The University of the State of New York

The State Education Department
State Review Officer
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No. 12-063

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, Lisa R. Khandhar, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at Reach for the Stars Learning Center (RFTS) for the 2010-11 school year. Respondent (the district) cross-appeals from the IHO's determination to the extent that it did not determine whether the district offered the student a FAPE or whether RFTS was an appropriate placement for the student for the 2010-11 school year. The appeal must be sustained in part. The cross-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, 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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parent reported that the student received a diagnosis of a pervasive developmental disorder (PDD) when he was evaluated at the age of two and a half years (Tr. p. 226; see also Parent Exs. S at p. 1; RR at p. 4). In 2005, the student began attending RFTS, a private school for

students on the autism spectrum, which utilizes 1:1 applied behavior analysis (ABA), and the student attended RFTS for six years (Tr. pp. 137, 153-54, 183).[1]

The CSE convened on March 4, 2010 to develop the student's IEP for the 2010-11 school year (Parent Ex. RR at pp. 1-2). The March 2010 CSE determined that the student was eligible for special education programs and related services as a student with autism and recommended a 12-month special education program consisting of, among other things, a 6:1+1 special class in a specialized school with related services of counseling, speech-language therapy, occupational therapy (OT), physical therapy (PT), and a full time 1:1 crisis management paraprofessional (id. at pp. 1, 18).[2] The March 2010 CSE also indicated that the student's behavior required highly intensive supervision and attached a behavior intervention plan (BIP) to the student's IEP (id. at pp. 4, 19).

In a letter to the parent dated June 15, 2010, the district summarized the recommendations made by the March 2010 CSE and notified the parent of the particular public school site to which it had assigned the student for the 2010-11 school year (Parent Ex. E at p. 1). On June 24, 2010, the parent and the student's current RFTS teacher visited the assigned public school (Tr. pp. 98-99; Parent Ex. E at p. 1). The parent returned the district's June 15, 2010 letter by facsimile on June 30, 2010 with a handwritten note dated June 28, 2010 that enumerated her objections to the assigned public school site (Parent Ex. E at pp. 1-2). The objections included, among other things, that the assigned public school: did not offer ABA therapy; did not conduct specific functional behavioral assessments or use frequency data to monitor behavior; grouped students according to age alone rather than skill level; and did not offer social and play skills as part of the standard curriculum (id.). The parent also informed the district of her intent to enroll the student at RFTS for the 2010-11 school year and request an impartial hearing for the cost of the student's tuition (id. at p. 1).

By letter to the district dated August 18, 2010, the parent again stated her intent to enroll the student at RFTS for the 2010-11 school year (Parent Ex. D at pp. 1-2). The letter also indicated that, should the district offer another program, the parent would view the assigned school and notify the district as to whether it was appropriate (id. at p. 1). The letter reiterated the parent's intent to request an impartial hearing to seek reimbursement and/or direct payment for the student's tuition to RFTS for the 2010-11 school year (id.). The student remained at RFTS for the 2010-11 school year.

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated July 11, 2011, alleging that the student was denied a FAPE for the 2010-11 school year on both procedural and substantive grounds (Dist. Ex. 1). Specifically, the parent alleged that (1) the annual goals listed in the March 2010 IEP were not sufficient to meet the student's needs; (2) the recommended 6:1+1 special class

[1] RFTS has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; Parent Ex. H at p. 1).

[2] The student's eligibility for special education services as a student with autism is not in dispute in this appeal (34 C.F.R. 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

placement was not appropriate for the student; (3) the district failed to conduct a functional behavioral assessment (FBA) and the BIP developed by the district was inappropriate; and (4) the district deprived the parent the opportunity to meaningfully participate in developing the student's IEP by failing to consider the concerns of the parent and the student's teachers regarding class size and the importance of an ABA program for the student (id. at pp. 2-4). The parent also alleged that the assigned public school site was inappropriate for the student because: the students in the school were not on similar social or academic levels; the assigned school did not offer an ABA program or conduct FBAs; and the assigned school had a curriculum that would not have been consistent with the student's academic and social needs (id. at p. 4). As relief for the 2010-11 school year, the parent requested that an IHO award her the cost of the student's tuition at RFTS for the 2010-11 school year and direct the district to provide the student with the related services recommended on the student's last agreed upon IEP, as well as transportation to and from RFTS (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 8, 2011 and concluded on December 21, 2011, after three days of proceedings (Tr. pp. 1 - 240). In a decision dated February 16, 2011, without making any findings on the merits of the case, the IHO determined that the parent lacked standing and denied the parent's request for relief (IHO Decision at pp. 13-15). The IHO determined that the parent had not paid any tuition or incurred any out-of-pocket expenses and, therefore, did not have standing to seek the costs of the student's tuition on behalf of the private school (id. at pp. 13-14). The IHO determined that the evidence in the hearing record supported a finding that the private school, not the parent, incurred the financial burden associated with the student's education for the 2010-11 school year but that the private school was not a party to the case and was, therefore, not entitled to relief (id. at p. 14). Characterizing the following findings as equitable considerations, the IHO noted that the parent filed her due process complaint notice close to the start of the subsequent (2011-12) school year, that throughout the 2010-11 school year the parent did not seek tuition payment from the district or make payments to the private school, and that the private school did not suspend or terminate the student's enrollment or pursue any claim against the parent for non-payment (id. at p. 15). Based on the foregoing, the IHO denied the parent's request for the costs of the student's tuition at RTFS for the 2010-11 school year (id. at p. 16).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's denial of her request for the costs of the student's tuition at RTFS for the 2010-11 school year. The parent alleges that the IHO erred by failing to make findings as to whether the district offered the student a FAPE and whether RFTS was an appropriate placement for the student for the 2010-11 school year. The parent further alleges that, contrary to the IHO's decision, equitable considerations favor her and she had standing to seek payment from the district, notwithstanding the fact that she did not pay out-of-pocket for the costs of the student's tuition at the unilateral placement during the 2010-11 school year. The parent also asserts that the IHO erred in finding that RFTS had no intention of seeking payment of the student's tuition from the parent and that, therefore, it was RFTS and not the parent who incurred the financial burden for the student's tuition. The parent also asserts that the IHO improperly placed the burden of proof on the parent. The parent requests that the IHO's decision

be reversed in its entirety and that she be granted the relief sought in her due process complaint notice.

The district answers the parent's petition, asserting that the IHO's denial of the parent's claim for tuition reimbursement or direct funding to RFTS for the 2010-11 school year should be upheld. The district asserts that the IHO properly found that the parent did not have standing to seek the cost of the student's tuition at RFTS for the 2010-11 school year, stating that the parent did not show that she was obligated to pay tuition under the contract or that the private school would seek to hold her liable for contract.

Alternatively, the district interposes a cross-appeal alleging that the IHO erred by failing to determine whether the district offered the student a FAPE and whether RFTS was an appropriate placement for the student. The district alleges that it offered the student a FAPE for the 2010-11 school year and notes that the parent failed to articulate a basis in her petition for a contrary finding. The district also asserts that RFTS was not an appropriate placement for the student and that equitable considerations did not favor the parent's request for relief. The district concedes that the IHO's analysis of equitable considerations was flawed but asserts that the result was correct.

The parent answers the district's cross-appeal, alleging that the district did not offer the student a FAPE and, specifically, that: the district's reliance on case law to support its position that its failure to conduct an FBA did not amount to a denial of a FAPE is misplaced; the hearing record shows that the staff at the recommended placement were not properly trained or qualified to address the student's significant behavioral needs ; and the recommended assigned classroom did not provide sufficient 1:1 instruction to meet the student's needs. The parent also alleges that RFTS was an appropriate placement for the student and that equitable considerations favor her request for relief.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012], cert. denied 2013 WL 1418840 [June 10, 2013]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for

developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic,

developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Standing

The IHO erred in finding that the parent lacked standing based on his determinations that the parent had not paid any tuition or incurred out-of-pocket expenses and that the student's private school undertook the financial risk of the student's education rather than the student's parent (see IHO Decision at pp. 14-15). Under the IDEA and New York State law, a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). It was permissible for the parent to file a due process complaint notice asserting that the district had failed to offer the student a FAPE on the basis that the March 2010 CSE had not complied with the procedural requirements set forth in the IDEA and that the 2010 IEP was substantively inadequate and not reasonably calculated to enable the student to receive appropriate educational benefits (see Winkelman, 550 U.S. at 531, 533; 34 CFR 300.507[a], 8 NYCRR 200.5[i]; see also Parent Ex. A).

The IHO mistakenly mixed two related inquiries—on the one hand, whether the parent had standing to pursue her claims that the district failed to offer the student a FAPE, and on the other,

whether the evidence in the hearing record supported her request for relief—and, as a result, unfortunately failed to address the heart of the parties' disagreement, to wit, whether the district failed to offer the student a FAPE. Although courts have disagreed on what is sufficient to constitute "injury in fact," the only courts that have addressed this issue in New York have found that the denial of a FAPE or of a procedural right created by the IDEA is sufficient to satisfy the "injury in fact" requirement (S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 359-360 [S.D.N.Y.2009] [finding that a denial of a FAPE constituted an injury in fact which could be redressed by direct retrospective payment, but declining to address whether direct retrospective payment was an allowable remedy under the IDEA]; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, at *6 [S.D.N.Y. March 14, 2011] [finding a denial of a FAPE or a procedural right under the IDEA was a statutorily created injury in fact to satisfy standing]; see also Heldman v. Sobol, 962 F.2d 148, 154-56 [2d Cir. 1992] [holding that the IDEA may create a statutory right, the alleged violation of which is an injury in fact]; see also Fetto v. Sergi, 181 F. Supp. 2d 53, 66 n.22 [D. Conn. 2001] [finding a denial of a FAPE was a statutorily created injury in fact]; but see Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007] [parents lacked standing on claim for reimbursement for services where student's estate, rather than parents, had actually expended resources]; Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005] [finding a denial of a FAPE as an injury in fact could not be redressed by tuition reimbursement because the student's education had already been paid for by the student's father's insurance carrier]; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006] [finding that the student and parent lacked an injury in fact because the private school had paid for education of student, rather than student or parent]).[3]

Because courts have determined that a denial of a FAPE by a district is an injury in fact under the IDEA and because the parent's due process complaint notice includes such an assertion, the only other relevant factors here in determining standing are (1) whether the petitioner can maintain a proceeding as a parent of the student, and (2) whether the relief requested is likely to redress the injury (see Raines v. Byrd, 521 U.S. 811, 818-19 [1997]; S.W., 646 F. Supp. 2d at 359, E.M., 2011 WL 1044905, at *6; see also Parent Ex. A).[4, 5] In this case, there is no dispute that the petitioner is the parent of the student within the meaning of the IDEA (Tr. p.193; see 20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; see also 8 NYCRR 200.1[ii]; Fuentes v. Bd. of Educ., 569 F.3d 46 [2d Cir. 2009]; Fuentes v. Bd. of Educ. 12 N.Y.3d 309, 314 [2009]). Consistent with the courts'

[3] The IHO relied heavily on one particular finding in S.W., wherein the court reasoned that, because the parent was relieved from any financial liability by the terms of the contract with the private school, the parent did not have a financial harm to satisfy the injury in fact requirement of standing (S.W., 646 F. Supp. 2d at 356-58). The IHO appears to have overlooked the subsequent finding in S.W. that the parent had standing based on a denial of FAPE, an injury in fact created by the IDEA (id. at 359). Because the parent in this matter also has standing based on a claim for the denial of FAPE as an injury in fact, I need not address whether the parent also had a financial harm sufficient to support standing (see E.M., 2011 WL 1044905, at *6).

[4] New York State regulations define the term "parent" (8 NYCRR 200.1(ii); see also Fuentes v. Bd of Educ. of the City of N.Y., 569 F.3d 46 [2d Cir. 2009]; Fuentes v. Bd. of Educ. of the City of N.Y., 12 N.Y. 3d 309, 314 [2009]).

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

determinations in S.W. and E.M., a parent's request for direct retrospective payment would redress the denial of a FAPE in circumstances where a private school has provided an education to the student and the parent has not made any payments to the private school (see S.W., 646 F. Supp. 2d at 359; E.M., 2011 WL 1044905, at *6). A request for tuition reimbursement could also redress the denial of a FAPE in circumstances where a private school has provided an education to the student and the parent has made or will make payments to the private school (see Burlington, 471 US at 369-370). The inquiry regarding standing ends here, without needing to determine whether the relief requested is in fact available (S.W., 646 F. Supp. 2d at 359; E.M., 2011 WL 1044905, at *6; see New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *7-8 [S.D.N.Y. March 17, 2010] [finding the party had standing even though the relief requested was ultimately unavailable]).[6]

The IDEA and New York State law specifically provide that an IHO must make a substantive determination based on whether the student "received a free appropriate public education." (20 U.S.C. § 1415[f][3][E]; 8 NYCRR 200.5[j][4]; see 34 C.F.R. 300.513[a]). By terminating this action based on standing, the IHO—albeit with good intentions—did not address the alleged violations regarding the failure of the district to offer the student a FAPE set forth in the parent's due process complaint notice or make a substantive determination on whether the district offered the student a FAPE and to address, as necessary, the relief requested.

Because the IHO (1) erred in concluding that the parents lacked standing, and (2) did not address the parent's claims that the student was denied a FAPE or conduct an analysis of the Burlington/Carter factors, I will remand the matter to the IHO for a determination on the merits of the claims set forth in the parent's July 2011 due process complaint notice (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F.Supp.2d 570, 589 [S.D.N.Y. 2013]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also Parent Ex. A).

B. Other Matters

As a final matter, I will briefly address the parent's allegation that the IHO's reference to Schaffer v. Weast, 546 US 49 (2005) indicates that he applied the incorrect burden of proof with respect to the parent's claims in the due process complaint notice (IHO Decision at p. 10).

[6] For a more thorough analysis of relief and the viability of prospective and retrospective direct payment as an available remedy, there are a number of SRO decisions applying the district court's ruling in Mr. and Mrs. A, 769 F. Supp. 2d at 406 in the context of relief but only after making determinations that the district offered a FAPE , the ' unilateral placement was appropriate, and equitable considerations favored an award of the costs of the private school tuition (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-106; see also P.K. v. New York City Dep't of Educ. (Region 4), 819 F.Supp.2d 90, 118 [E.D.N.Y. 2011], aff'd, 2013 WL 2158587 [2d Cir. May 21, 2013]). With respect to the question raised by the IHO, regarding whether a parent may seek tuition reimbursement without first making a payment of tuition costs or incurring out-of-pocket expenses to a unilateral placement, I note that, while there is no requirement that relief can only be sought under such circumstances, attainment of such relief is premised upon monies actually expended. As a consequence, an order by an IHO providing for tuition reimbursement is appropriately coupled with a parent showing proof of payments actually made (see e.g., Application of the Dep't of Educ., Appeal No. 11-131). Additionally, I note that, in considering appropriate relief in a tuition reimbursement case, an IHO may consider whether the parent is obligated to repay a third party for payments made to a unilateral placement by that third party.

Because the IHO decision references Schaffer only with respect to the parent's burden of proving that the unilateral placement of the student was appropriate, I decline to find that the IHO made a reversible error regarding the burden of proof. However, for the purposes of clarity, I note that, upon remand, the burden of proof is to be placed on the district during an impartial hearing, except that, insofar as the is parent seeking tuition reimbursement for the unilateral placement at RFTS, she has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G., 2010 WL 3398256, at *7).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the IHO dated February 16, 2011 is vacated and the matter is remanded to the same IHO to determine whether the district denied the student a FAPE as a result of the allegations set forth in the parent's' July 2011 due process complaint notice; and

IT IS FURTHER ORDERED that if the IHO determines that the district failed to offer the student a FAPE, the IHO shall determine whether the unilateral placement at RFTS was appropriate for the student and, if necessary, whether equitable considerations support the parent's claim; and

IT IS FURTHER ORDERED that if the IHO who issued the February 16, 2011 decision is unavailable, another IHO shall be appointed.

Dated: **Albany, New York**
September 20, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER