The University of the State of New York

The State Education Department
State Review Officer
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No. 14-026

Application of a STUDENT WITH A DISABILITY, by his parents, 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, Francesca J. Perkins, 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. Petitioners (the parents) appeals from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Seton Foundation for Learning (Seton) for the 2013-14 school year. Respondent (the district) cross-appeals from the IHO's determination that the district was required to identify the specific school site to which the student was assigned by June 15. The appeal must be dismissed. The cross-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

On May 23, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (see Dist. Ex. 1). Finding the student eligible for special education and related services as a student with autism, the May 2013 CSE recommended a 12-month program in an 6:1+1 special class placement in a specialized school, special transportation, adapted physical education, and the following related services: one 30-minute session per week of individual counseling, four 30-minute sessions per week of individual occupational therapy (OT), two 30-minute session per week of individual physical therapy, four 30-minute session per week of individual speech-language therapy, and two 50-minute sessions per year of parent counseling and training in a group (id. at pp. 1, 13-15, 17-18). By final notice of recommendation (FNR) dated June 14, 2013, the district summarized the special education programs and related services recommended by the May 2013 CSE, and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex. 2).

A. Due Process Complaint Notice

By due process complaint notice dated July 3, 2013,[1] the parents requested an impartial hearing and asserted that the district failed to offer the student a free appropriate public education (FAPE) in a timely manner (Supplemental Ex. I at pp. 1-6). Specifically, the parents asserted that the student's FNRs were untimely because they were received after the district's June 15 deadline to timely offer the student a FAPE (id. at pp. 3-6). The parents contended that pursuant to the district's "special education placement policy," because the FNRs were not timely, the student was not offered a timely FAPE and the district was required to issue a "Nickerson letter" to the parents (id. at pp. 2-3, 6).[2] The parents also asserted that, in the alternative, the June 15 deadline itself did not provide them with a reasonable amount of time to decide whether to leave the student in his private school placement or accept the public school site assignment, and therefore they were deprived of a meaningful opportunity to participate in the placement decision (id. at pp. 2, 6-7). The parents next argued that the particular recommended public school site was not appropriate for the student because it was overcrowded and unsafe, and that the parents' unilateral placement at Seton was appropriate for the student (id. at pp. 7-13). The parents requested reimbursement for a tuition deposit they paid to Seton, and direct funding of the balance of the student's tuition at Seton for the 2013-14 school year (id. at p. 2).

B. Impartial Hearing Officer Decision

On December 9, 2013, the parties proceeded to an impartial hearing, which concluded on December 17, 2013 after three days of proceedings (see Tr. pp. 1-233). In a decision dated January 7, 2014, the IHO found that the district offered the student a FAPE for the 2013-14 school year (IHO Decision at pp. 2-6).[3] Initially, the IHO found that the district was required to provide parents

[1] The parents' July 3, 2013 due process complaint notice was not formally entered into the hearing record (see, e.g., IHO Decision at p. 7). However, it is clear from the hearing record that the parties and the IHO had the parents' due process complaint notice and the attachments thereto available to them at the time of the impartial hearing, and the contents of the due process complaint notice are not in dispute (see Tr. pp. 12, 14, 16-17, 25, 42, 57-58, 64, 69, 78, 162-63, 211, 219, 222; IHO Decision at p. 2). Under State regulation, inclusion of these documents in the administrative record became mandatory effective February 1, 2014 (after the IHO proceeding concluded); however, there is no reason at this juncture not to include them for purposes of completeness of the hearing record (8 NYCRR 200.5[j][5][vi][a]). The due process complaint notice and its attachments are accordingly made part of the record on appeal, and will be referred to hereinafter as Supplemental Exhibit I.

[2] Although not described in the hearing record or in the IHO's decision, a "Nickerson letter" is a remedy for a systemic denial of a free appropriate public education (FAPE) that was imposed by the United States District Court for the Eastern District of New York based upon a class action lawsuit, available to parents and students who are class members in accordance with the terms of a consent order (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). 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 id.).

[3] The IHO also issued an interim order dated December 11, 2013 that concerned an evidentiary dispute and provided for three district witnesses to appear via telephone (Interim IHO Decision at p. 2). However, to the extent the IHO indicated on the first hearing date that the district had no obligation to disclose the names of the witnesses it intended to call to testify five days before the impartial hearing (Tr. pp. 6-7; see 34 CFR 300.512[a][3]), I note that the United States Department of Education has opined, interpreting similar language in the regulations to the predecessor statute to the IDEA, "that names of witnesses to be called and the general thrust of their testimony should be disclosed" (Letter to Bell, 211 IDELR 166 [OSEP 1979]). State regulations also expressly contemplate the "exchange of witness lists" (8 NYCRR 200.5[j][3][xvii]).

of students receiving extended school year services with FNRs by June 15, and the initial FNR in this matter was four days late (id. at pp. 2-3). The IHO found that this defect constituted a procedural error that, under the circumstances of this case, did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision making process regarding the provision of FAPE to the student, or cause a depravation of educational benefits (id.). Regarding the particular school site recommended for the student, the IHO found that the parents' assertions that the school did not "meet State or [district] standards" and was unsafe were not borne out by the hearing record (id. at pp. 3-4). Although the IHO found that the district offered the student a FAPE, he found that the failure to provide a timely FNR was a "violation of procedural regularity" and ordered that.

> the CSE meet to conduct the child's annual review [for the 2014-15 school year] no later than March 1, 2014 and that prior written notice be provided to the family of any proposed offer of placement for [the] 2014-15 [school year] no later than May 1, 2014 so that the parent has ample time to seek a due process hearing to remedy any dilatory meeting or offer prior to the June 15 final deadline.

(IHO Decision at p. 3).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in determining that their receipt of the FNRs after June 15 and the district's failure to issue a Nickerson letter did not constitute a denial of FAPE for the 2013-14 school year. The parents contend that the failure to deliver an FNR to the parent before June 15 is a violation of the consent order settling the class action lawsuit in Jose P. v. Ambach (553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The parents contend that the student is a member of the Jose P. class and that the consent order provided parents with specific rights with respect to the selection of school placement sites, which have not been provided. The parents further contend that the New York State Education Department was a party to the Jose P. suit and is charged with ensuring that the district complies with the judgment. The parents also contend that the failure to issue an FNR in this matter by June 15 impeded the student's right to a FAPE in a timely manner, constituting a denial of FAPE under the IDEA. The parents assert that SROs have the authority and jurisdiction to rule on matters involving the Jose P. consent order, and to decide if the consent order has been violated. The parents contend that if the June 15 deadline is missed, the district must issue a Nickerson letter to the parents. The parents argue that the lack of a Nickerson letter therefore caused a deprivation of educational benefits and a denial of FAPE. The parents also assert that their unilateral placement of the student at Seton was appropriate, that equitable considerations favor their request for reimbursement, and request that the IHO's decision be annulled.

In an answer and cross-appeal, the district asserts that it offered the student a FAPE for the 2013-14 school year and the parents' claim that the district's alleged failure to timely issue an FNR deprived the student of a FAPE is without merit and was properly dismissed by the IHO. The district also argues that the recommended public school site was appropriate and that the parents' arguments in the due process complaint notice to the contrary were speculative. The district asserts that the unilateral placement at Seton was not appropriate because the hearing record is unclear regarding whether Seton provides the student with adequate related services. Lastly, the district contends that equitable considerations do not favor the parents because the parents failed to provide sufficient notice of their unilateral placement of the student and did not establish that direct funding of the student's tuition at Seton was warranted. In its cross-appeal, the district contends that the IHO correctly determined that the alleged failure of the district to provide an FNR by June 15 did not lead to a deprivation of FAPE, but erred in determining "that the IDEA should be interpreted to contain a June 15 deadline" in light of the Jose P. stipulation and consent order.[4]

In a reply and answer to the cross-appeal, the parents restate and provide additional argument for the claims that the IHO erred in finding that the failure to provide an FNR by June 15 did not result in a denial of FAPE, and that the Jose P. judgment requires the State to assure the district's compliance with the June 15 deadline. The parents also expand on the claim that the unilateral placement at Seton was appropriate and that equitable considerations favored reimbursement. The parents assert that the question of whether they were eligible for direct funding of the student's tuition was not a disputed fact during the impartial hearing and it would be unfair to allow the district to raise the issue for the first time on appeal. Lastly, the parents assert that the student was previously placed at Seton and therefore they were not required to provide the district with notice of their unilateral placement.[5]

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]).

[4] The district does not cross-appeal from those parts of the IHO's decision which ordered the district to convene a CSE to develop the student's IEP for the 2014-15 school year no later than March 1, 2014 and to provide the parents with prior written notice of any proposed offer of placement for the 2014-15 school year no later than May 1, 2014.

[5] In the reply and answer to cross-appeal, the parents also set forth arguments relating to the ability of the specific public school site recommended by the district to implement the IEP, in particular certain of the student's physical therapy goals. However, the parents' petition specifically limited the subject of the appeal to the IHO's finding that the failure to provide an FNR by June 15 did not result in a denial of FAPE, and that the State is required to assure the district's compliance with the judgment in the Jose P. case. Accordingly, I decline to address the arguments raised on appeal for the first time by the parents in their reply and answer to the cross-appeal. However, I caution the district that in the future, if it raises in its answer arguments on additional issues not advanced by a petitioning parent in an effort to further bolster the substantive adequacy of its placement recommendation, it may become necessary to consider whether the district has "open[ed] the door" to my consideration of the issue pursuant to the holding of the Second Circuit in M.H. v. New York City Dep't of Educ. (685 F.3d 217, 250-51 [2d Cir. 2012]). In this instance, however, I need not address these issues in this instance as the Second Circuit has also held that claims regarding the possibility that a district may not appropriately implement a student's IEP are speculative if the student did not attend the recommended public school placement (see F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 187 n.3, 195 [2d Cir. 2012]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; see also B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *22 [E.D.N.Y. Mar. 31, 2014]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *13 [S.D.N.Y. Aug. 13, 2013]).

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 [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

The parents point to language in a judgment that describes the oversight responsibilities of New York State concerning the district's compliance with the consent decree in Jose P. (Pet. ¶ 4).[6] However, in this case, the district correctly argues that neither an IHO, nor an SRO, has jurisdiction over matters related to the stipulation reached in the Jose P. class action suit. The remedy provided

[6] Specifically, the parent points to the citation "79 CV 560. Page 11; February 1980, E.D.N.Y.," however a copy of this document does not appear in the hearing record and the cited docket number does not correspond to the Jose P. case.

by the Jose P. decision was intended to address those situations in which a student had 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. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]). 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 International, 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., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ. , 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]; Application of a Student with a Disability, Appeal No. 12-039 [indicating that "[n]o 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. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012]; see P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011] [an allegation that the Jose P. consent decree has been violated should be raised in the Jose P. action], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]).

Consequently, 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 a 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. Jan. 21, 2011] ["the remedy for a violation of a consent order lies with the court that entered that order, not in a separate proceeding"], 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, 289-90 n.15 [S.D.N.Y. 2010] ["To the extent that the Parents are alleging a violation of a consent order in a separate proceeding, they might be better advised to seek relief from the court that entered that order"]; see F.L., 2012 WL 4891748, at *11-*12; M.S., 734 F. Supp. 2d at 279 [addressing the applicability of and parents' rights to enforce the Jose P. consent order]).

Notwithstanding the above, the parents claim that an SRO has the authority—and the obligation—to decide the parents' claims arising from the district's alleged failure to abide by the Jose P. stipulation and consent order because the "State defendants" have a duty—apparently set forth in the stipulation—to oversee the district's compliance with the stipulation, but the parents' arguments are misplaced.[7] Initially, the Office of State Review, having been created in 1990, was not in existence at the time the Jose P. class action suit was commenced or at the time of the July 1988 stipulation referenced by the parents, at which time appeals from the decisions of IHOs were heard by the Commissioner of Education (see L. 1990, ch. 53, § 60; see also http://www.sro.nysed.gov/aboutus.html). Thus the "State defendants" referenced in the Jose P. litigation were the New York State Education Department and/or the Commissioner of Education, not the Office of State Review, and there is no allegation that the stipulation provides for enforcement by SROs or through the impartial hearing or State-level review procedures. Furthermore, State regulations provide that "State Review Officers shall not have jurisdiction to review the actions of any officer or employee of the State Education Department" and I am

[7] As noted above, the parents did not offer into evidence any of the Jose P. documents to which they refer.

precluded from making a determination with regard to whether the "State defendants" referenced in the Jose P. litigation have complied with their obligations under the consent order and stipulations entered in that case (8 NYCRR 279.1[c][2]).

The parent argues that the Southern District's decision in F.L. has been misinterpreted in prior SRO decisions because, in the parents' view, the court in F.L. did not conclude that the SRO has no authority to enforce or review matters involving the Jose P. litigation, but merely pointed out that the proper venue for federal court review of a Jose P. case is the Eastern District of New York, where the suit was initiated, rather than the Southern District of New York, where the F.L. case was filed. However, upon review of the decision in F.L., the parents' asserted interpretation does not outweigh the prior SRO decisions referenced by the parents. The court in F.L., in determining that Jose P. was "inapplicable" in that case stated that:

> a consent decree can be enforced only by a party, a party's privy, or an intended beneficiary involved in the action [and] an allegation that the Jose P. consent decree has been violated should be raised in the Jose P. action. . . . Thus, 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 [internal citations and quotations omitted]).

Although the parent is correct that F.L. does not explicitly state that SROs do not have jurisdiction over enforcement of the Jose P. stipulation, the statement that a claim that the stipulation has been violated should be raised in the Jose P. action itself weights against exercising jurisdiction over this claim for all of the reasons stated above (see, e.g., F.L., 2012 WL 4891748, at *11; P.K., 819 F. Supp. 2d at 101 n.3; R.K., 2011 WL 1131492, at *17 n.29; M.S., 734 F. Supp. 2d at 279; W.T., 716 F. Supp. 2d at 290 n.15).

In their reply and answer to cross-appeal, the parents point to a United States Supreme Court case, Frew v. Hawkins (540 U.S. 431 [2004]), for the proposition that a consent decree is enforceable even in instances where there have been no violations of federal law in support of the claim that the Jose P. consent decree is enforceable under the IDEA. However, the decision in Frew concerned an appeal of a federal court's enforcement against state officials of a consent decree that was itself a federal-court order (see Frew, 540 U.S. at 438-39). Thus, if Frew is applicable at all to this issue, it supports the conclusion only that an allegation concerning a violation of the Jose P. consent decree may be raised in federal court, and the parents' reliance on Frew to establish jurisdiction over the consent decree within the administrative tribunals is misplaced.

To the extent the parents' arguments regarding the timing of the FNRs in this matter can be understood to allege that the recommendation for a particular public school site made after June 15, 2013 constituted a denial of FAPE to the student and significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, I concur with the IHO that no denial of FAPE occurred.[8] At the beginning of each school

[8] The remedy provided for a late offer of placement under Jose P. is a Nickerson Letter authorizing a parent to place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P., 553 IDELR 298). However, the parents are not even seeking the remedy of a Nickerson letter for an approved nonpublic school under Jose P., but rather to extend relief beyond Jose P. to tuition

year, a school district is required to have an IEP in effect "for each child with a disability in [its] jurisdiction" (20 U.S.C. § 1414[d][2][A]; see also 34 CFR 300.323[a]; Cerra, 427 F.3d at 194 ("the District fulfilled its legal obligations by providing the IEP before the first day of school"). Federal regulations specifically direct that a school district must have an IEP in place at the beginning of the school year (34 CFR 300.323[a]; see also Letter to Reyes, 59 IDELR 49 [OSEP 2012]). In this case, the parents conceded that the district developed the May 2013 IEP and, moreover, identified the public school site for IEP implementation prior to the start of the 12-month school year (see Supplemental Ex. I at pp. 3-6 and Attachments 4-5; Dist. Ex. 2). Accordingly, the hearing record provides no basis on which to find that the district was not in compliance with State and federal regulations (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]).

VII. Conclusion

Based on the foregoing, the IHO correctly determined in a thorough and well-reasoned decision that the district offered the Student a FAPE and denied the parents' request for tuition reimbursement and the appeal must be dismissed. To the extent the IHO determined that the district was required to provide the parents with an FNR by June 15 in light of the Jose P. stipulation and consent order, that finding would require the IHO, and the undersigned on appeal, to assert jurisdiction over the Jose P. issue and determine whether or not the student is in fact a member of the Jose P. class covered by the consent decree, which in my view goes one step too far and thus the cross-appeal must be sustained to that extent.

I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

Dated: Albany, New York
April 16, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

reimbursement at Seton (Supplemental Ex. I at pp. 1-2, 13), which has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).