this case" (Tr. pp. 24-25).

Based upon the foregoing, I find it difficult to disagree with the IHO's decision to broadly construe the parent's due process complaint notice to include the issuance of a Nickerson letter to the parent as a potential form of relief (compare Tr. pp. 24-25, with Parent Ex. A at pp. 4-5). Therefore, I cannot conclude that the IHO improperly expanded the scope of the impartial hearing to include this type of relief.

With respect to the district's contention that the IHO improperly based the decision in this case on whether the district failed to issue an FNR—an issue the district claims that the parent did not raise in the due process complaint notice—I disagree. Upon review of the IHO's decision, I cannot construe the sole basis for the IHO's finding that the district failed to offer the student a FAPE to be so narrowly predicated upon the district's alleged failure to issue an FNR (see IHO Decision at pp. 4-5). To the contrary, the IHO's decision reflects that the district failed to sustain its burden of proof with respect to the whether the district offered the student an appropriate placement—which the parent did raise in the due process complaint notice—and that the IHO considered the district's failure to issue an FNR as an evidentiary issue weighing heavily against the district's burden of production (compare IHO Decision at pp. 4-5, with Parent Ex. A at p. 4 [alleging that the "CSE failed to ensure that there was a valid IEP and appropriate placement for [the student] prior to the start of the school year"]). Thus, I decline to annul the IHO's decision on this basis.

B. Notice of Placement

Notwithstanding the findings made herein, the IHO's decision must be annulled because her determination that the district's failure to offer an actual placement to the student for the 2011-

12 school year as a basis to conclude that the district failed to offer the student a FAPE is not a grounded in either the IDEA, State law, or the regulations implementing these statutes.

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[8] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]).[9] Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320).

In order to implement a student's IEP, however, 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]; T.Y., 584 F.3d at 419-20; 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 & 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]; 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). [10]

[8] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

[9] With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In addition, a delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

[10] 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]; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 2011 WL 4001074, at *11).

Nothing in the IDEA, State law, or the regulations implementing these statutes, however, requires a district to formally provide parents with a notice of placement recommendation in a specified format in order to either offer the student a FAPE or in order to implement the student's IEP.[11]

1. District's Burden of Proof

Even assuming for the sake of argument that the district was obligated to issue either an FNR or a notice of placement, the weight of the evidence nevertheless contradicts the IHO's determination that the district failed to sustain its burden to establish that it offered an actual placement for the student for the 2011-12 school year. At the impartial hearing, the parent (student's mother) and step-father appeared as witnesses (Tr. pp. 270-344). With respect to the two letters the parent received dated April 2011, the student's step-father testified that he was aware that the letters offered the same school ("this was one school that they were recommending") and that he and the parent had "put together that they were both the same school, when we looked at the address and looked up the school" (Tr. pp. 273-74, 279, 289). Admittedly for the 2011-12 school year, he testified that "until [he] visited the schools" proposed for the student's 2011-12 school year, he would have preferred that the student attend a public school closer to his home (Tr. pp. 277-87).

The parent testified that in April 2011, she received letters from the district with a "recommended placement" indicating the "school name . . . the school and the address, and [a] contact person," which she identified specifically in her testimony as public school 2 and which she identified specifically as the school recommended in the two letters dated April 2011 (Tr. pp. 318-20; Parent Ex. F at pp. 1, 3; compare Tr. p. 320, with Parent Ex. F at pp. 1, 3). Upon receiving the letters in April 2011, the parent began making telephone calls to schedule an appointment to visit the school, and she realized at that time that both April 2011 letters recommended the same school: public school 2 (Tr. pp. 321-23). Eventually, the parent contacted public school 2's principal, and scheduled an appointment to visit (Tr. pp. 323-24). After the visit, the parent contacted the district placement officer and left a telephone message; when she did not receive a response, she continued to look for schools "on [her] own" (Tr. p. 327). After leaving the telephone message with the placement officer, she did not attempt to contact the placement officer again, except for writing the June 8, 2011 letter in which she rejected the recommended placement at public school 2, as well as notifying the district of her rejection of three other public schools she had visited on her own (Tr. p. 328; see Parent Ex. G at pp. 1-2). Shortly thereafter on June 20, 2011, the parent wrote to the district, again rejecting the recommended placement at public school 2, and notifying the district of her intention to unilaterally place the student at Learning Spring for the 2011-12 school year (see Parent Ex. I).

Moreover, the evidence indicates that the district began implementing the student's January 2011 IEP in January 2011 while the student attended public school 1, and continued to implement the IEP through mid-August 2011 (see Tr. pp. 31-32, 60, 107; see also Tr. pp. 28-30, 333). In

[11] When implementing an IEP a district must within a reasonable time provide copies of the student's IEP, as appropriate; and inform each individual of his or her IEP implementation responsibilities ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/ publications/iepguidance/IEPguideDec2010.pdf). For a student who needs his/her instructional materials in an alternative format, the materials must be made available to the student at the same time that such materials are available to non-disabled students. Guidelines for implementing an IEP (id.).

addition, the student's special education teacher who implemented the student's January 2011 IEP from January 2011 through August 2011 provided extensive, unrebutted testimony about the student's progress in the annual goals contained in the IEP during the implementation of that IEP (see Tr. pp. 76-80, 89-91, 96-107). Thus, even if the district did not issue an FNR or a notice of placement, the student clearly had been provided with a public school to attend and the hearing record does not indicate that the district deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits.

Based upon the evidence, it is altogether unclear how the IHO concluded that the district failed to sustain its burden to establish that it offered the student an actual placement for the 2011-12 school year when the evidence sufficiently demonstrates the following: both the parent and the student's step-father understood that the two letters received by the parent in April 2011 recommended public school 2 as the student's placement for the 2011-12 school year; both the parent and the step-father visited public school 2; the parent, in both June 2011 letters to the district, identified public school 2 as the recommended placement that she was specifically rejecting as not being appropriate for the student; that the parent's knowledge of public school 2 as the recommended placement was specifically reflected in the due process complaint notice; and that the student attended public school 1 during July and August 2011.

C. Nickerson Letter

Given the foregoing, the IHO also erred in directing the district to issue a Nickerson letter to the parent. A "Nickerson letter" is a remedy for a systemic denial of FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E., 785 F. Supp. 2d at 44). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

Assuming for the sake of argument that the district had failed to implement the student's IEP, jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services, 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]). No provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal. Consequently, neither the IHO, nor I for that matter, have jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K., 2011 WL 1131492, *17 n.29; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see M.S., 734 F. Supp. 2d at 279 [addressing the applicability

and parents rights to enforce the Jose P. consent order]; Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has consistently distinguished systemic violations such as those in Handberry v. Thompson (436 F.3d 52 [2d Cir. 2006]) and Jose P. to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators]; Application of a Student with a Disability, Appeal No. 10-115; see also R.E., 785 F. Supp. 2d at 43-44; E.Z.-L., 763 F. Supp. 2d at 594; Dean v. Sch. Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]).[12]

D. Assigned School

The IHO erred in concluding that the district failed to sustain its burden to establish that the student would have been appropriately grouped for instructional purposes had he attended public school 2. Here, the IHO exceeded her jurisdiction by addressing an issue that was not raised in the due process complaint notice (see Parent Ex. A at pp. 1-5; R.B., 2011 WL 4375694, at *6-*7). A review of the parent's due process complaint notice indicates that the parent alleged that the recommended placement (public school 2) was not appropriate to meet the student's unique special needs (see id. at pp. 3-4). Moreover, the IHO's point that the student was not functionally grouped at public school 2 is irrelevant insofar as the district actually provided the services to the student at public school 1 as described above (see IHO Decision at p. 5). The district was not required to prove a hypothetical state of facts regarding IEP implementation to establish its compliance with the IDEA.

E. January 2011 IEP

Finally, as noted above, the IDEA directs that, in general, an IHO's determination regarding whether a student was offered a FAPE must be made on substantive grounds. Generally, a district meets its obligation to offer a FAPE by developing an IEP that is reasonably calculated to enable the student to receive educational benefits. While the IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP, a school district must provide an IEP that is likely to produce progress, and affords the student with an opportunity greater than mere trivial advancement.

In this case, although the IHO did not make any substantive findings about the student's January 2011 IEP in the decision, a lengthy analysis is not necessary (see IHO Decision at pp. 1-10). First, a review of the hearing record indicates that district implemented the student's January 2011 IEP from January 2011 through August 2011, while the student remained at public school 1 (see Tr. pp. 31-32, 60, 107; see also Tr. pp. 28-30, 333). In addition, the student's special education teacher who implemented the student's January 2011 IEP from January 2011 through August 2011 provided extensive, unrebutted testimony about the student's progress in the annual goals contained in the January 2011 IEP during the implementation of that IEP (see Tr. pp. 76-80, 89-91, 96-107). Given that the student's January 2011 IEP was implemented and that the unrebutted evidence demonstrates that the student made progress, I conclude that the IEP was reasonably

[12] In a proper case, however, nothing would preclude a party to an administrative due process proceeding from developing a hearing record with regard to the individual needs of a student and asserting arguments regarding appropriate relief, which may, in some cases, be similar to the relief granted to individual plaintiffs in Jose P. (see Application of a Student with a Disability, Appeal No. 10-115).

calculated to enable the student to receive educational benefits and did not deprive the student of a FAPE.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Learning Spring was an appropriate placement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 17, 2012, is hereby reversed to the extent that it determined that the district failed to sustain its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated January 17, 2012, is hereby reversed to the extent that it determined that the district shall issue a Nickerson letter to the parent and to reimburse the parent for the costs of the student's tuition at Learning Spring for the 2011-12 school year.

Dated: **Albany, New York**
May 17 , 2012

JUSTYN P. BATES
STATE REVIEW OFFICER