



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-012

Application of a STUDENT WITH A DISABILITY, by her 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:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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 his request for the issuance of a "Nickerson letter" for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

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

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

III. Facts and Procedural History

On July 20, 2011, the CSE convened to conduct the student's initial review and to develop an IEP for the 2011-12 school year (see Dist. Exs. 7 at pp. 1, 6-7, 10-11; 17 at p. 1; 18 at p. 1). Finding the student eligible for special education and related services as a student with a learning disability, the July 2011 CSE recommended a 12:1+1 special class placement in a community school with related services consisting of one 30-minute session per week of counseling in a small group (id. at pp. 1, 6, 10).¹ The July 2011 CSE also developed annual goals to address the student's needs (id. at pp. 4-6).

By final notice of recommendation (FNR) dated October 14, 2011, the district summarized the special education and related services recommended in the July 2011 IEP, and identified the

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

particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 9).

On or about September 10, 2012, the student began attending a 12:1+1 special class placement in a district public school (see Tr. pp. 41-42; see generally Tr. pp. 22-31, 38-39; Dist. Ex. 1 at p. 1).

A. Due Process Complaint Notice

By a due process complaint notice dated September 17, 2012, the parent requested an impartial hearing based upon the district's failure to provide the student with "[s]pecial [e]ducation [s]ervices" in a "[s]pecial [e]ducation class" beginning October 31, 2011 (IHO Ex. I at p. 1). In addition, the parent asserted that the district failed to conduct an annual review on or about July 17, 2012, and since the student's needs had "drastically changed," the parent requested that the district review and update the student's IEP, and consider a 12-month school year program for the student (id. at pp. 1-2). As relief, the parent requested an order directing the district to issue a "Nickerson letter" (id. at p. 2).²

B. Events Post-Dating the Due Process Complaint Notice

On September 25, 2012, the parties executed a Resolution Agreement for the "2011-2013" school years, within which the parties agreed to hold an "IEP meeting" and to complete a functional behavioral assessment (FBA) and behavior intervention plan (BIP) by November 6, 2012 (Dist. Ex. 6 at pp. 1-3).³ By notice dated October 9, 2012, the district requested the parent's consent to evaluate the student, and on October 21, 2012, the parent consented to the request (see Dist. Ex. 15).⁴

By letter dated November 13, 2012, the parent indicated that based upon the "meeting" held on September 25, 2012 with the district representative and staff, the parties agreed to reevaluate the student and reconvene a meeting on November 7, 2012 (see Dist. Ex. 1 at p. 1). The parent further indicated that based upon the "outcome" of the meeting held on November 7, 2012—as well as the district's past delay in providing the student with special education—he requested

² While not described in the hearing record, a "Nickerson letter" is designed as a remedy for a systemic denial of a free appropriate public education (FAPE) imposed by a 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. v. New York City Dep't of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The remedy of a Nickerson letter is intended to address the situation in which a student has not been evaluated or placed in a timely manner, and 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]; R.E., 694 F.3d at 192 n.5; see also Application of the Dep't of Educ., Appeal No. 13-209; Application of the Dep't of Educ., Appeal No. 13-190; Application of a Student with a Disability, Appeal No. 12-184; Application of the Dep't of Educ., Appeal No. 09-114).

³ In the Resolution Agreement, the parent dated his signature as "September 25, 2012;" however, without explanation, the district representative dated her signature as "July 25, 2012" (Dist. Ex. 6 at p. 2).

⁴ Although the Resolution Agreement refers solely to an "FBA/BIP" with respect to the evaluation of the student, the consent form signed by the parent notes that the assessment of the student authorized by the form "may include a psycho-educational evaluation, a classroom observation, and other appropriate assessments or evaluations."

that the district issue a Nickerson letter to allow the student to attend a nonpublic school (id. at pp. 1-2). In addition, the parent noted that although the district agreed to reevaluate the student prior to the November 7, 2012 meeting, the district did not administer a "new psychological evaluation" and the "IEP" was not "ready" to be reviewed (id. at p. 2). As a result, the parent requested that the district issue a Nickerson letter (id.). Based upon the evidence in the hearing record, the district finalized the student's IEP by November 20, 2012 (see Dist. Exs. 3; 4 at pp. 1-2; 10; 11 at pp. 1-4; 14 at pp. 1-2; 15).

C. Impartial Hearing Officer Decision

On December 11, 2012, the parties conducted an impartial hearing in this matter (see Tr. pp. 1-50). In a decision dated December 17, 2012, the IHO determined that the district failed to provide the student with his "mandated program during the 2011-12 school year," and contrary to the district's position, the parent provided consent for the student to receive special education services on October 31, 2011 (IHO Decision at pp. 2-4). However, while the IHO determined that this case "precisely" represented the situation intended to be addressed by the remedy of a Nickerson letter, the award of a Nickerson letter at this time was no longer appropriate given the expiration of the school year at issue—namely, the 2011-12 school year—as well as the student's placement in a 12:1+1 special class for the 2012-13 school year and the parent's satisfaction with the student's placement (see id. at pp. 3-5). The IHO further indicated that to the extent that the parent's due process complaint notice included "statements" regarding a "hoped-for review" of the student's IEP and a "desire" for the consideration of a 12-month school year program for the student, these issues did not "constitute issues presented for determination in this proceeding," and thus, the IHO confined the issues raised in the parent's due process complaint notice as only relating to the student's "educational program" for the 2011-12 school year (id. at p. 4). Having denied the parent's request for a Nickerson letter as relief, the IHO fashioned an equitable remedy and ordered the district to provide the student with additional educational services consisting of 93 hours of "remedial, private one-to-one tutor instructional services," 31 sessions of counseling services—provided either through the student's then-current school or through the issuance of related services authorizations (RSAs)—and transportation services (id. at pp. 4-6). The IHO also ordered that the student must use the additional education services during the 2012-13 school year, or the services would otherwise be forfeited (id. at pp. 5-6).

IV. Appeal for State-Level Review

The parent appeals, and seeks to overturn the IHO's decision denying his request for a Nickerson letter. The parent also asserts that the student's "IEP" did not address concerns noted in his due process complaint notice regarding a pediatrician diagnosing the student as having "[d]yslexia," a "math disorder," and an attention deficit hyperactivity disorder (ADHD). In addition, the parent contends that although he requested a reevaluation of the student, the district failed to evaluate the student. Consequently, the parent seeks a Nickerson letter as relief, and requests a neuropsychological evaluation of the student. Finally, the parent attaches additional documentary evidence to the petition.

In an answer, the district argues that although the IHO erroneously concluded that he had jurisdiction to award a Nickerson letter as relief, the IHO correctly denied the parent's request and appropriately awarded additional educational services as an equitable remedy. In addition, the

district asserts that any issues now raised by the parent in the petition regarding the 2012-13 school year—including issues related to the development of the November 2012 IEP—must be dismissed because the parent did not raise these issues in the due process complaint notice. Similarly, the district contends that the parent's request for a neuropsychological evaluation of the student must also be dismissed.^{5,6}

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10

⁵ As neither party appeals the IHO's finding that the district failed to offer the student a FAPE for the 2011-12 school year or the IHO's award of additional educational services consisting of 93 hours of individual tutoring and 31 sessions of counseling services, these determinations are final and binding on both parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

⁶ Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, although the district does not object to the submission or consideration of the additional documentary evidence attached to the petition, a brief review of the documents indicates that they were available at the time of the impartial hearing but not offered as evidence, and are not now necessary to consider in order to render a decision; as such, I decline to consider them on appeal.

[S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No.

07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. As noted above, the district asserts that any issues now raised by the parent in the petition regarding the 2012-13 school year, including issues related to the development of the November 2012 IEP and the request for a neuropsychological evaluation of the student, must be dismissed because the parent did not raise these issues in the due process complaint notice. The district also notes in the answer that the IHO properly confined the impartial hearing solely to those issues raised in the due process complaint notice concerning the 2011-12 school year. While an independent review of the entire hearing record does not support the district's contentions, it appears that issues raised by the parent in the due process complaint regarding the 2012-2013 school have been resolved—either wholly or in part—by the resolution agreement executed between the parties.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[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 300.508[d][3][ii]; 8 NYCRR

200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8).

Upon review—and contrary to the district's assertion and IHO's finding—I find that the parent's due process complaint notice can be reasonably read to include challenges to the 2012-13 school year. Here, the parent specifically alleged that the district failed to conduct an annual review for the student on or about July 2012, which directly pertains to the 2012-13 school year (see IHO Ex. I at p. 1). In addition, the parent alleged in the due process complaint notice that the student's needs changed, and the parent requested that the district review and update the student's IEP, and consider a 12-month school year program for the student (id. at pp. 1-2). As the 2011-12 school year had expired at the time of the parent's due process complaint notice, it is reasonable to conclude that these particular allegations also referred to the 2012-13 school year (id.). Moreover, the evidence in the hearing record indicates that the parent asked for a Nickerson letter for the 2012-13 school year (see Tr. pp. 41-46).

However, as noted above, the parties executed a Resolution Agreement related to issues for the "2011-2013" school years, and as explained more fully below, even if the parent properly raised issues regarding the 2012-13 school year in the due process complaint notice that have not been fully resolved through the Resolution Agreement, the parent would not be entitled to the remedy of a Nickerson letter as relief.

B. Nickerson Letter

In this case and as the district correctly argues, 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, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; 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—and contrary to the IHO's conclusion—neither an IHO, nor an SRO, has 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. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Aug. 5, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd sub nom. R.E., 694 F.3d at 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, at 289–90 n.15 [S.D.N.Y. 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012]; 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. School Dist., 2009 WL 261470, *7-*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 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]).

Furthermore, in this case, the IHO resolved the issue of whether the district offered the student a FAPE for the 2011-12 school year in favor of the student and awarded relief to the student, which the parent neither appeals nor otherwise asserts any disagreement with in his appeal, and further relief fashioned in the form of a Nickerson letter that is styled after the relief in Jose P. is not warranted in this case.⁷ Under the circumstances, an appropriate equitable remedy would be an award of additional educational services at district expense—which the IHO has already awarded as relief.⁸ To the extent that the parent seeks the issuance of a Nickerson letter to prospectively fund a nonpublic school placement, the IHO directed the district to provide the student with additional educational services, which again, under the circumstances, constitutes an appropriate equitable remedy that the parent neither appeals nor otherwise asserts any disagreement with in his appeal.

Consequently, the parent's request for a Nickerson letter as a remedy must be denied.

VII. Conclusion

Based on the above, the evidence in the hearing record supports the IHO's determination.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 31, 2014**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

⁷ In addition, it is unclear whether the parent was asking the IHO, and now an SRO, to determine if the student was a member of the class of plaintiffs in Jose P. and to enforce the Court's injunction in that case or whether the parent was simply seeking similar relief upon a similar theory (see Application of the Dep't of Educ., Appeal No. 11-105; Application of the Dep't of Educ., Appeal No. 11-016; Application of the Dep't of Educ., Appeal No. 10-115).

⁸ Courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief; courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove, 557 U.S. 230). Notably, the parent does not assert that the impartial hearing officer abused his discretion in either the relief awarded or in the relief denied.