The University of the State of New York

The State Education Department
State Review Officer
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No. 13-190

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for petitioner, Neha Dewan, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which determined that that the district failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to issue a Nickerson letter to the parent. The appeal must be sustained.

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

Because the IHO did not hear testimony from any witnesses and did not enter any exhibits into the record, the hearing record does not provide a basis to review or summarize the factual and procedural background of this case (Tr. pp. 1-21).[1] On appeal, however, the district submits two exhibits: the April 9, 2013 IEP (Pet. Ex. A) and the May 16, 2013 Final Notice of Recommendation (Pet. Ex. B). The April 9, 2013 IEP reflects that on April 9, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (Pet. Ex. A at p. 11). The CSE determined the student was eligible for special education services as a student with an emotional disturbance (id. at p. 1). The CSE recommended a 12-month school year program consisting of, among other things, a 12:1+1 special class in a specialized school (id. at p. 7). The CSE also recommended related

[1] The hearing record consists of a 21-page transcript (Tr. pp. 1-21).

services consisting of one 30-minute session per week of 3:1 counseling; and one 30-minute session per week of 1:1 counseling (id.). In addition, the CSE recommended that the student receive a behavior intervention plan (BIP) (id. at p. 2). The CSE considered but rejected a 12:1+1 special class in a community school because the student's "social emotional and behavioral difficulties [were] too severe to be managed in a special class in a community school" (id. at p. 11).

The second exhibit submitted by the district, the May 16, 2013 Final Notice of Recommendation (FNR), reflects that the district summarized the services recommended by the April 9, 2013 CSE and notified the parent of the particular public school site to which the student was assigned and at which her IEP would be implemented for the 2012-13 school year (Pet. Ex. B). The FNR also provided contact information for an individual who could arrange a site visit for the parent (id.). There is no documentary evidence or testimony from the parent in the hearing record indicating whether the parent received the FNR.

A. Due Process Complaint Notice

The parent's due process complaint notice is not contained in the hearing record (IHO Decision at p. 2). The district, however, submitted a certified copy of the parent's one-page June 5, 2013 due process complaint, in which the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) (Due Process Complaint Notice). With regard to the April 2013 IEP, the parent requested that the student be placed in a smaller class in a "different setting" (id.). The parent also appears to claim that the student requires further evaluation with regard to "her out-side [sic] services," which would provide the CSE with "a better idea of [the student's] needs [and] education" (id.). The parent stated that she "disagree[d]" with the CSE's recommendation for placement in a special school (id.). Although the issue requires further clarification, it appears that the parent was also concerned that she "wasn't aware of or given proper info[rmation or] understanding" regarding either the placement set forth in the IEP, the assigned public school site identified in the FNR, or both (id.). The parent also indicated that she "did not sign" a letter, but the statement is partially illegible (id.).

B. Impartial Hearing Officer Decision

An impartial hearing was conducted on August 8 and September 4, 2013 (Tr. pp. 1, 11). The transcript of the impartial hearing reveals that during the course of the hearing, the IHO, the district's representative, and the parent engaged in lengthy off-the-record discussions about the case (Tr. p. 3). At the hearing the IHO did not hear testimony from any witnesses, and no exhibits were entered into the record (Tr. pp. 1-21).

By decision dated September 4, 2013, the IHO issued a one-sentence decision stating: "Because no Final Notice of Recommendation was issued for this child, who was referred for evaluation on February 26, 2013, and for whom a (late) IEP was generated on April 19, 2013, I

find that the parent is entitled to receive a P-1 letter[,] and I Order that it be issued immediately" (IHO Decision at p. 2).[2]

IV. Appeal for State-Level Review

The district appeals the IHO's determination that the parent was entitled to a Nickerson letter for the district's purported failure to offer a timely placement recommendation by June 15, 2012, in violation of the Jose P. federal court stipulation. In support of its appeal, the district first argues that the IHO failed to "set forth the reasons and the factual basis for the determination" (8 NYCRR § 200.5[j][5][v]). Specifically, the district contends that the IHO's determination that the parent was entitled to a Nickerson letter must be annulled because no exhibits were entered into evidence and testimony was not elicited during the hearing.

Second, the district argues that the IHO erred in considering the issue of whether the parent was entitled to a Nickerson letter because the parent failed to request a Nickerson letter in her due process complaint notice. Noting that a due process complaint notice is required to describe "the nature of the problem . . . including facts relating to such problem," the district contends that, absent the parties' agreement, the IHO should not have considered an issue that was not raised in the parent's due process complaint notice (8 NYCRR § 200.5[i][iv]; R.E., 694 F.3d at 187 n.4; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]).

Third, the district argues that the IHO erred in ordering the district to issue to the parent a Nickerson letter. Specifically, the district contends that the IHO and SRO lack jurisdiction to issue a Nickerson letter pursuant to the Jose P. stipulation because authority over class action suits and consent orders issued by the lower federal courts rests with the district courts and circuit courts of appeals (citing 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; Weight Watchers Int'l, Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d 167; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] ["It has been held that violations of the Jose P. consent decree must be raised in the court that entered the order."]).

Fourth, the district argues that even if the IHO had jurisdiction to order the issuance of a Nickerson letter where "no [FNR] was issued for [the student]," the IHO erred in doing so because no evidence in the hearing record existed to demonstrate that the student had not been evaluated in a timely fashion (IHO Decision at p. 2). Further, the district argues that consistent with State and federal regulations the April 9, 2013, IEP was offered to the parent prior to the start of the

[2] A "P-1 letter," also called a "Nickerson letter," is a remedy for a systemic denial of a 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. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). 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.; R.E., 694 F.3d at 192, n.5; 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).

2013-14 school year, which began on July 1, 2013 (citing Educ. Law § 2[15]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][l][ii]).

The parent has not filed an answer.

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., 694 F.3d at 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 [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

For the reasons that follow, the IHO's decision is improper and must be vacated.

First, in this case, where the IHO failed to hear any testimony and failed to enter any exhibits into the hearing record, the IHO had no record evidence or testimony upon which to base any finding or determination. State regulations provide that an IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 C.F.R. § 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO has the discretion to limit or exclude evidence or testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c], [d], [e]), it is also an IHO's responsibility to ensure that there is an adequate record upon which to permit meaningful review (Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of a Child with a Disability, Appeal No. 00-021; Application of the Bd. of Educ., Appeal No. 97-92).

State regulations further provide in relevant part that "[t]he decision of the [IHO] shall be based solely upon the record of the proceeding before the [IHO], and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity (see Application of a Student with a Disability, Appeal No. 10-007; Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-138; Application of a Student with a Disability, Appeal No. 08-043). Moreover, State regulations further require that an IHO "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any IHO decision (see Application of the Dep't of Educ., Appeal No. 09-092; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-064).

Here, where testimony has not been heard and exhibits have not been entered into the hearing record before the IHO, there was no factual or legal basis for the IHO to render his decision. Moreover, the hearing record does not adequately permit meaningful review of the IHO's September 4, 2013 decision. In addition, the decision of the IHO did not adequately identify the IHO's reasons for his determinations, or lack thereof. There is no explanation of how the IHO reached his conclusion. There is insufficient application of the law to the facts. The IHO's failure to cite with specificity to the facts in the hearing record and the law upon which the decision is based, and failure to provide the reasons for his determinations, is not helpful to the parties in understanding the decision. Based on the foregoing, the decision does not comport with State regulations at 8 NYCRR 200.5(j)(5)(v) requiring the decision to set forth the reasons and the

factual basis for the determination. Moreover, the decision improperly failed to address the parent's claims raised in her due process complaint and reached a conclusion void of evidentiary or testimonial support.

Second, notwithstanding the deficient hearing record, the IHO exceeded his jurisdiction in directing the district to issue a Nickerson letter to the parent because the IHO and SRO do not have jurisdiction over matters related to the stipulation reached in the Jose P. class action suit. 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 (Jose P., 553 IDELR 298; see R.E., 694 F.3d at 192, n.5; M.S., 734 F. Supp. 2d at 279; see also 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). 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., Luigino's, Inc., 423 F.3d at 141-42; 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., 734 F. Supp. 2d at 279; E.Z.-L., 763 F. Supp. 2d at 594; Application of a Student with a Disability, Appeal No. 12-039 ["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."]), and "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (F.L., 2012 WL 4891748, at *11; see P.K. v. New York City Dept. of Educ. (Region 4), 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]). Therefore, neither the IHO nor SRO have the 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, *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd sub nom. R.E v. New York City Dep't of Educ., 694 F.3d 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L., 2012 WL 4891748, at *11-*12; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]).

Third, assuming, for the sake of argument, that the IHO or I had jurisdiction and an adequate hearing record on the issue of a Nickerson letter to the parent, the documentary evidence submitted by the district on appeal does not lend support to the IHO's decision (Pet. Exs. A; B). The documentary evidence offered by the district establishes that on or about May 16, 2013, the district issued an FNR to the parent (Pet. Ex. B).[3] Although the hearing record does not establish whether the parent received the FNR, the IHO still lacked jurisdiction to direct the district to issue a Nickerson letter to the parent (see Application of a Student with a Disability, Appeal No. 12-111

[3] On appeal, the district represents that at the time of the hearing, the district representative "mistakenly believed" that a FNR had not been issued to the parent because a search of the district's computer system did not indicate that an FNR existed for the student in this case (Pet. ¶ 13; see also Tr. 15-16). In fairness to the IHO, the district also represents on appeal that the FNR apparently "had not yet been uploaded" to the district's computer system at the time of the impartial hearing (Pet. ¶ 13).

[reversing for lack of jurisdiction the IHO's award of a Nickerson letter where the district had failed to issue an FNR]). Moreover, the April 9, 2013, IEP and May 16, 2013 FNR were offered to the parent prior to the start of the 2013-14 school year, which began on July 1, 2013 (Educ. Law § 2[15]). Thus, consistent with State and federal regulations an IEP was "in effect at the beginning of [the] school year" (34 CFR 300.323[a]; 8 NYCRR 200.4[e][l][ii]).

VII. Conclusion

For the reasons stated herein, this matter is remanded for the purpose of allowing testimony and entering documentary evidence into the hearing record related to the district's recommended placement for the student for the 2013-14 school year. A minimum hearing record upon which to render a decision is required. At a minimum, the district is directed to disclose to the parent five days prior to the impartial hearing and submit into evidence for the IHO's consideration: 1) the due process complaint and any amendment thereto, 2) a prior written notice, if any, issued in relation to the student's April 2013 IEP, 3) the April 2013 IEP, 4) all evaluative information considered by the CSE in formulating the student's April 2013, 5) all progress reports resulting from prior IEPs for the student, if any, from April 2012 through April 2013, and 6) the May 16, 2013 FNR submitted in this appeal. The parent shall have the opportunity to cross-examine and confront the district's witnesses, as well as present evidence, including testimony, in response to the district's witnesses' testimony. Upon the conclusion of the testimony, the IHO shall render a written decision consistent with regulatory requirements which applies correct legal standards and addresses the claims and arguments of the parties, as appropriate.

In light of the determinations above, the district's remaining arguments need not be addressed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the September 4, 2013 decision of the IHO is reversed in its entirety; and

IT IS FURTHER ORDERED that this matter be remanded to the IHO who shall, unless the parties otherwise agree, reconvene the impartial hearing, hear testimony and enter exhibits into the hearing record consistent with this decision, and render a written decision within 30 calendar days of receipt of this decision; and

IT IS FURTHER ORDERED that the district shall, at a minimum, disclose to the parent and offer into evidence for the impartial hearing officer's consideration all documentary evidence submitted in connection with this appeal, and

IT IS FURTHER ORDERED that if the IHO who issued the September 4, 2013 decision is not available to reconvene the impartial hearing, a new IHO shall be appointed.

Dated: **Albany, New York**
October 25, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER