The University of the State of New York

The State Education Department
State Review Officer
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No. 14-135

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 Board of Education of the Ellenville Central School District

Appearances:

Family Advocates, Inc., attorneys for petitioner, RosaLee Charpentier, Esq., of counsel

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, Neelanjan Choudhury, 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)[1] appeals from the decision of an impartial hearing officer (IHO) which denied a request for compensatory educational services and reimbursement for the costs of the student's tuition at Hillcrest Education Centers (Hillcrest) for the 2012-13 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

[1] The student's permanent legal guardian—a county department of social services—served as the "parent" for purposes of these proceedings (see 20 U.S.C. §1401[23][B]; 34 CFR 300.30[a][3]; 8 NYCRR 200.1[ii][1]; see IHO Exs. 6C at p. 1; 7B at pp. 1-9).

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 April 18, 2012, a subcommittee of the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see IHO Ex. 6A at pp. 1-3). Finding that the student remained eligible to receive special education and related services as a student with multiple disabilities, the April 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement at the same State-approved nonpublic residential school the student attended from November 2008 through the 2011-12 school year (id. at pp. 1-3, 7, 13-14; see IHO

Exs. 6D at p. 2; 7 at p. 2).[2] At the conclusion of the 2011-12 school year, the student left the State-approved nonpublic residential school, which thereafter informed the district that it could not offer the student an appropriate program at that time (see Tr. pp. 196-98; IHO Ex. 6D at p. 2).

In a letter dated July 13, 2012, the parent advised the district of its appointment as the student's guardian (see IHO Ex. 6C at p. 1). At that time, the parent requested that the district schedule a CSE meeting to locate an appropriate placement for the student and to discuss the "transition to adult services" (id.).

On or about October 11, 2012, the student began attending Hillcrest, an out-of-State approved nonpublic residential school (see IHO Ex. 7 at pp. 7-8).

By due process complaint notice dated April 26, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see IHO Ex. 1 at pp. 1-7). On May 20, 2013, the parties proceeded to an impartial hearing, resulting in an interim decision, dated June 1, 2013, in which the IHO denied the district's motion to dismiss for lack of jurisdiction, denied the parent's request to render a determination regarding the student's pendency (stay-put) placement, and adjourned the proceedings pending a resolution of the parties' claims regarding whether the district was financially responsible for the costs of the student's education (see Tr. pp. 1-40; IHO Ex. 10 at pp. 1-6). The parent appealed—and the district cross-appealed—the IHO's interim decision (see IHO Ex. 9 at pp. 1-6). In a decision dated November 20, 2013, an SRO noted that 8 NYCRR 279.10(d) limited appeals of interim decisions to pendency matters; therefore, arguments pertaining to the merits of the parent's case or the district's cross-appeal were outside the scope of permissible review (id. at pp. 7-8). Finding that the IHO erred in not issuing a determination on the student's pendency placement, the matter was remanded to the same IHO with instructions to render determinations on the issue of the student's pendency placement, as well as the merits of the parent's claim that the district failed to offer the student a FAPE (id. at pp. 7-10).

A. Impartial Hearing Officer Decision Upon Remand

On December 16, 2013, the parties returned to an impartial hearing, which concluded on May 8, 2014, after four additional days of proceedings (see Tr. pp. 46-478). In a decision dated July 14, 2014, the IHO initially set forth the lengthy procedural history of this case, the chronology of events, the relief sought by the parent for various periods of time within the chronology of events, the parties' respective positions, the general proceedings during the impartial hearing with respect to documentary and testimonial evidence, and the ultimate relief sought by the parent as outlined at the conclusion of the impartial hearing (see IHO Decision at pp. 1-9). Turning first to the issue of the student's pendency placement, the IHO found that the April 2012 IEP entered into evidence provided an "appropriate program" for the 2012-13 school year; that the program and services in the IEP were not "dependent upon the place the services [were] delivered;" all parties indicated that the "services could be delivered" by Hillcrest; and thus, an appropriate IEP existed for the student for the 2012-13 school year, and the student had not been "denied FAPE" (id. at p. 10). The IHO further found that since the "parties have agreed to [Hillcrest] as an appropriate

[2] The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

placement," Hillcrest constituted the student's pendency placement (id.). Next, the IHO found that as the student's legal guardian, the parent "could approve of the placement" at Hillcrest, and thus, the student's placement at Hillcrest was "valid" (id.). With respect to whether Hillcrest was a "'child care institution' or 'a residential treatment facility,'" the IHO concluded it was the latter even though Hillcrest also provided the student with an "education pursuant to the terms of the IEP" (id.). The IHO further found that "all parties" approved of Hillcrest as the "place to deliver the educational program provided in the IEP developed" by the district for the 2012-13 school year (id. at pp. 10-11).

Next, the IHO found that the student's "emergency hospitalization" during July 2012 through October 2012 constituted a "change of residence" and further determined that the district could not provide the student with the special education program and related services while hospitalized (see IHO Decision at p. 11). The IHO also found that even if services were to be provided during the student's hospitalization, the district within which the hospital was located—i.e., the district of location—rather than the district of residence (district) had the obligation to provide the student with special education and related services during that time period (id.). Given that the State had a "method of reimbursement" for such instances and finding no reason to "decide on the cost of services never provided," the IHO found that the failure to provide the student with educational services between July 2012 and October 2012 did not result from any fault of the district (id.). Accordingly, the IHO denied the parent's request for compensatory educational services as a remedy for this "break in educational services" from July 2012 through October 2012 (id. at pp. 11, 14-15).

Regarding the student's placement at Hillcrest, the IHO found that although the district participated in a search for an educational placement for the student, the district's assistance in locating a placement did not make it "responsible for [the student's] placement at Hillcrest" (IHO Decision at pp. 11-12). In addition, the IHO declined to exercise jurisdiction over the issue of "who [was] responsible for payment or the method for arranging such payment" for the services provided to the student by Hillcrest "for the period after June 23, 2012," as that question involved "parties over whom" the IHO did not have jurisdiction (id. at pp. 12-13). Regardless, the IHO then concluded that the district provided for a "program and a CSE IEP" that included a "full year residential program . . . up to and including June 23, 2012," and therefore, the district was "responsible for the payment of the tuition due and owing for this period of time" (id. at pp. 12-14). Next the IHO noted, however, that the hearing record contained no evidence that the parent paid any of the student's tuition or related costs at Hillcrest, so the parent's request for reimbursement of the tuition payments made on behalf of the student were denied (id. at p. 14).

Finally, the IHO denied the parent's request for an award of compensatory educational services in the form of two months of placement and services at Hillcrest as a remedy for the district's failure to adhere to IDEA's pendency provisions (see IHO Decision at pp. 14-15). Here, the IHO indicated that because the student received an education pursuant to the provisions of the April 2012 IEP up until the end of the school year that she turned 21, he found no need to issue an award of compensatory educational services (id. at p. 14).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent asserts that the IHO properly found that the student received an appropriate educational program at Hillcrest from October 2012 through June 2013,

and that Hillcrest constituted the student's pendency placement. The parent further alleges, however, that the IHO erred in finding that the student's residence changed as a result of the hospitalization from July 2012 through October 2012. The parent also asserts that the IHO erred in finding that although Hillcrest has not enforced the satisfaction of any outstanding tuition debt, the student has no such debt and no viable tuition reimbursement claim. Furthermore, the parent asserts that the IHO ignored the district's failure to comply with the IDEA's procedural safeguards, which resulted in a failure to offer the student a FAPE. Next, the parent argues that the IHO improperly relied upon irrelevant State law and applied "defective reasoning" in reaching his conclusions. In addition, the parent asserts that the IHO erred in finding that the student was not entitled to services during the hospitalization from July 2012 through October 2012, and the IHO improperly failed to consider whether the district was required to hold CSE meetings, pay for the student's placement at Hillcrest, or issue a determination regarding tuition reimbursement. As a result, the parent requests the following determinations and corresponding relief: the district was required to offer the student a FAPE in accordance with the IEP from July 13, 2012 through June 30, 2013; the district failed to offer the student a FAPE from July 13, 2012 through October 10, 2012 and thus, the student is entitled to three months of compensatory educational services at Hillcrest paid for by the district; an order directing the district to pay for the student's placement and attendance at Hillcrest for the period of October 10, 2012 through June 30, 2013, or in the alternative, an award of tuition reimbursement due to the district's actions; a finding that the district failed to provide written notices, conduct CSE meetings, and update the student's IEP; an order finding that equitable considerations do not preclude or reduce any award of tuition reimbursement; and finally, a finding that the district must fund the student's pendency placement at Hillcrest for the period from April 26, 2013 through June 30, 2013—or alternatively, order that the student receive two additional months of services at Hillcrest as compensatory educational services.

In an answer, the district responds to the parent's allegations with general admissions and denials, but does not otherwise identify errors or affirmatively cross-appeal any of the IHO's findings in the decision. Additionally, the district asserts that an SRO lacks jurisdiction to determine which party is financially responsible for the payment of the student's tuition costs; that the parent failed to provide any notice to the district regarding the intention to unilaterally place the student at Hillcrest; and that if the district remained the student's district of residence, then the district would be responsible "to the State for its expenditures" made on behalf of the student.[3]

[3] In this instance, neither party appealed the IHO's finding that Hillcrest was an appropriate placement for the student or that IHO improperly concluded that Hillcrest was the student's pendency placement; accordingly, the IHO's determinations are final and binding on both parties and will not be further addressed in this decision (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]; IHO Decision at pp. 7, 10-11, 14). As a point of clarification, the student's entitlement to a pendency placement existed in this matter for the period beginning on the date of the due process complaint notice (April 26, 2013) through the end of the 2012-13 school year (June 2013) (see Application of a Student with a Disability, Appeal No. 13-126, citing Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526 [S.D.N.Y. 2011] [holding that the pendency provisions of the IDEA are triggered upon the filing of a due process complaint notice]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 386-87 [N.D.N.Y. 2001] [finding that the right to automatic pendency terminates at the time a student is no longer eligible for services]).

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 [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. CSE Process

Turning first to the parent's assertion that the IHO improperly failed to consider whether the district was required to hold CSE meetings, a review of the evidence in the hearing record supports this assertion and thus, the IHO's finding that the district offered the student a FAPE for the 2012-13 school year must be reversed.

Ultimately, regardless of the various arguments set forth by the district seeking to divest itself of the responsibility to offer the student a FAPE for the 2012-13 school year—including the student's residence, obligations of the district of location versus the district of residence, the appointment of a local department of social services as the permanent guardian of the student's person and property—none find support in the law or under the facts of this case. First, it is undisputed that in April 2012, a CSE convened to conduct the student's annual review and developed an IEP for the 2012-13 school year, which continued to find the student eligible for special education and related services as a student with multiple disabilities (see IHO Ex. 6A at pp. 1-3, 7, 13-14; see also Tr. pp. 414-17). Second, it is also undisputed that the student left the State-approved nonpublic residential placement after the conclusion of the 2011-12 school year and returned to a relative's home located within the district, where shortly thereafter, the student was involved in an incident that required hospitalization (see Tr. pp. 418-25). In the decision, the IHO—without pointing to any legal authority—concluded that the student's hospitalization effectively changed the student's residence, or alternatively, placed the obligation to offer the student a FAPE on the school district within which the hospital was located (district of location) (see IHO Decision at pp. 6-7, 10-11). Third, it is undisputed that by letter dated July 13, 2012, the parent advised the district that the State-approved nonpublic residential placement declined to readmit the student, thus, the parent requested that the district schedule a CSE meeting to locate an appropriate placement for the student and to discuss the "transition to adult services" (IHO Ex. 6C at p. 1; see IHO Ex. 6D at p. 2). Finally, it is undisputed that the district did not convene a CSE meeting, or otherwise modify or amend the student's April 2012 IEP, or notably, find that the student was no longer eligible for special education and related services as a student with multiple disabilities during the remainder of the 2012-13 school year (see Tr. pp. 434, 446; see also Tr. pp. 1-478; Dist. Ex. 1; IHO Exs. 1-10; Pet. Exs. A-F).[4] Based upon these facts, the district cannot escape its obligation to offer the student a FAPE for the 2012-13 school year (see 20 U.S.C. § 1412[a][1][A]; 34 CFR 300.101[a]). Accordingly, for purposes of this decision, the parent's claims for relief are analogous to a tuition reimbursement claim, pursuant to Burlington/Carter.

As indicated above, under the IDEA an administrative officer may find that a student did not receive a FAPE if the procedural inadequacies alleged impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]). Here, the district's director of special education (director), who testified at the impartial hearing, did not

[4] On March 17, 2014, the parent submitted additional documentary evidence at the impartial hearing, which the IHO identified and labeled as "Petitioner" exhibits (Tr. pp. 150, 158-61, 279-82). For clarity, this decision will continue to use "Petitioner" or "Pet." to cite to these exhibits (Pet. Exs. A-F).

convene a CSE meeting, but instead offered to "start looking and investigating" what placements were available for the student when the parent contacted the district (see Tr. pp. 420-29; IHO Exs. 6B-6C; 7D; 7i-7J).[5] However, while the evidence in the hearing record reflects ongoing communication between the parent and the district regarding the efforts to secure a residential placement for the student during summer 2012, such continued cooperation and collaboration occurred outside the purview of the CSE, which as described above, is empowered to recommend appropriate services for a student (see Tr. pp. 420-29; IHO Exs. 7C-7J). In addition, the evidence in the hearing record reveals that as of October 3, 2012, the district—and specifically, the director—ceased all communications with the parent regarding the student's placement based upon communications with the State Education Department (SED) (see IHO Ex. 7 J at p. 1; see also Tr. p. 446).[6] Essentially, SED advised the director that the student was "no longer [the district's] responsibility for placement," but rather, the student was now the responsibility of the local department of social services (Tr. pp. 435-41). In addition, SED advised the director that the student was now considered "homeless" (Tr. p. 442). SED further advised the director that "if the district convened a CSE meeting to recommend" Hillcrest, the district "would not be reimbursed" (Tr. pp. 442-44). Subsequent efforts by Hillcrest personnel to contact the district in an effort to update the student's IEP after her admission also proved unsuccessful (see Tr. pp. 349-50).

Under the circumstances, the district's failure to convene a CSE meeting upon the parent's request in this case significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[2]; 8 NYCRR 200.5[j][4][ii]. Accordingly, the IHO's finding that the district offered the student a FAPE for the 2012-13 school year must be reversed.

B. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year and, in this instance, having no need to review the IHO's finding that Hillcrest was an appropriate placement for the student, the final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist.,

[5] In its answer, the district asserted that the director conducted a search during summer 2012 "under the belief that the [d]istrict was obligated to do so" (Answer ¶17).

[6] Additionally, the district did not provide the parent with prior written notice explaining its refusal or failure to conduct a CSE meeting pursuant to the parent's request and the basis for that decision (see 34 CFR 300.503[a]; 8 NYCRR 200.5[a]).

2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

It is undisputed that the parent did not provide the district with a 10-day notice consistent with regulatory requirements. However, the evidence in the hearing record indicates that the district failed to convene a CSE meeting at which time the parent could have provided such information to the district; the district had actual notice of the student's placement at Hillcrest through its involvement in locating a residential placement for the student; and in a letter, dated October 9, 2012, Hillcrest advised the district of the student's acceptance into the program (see IHO Ex. 7J at p. 1; Pet. Ex. C1 at p. 1). Therefore, under the circumstances, I decline to exercise my discretion to either reduce or deny the parent's request for reimbursement of the costs of the student's tuition at Hillcrest for the period from October 10, 2012 through June 30, 2013 based upon the failure to provide the district with a 10-day notice in this instance.[7]

C. April 2012 IEP

Next, the parent asserts that the IHO erred in finding that the student was not entitled to services during the hospitalization from July 2012 through October 2012, and seeks a finding that the district failed to offer the student a FAPE from July 13, 2012 through October 10, 2012. As explained more fully below, while it is undisputed that the student did not receive special education services while hospitalized, an award of compensatory educational services in the form of three

[7] In light of my determination herein, the parent's request for payment of the student's pendency placement at Hillcrest for April 2013 through June 2013 need not be addressed.

additional months of services at Hillcrest paid for by the district is not warranted.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];18 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

It is undisputed that the district failed to implement the student's April 2012 IEP during the student's hospitalization from July 13, 2012 through October 10, 2012. However, in this particular instance, due to the passage of time, it is unclear whether the parent's requested relief would effectively or meaningfully serve the purposes of compensatory educational services. Here, a review of the evidence in the hearing record supports the IHO's finding that while enrolled in Hillcrest, the student received an appropriate education (see IHO Decision at p. 14). During the 2012-13 school year at Hillcrest, the student achieved 'honor roll" status based upon her "academic successes"(Pet. Ex. C at p. 5). According to Hillcrest's program director, the student "really liked school, she liked her teachers, she liked her classes and did well and was well liked on campus by other students and teachers" (Tr. pp. 373-74). He also described the student as "generally successful" (id.). Additionally, the student "consistently engaged herself productively in the multiple areas of [Hillcrest's] program, including structured classrooms, individual and group therapies, behavioral plans and self-help activities" (Pet. Ex. C at p. 5). In November 2012, Hillcrest also afforded the student supervised on-campus visits with her biological family, and by May 2013, Hillcrest approved the student for home visits with her family (id.). Finally, Hillcrest progress reports for the 2012-13 school year indicated that the student achieved all of annual goals set forth in the April 2012 IEP (see Pet. Ex. C3 at pp. 3-6; IHO Ex. 6A at pp. 10-13). Under the circumstances presented above, given that the student attained educational benefits from her program at Hillcrest, she ultimately received an appropriate education, and it is not clear that the purpose of an award of compensatory educational services would be served at this juncture. Accordingly, the IHO properly denied the parent's request for an award of compensatory educational services for the period of July 13, 2012 through October 10, 2012.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district failed to establish its burden that it offered the student a FAPE in the LRE for the 2012-13 school year, the IHO's decision must be reversed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 14, 2014 is modified by reversing that portion which found that the district offered the student a FAPE for the 2012-13 school year; and,

IT IS FURTHER ORDERED that the IHO's decision dated July 14, 2014 is modified by reversing that portion which denied the parent's request for reimbursement of the costs of the student's tuition at Hillcrest for the 2012-13 school year from October 10, 2012 through June 30, 2013; and,

IT IS FURTHER ORDERED that the district shall reimburse the parent for the costs of the student's tuition at Hillcrest for the 2012-13 school year from October 10, 2012 through June 30, 2013.

Dated: **Albany, New York**
September 25, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER