The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-200

Application of a STUDENT WITH A DISABILITY, by her 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:
Kimberly C. Tavares, Esq., attorney for petitioners

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

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) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the full costs of their daughter's tuition at the Dwight School (Dwight) for the 2020-21 school year. 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

During the 2018-19 school year, the student attended fourth grade at a parochial school, which she had attended since preschool (Parent Ex. F at p. 2).[1] A clinical neuropsychologist conducted an independent psychoeducational evaluation of the student in April 2019 (Parent Ex. F). The evaluation was sought to assess the student's "literacy and language skills and related

[1] The hearing record contains multiple duplicative exhibits (compare Parent Exs. A, B, C, F, and G, with Dist. Exs. 1, 2, 8, 10, 11, and 13). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content; however, for the documents prepared at CSE meetings, the district's exhibits will be cited since they include completed attendance pages (compare Dist. Exs. 8 and 13, with Parent Exs. B and C). The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

cognitive functions" given that the student exhibited "early challenges in reading development, as well as associated vulnerabilities in learning including processing speed, rote learning and memory, and metacognitive skills" (id. at p. 1). The neuropsychologist indicated that the student met the criteria for diagnoses of a specific learning disorder with impairment in reading and an other specified neurodevelopmental disorder (id. at p. 10). The neuropsychologist flagged the student's attention and executive function challenges and performance anxiety as other areas of concern (id. at p. 11). The neuropsychologist made several recommendations to support the student's learning through services such as participation in a reading group, 1:1 support with reading in school, 1:1 support with a learning specialist outside of school, and support during the summer to prevent regression, as well as tools, accommodations and modifications, and suggested strategies (id. at pp. 11-17).

During the 2019-20 school year (fifth grade), the parents referred the student to the district for an initial evaluation to determine if she was eligible for special education as a student with a disability, indicating that the student's parochial school could not provide the student with the additional support she required (see Dist. Ex. 5 at pp. 1, 3).[2] On January 27, 2020, the parents provided consent for the district to evaluate the student and the district conducted a social history evaluation and an educational evaluation (Dist. Exs. 4; 5; 7).[3]

On February 25, 2020, the parents executed a contract for the student's attendance at Dwight for the 2020-21 school year (Parent Ex. L).[4]

A CSE convened on March 3, 2020 to conduct the student's initial review and found the student eligible for special education as a student with a learning disability (Dist. Ex. 8).[5] Because the student had been parentally placed in a nonpublic school, the parents requested equitable services from the district, and the CSE developed an individualized education services program (IESP) for the student with a projected implementation date of March 3, 2020 (see Parent Exs. 8 at pp. 1, 12; 9 at p. 1).[6] The CSE recommended that the student receive three periods per week of

[2] Several pages of the hearing record filed with the Office of State Review contain highlighting of text, which was presumably made by either the attorney for the district or the IHO (see Dist. Exs. 5 at pp. 1-3; 7 at p. 4; 8 at pp. 1, 5-6; 10 at pp. 1-2; 11 at p. 2; 13 at pp. 2-3, 18; 14 at pp. 1-2; 15 at p. 1). The district and/or the IHO is reminded that it is necessary to avoid annotating the documents maintained as the official record of the proceedings as it becomes very difficult during subsequent administrative and judicial review to decipher what notations, if any, should be attributed to the various document authors or to the party offering the exhibit. The highlighting has been disregarded.

[3] The results of the educational evaluation conducted on January 27, 2020, were memorialized in a report dated February 28, 2020 (Dist. Ex. 7).

[4] Dwight has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

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

[6] When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an IESP under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). Under State law, parents of a student with a disability

special education teacher support services (SETSS) in a group, as well as several supports for the student's management needs (see Parent Ex. 8 at pp. 6, 10).

For the end of the 2019-20 school year, the student began receiving the services and supports set forth in the March 2020 IESP (see Parent Ex. E; see also Parent Ex. T at ¶ 5).

In a letter to the district dated July 1, 2020, the parents requested that the district provide the student with a free appropriate public education (FAPE) (Parent Ex. H).[7] The parents indicated that the student had an IESP but that they were requesting that the CSE meet to develop an IEP for the student (id.).

In a letter to the district dated August 10, 2020, the parents indicated that, to date, a CSE had not convened to develop an IEP for the student for the 2020-21 school year (Parent Ex. N). Accordingly, the parents notified the district of their intent to seek public funding for the costs of the student's attendance at Dwight for the 2020-21 school year (id.).

According to the parents, the district sent them a form dated August 24, 2020 in order to obtain authorization for the delivery of the SETSS services set forth on the student's IESP (see Parent Ex. J). In a letter dated September 10, 2020, the parents expressed that they were surprised to have received the form given their prior communications to the district requesting an IEP for the student (id.). The parents reiterated their request that the CSE convene and develop an IEP for the student (id.).

The student attended Dwight for the 2020-21 school year (sixth grade) (see Parent Ex. W; X; Y).

A CSE convened on October 9, 2020 to develop an IEP for the student (Dist. Ex. 13). Finding that the student remained eligible for special education as a student with a learning disability, the CSE recommended that the student attend a general education classroom placement in a district "Non-Specialized" school and receive three periods per week of SETSS in English language arts (ELA) in a group, as well as one 40-minute session of individual counseling per week and supports for management needs (id. at pp. 1, 5, 13, 16). According to the IEP, the parents expressed concern with the "classroom size" and that the student would not receive individual

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who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).

[7] As discussed below there is a question of fact as to when this letter was mailed to the district (see Parent Ex. I).

support in SETSS (id. at p. 18). The parents also stated that they wanted to be sure the skills worked on in SETSS were "communicated to the classroom teacher for continued support" (id.).

In a letter dated October 20, 2020, the district notified the parents of the particular public school site to which it assigned the student to attend for the 2020-21 school year (Dist. Ex. 15).

A. Due Process Complaint Notice

In a due process complaint notice dated December 10, 2020, the parents alleged that the district failed to offer the student a FAPE for the 2020-21 school year (Parent Ex. A). The parents alleged that the district's failure to convene a CSE to develop an IEP for the student prior to the beginning of the 2020-21 school year deprived the student of a FAPE (id. at p. 3). The parents also asserted that the district deprived them the opportunity to meaningfully participate in the CSE process and that the October 2020 CSE was not duly constituted, predetermined its recommendations, had insufficient evaluative information about the student, and failed to consider the independent evaluation provided by the parents (id. at pp. 3-4). The parents contended that the October 2020 IEP was inappropriate for the student as it did not include a sufficient description of the student's present levels of performance, appropriate and measurable annual goals, or appropriate management needs, methodology, or program and placement recommendations (i.e., contrary to opinions of professionals and consisting of recommendations that included a large class size and insufficient opportunity for 1:1 instruction or attention), or necessary transportation (id. at pp. 3-4). The parents also contended that the district failed to provide them with adequate information about how the IEP would be implemented in the assigned school (id. at p. 5).

The parents alleged that Dwight was an appropriate unilateral placement for the student for the 2020-21 school year and that they cooperated with the CSE and provided the district with timely notice of their intent to seek tuition reimbursement and reimbursement for the April 2019 independent psychological evaluation (Parent Ex. A at pp. 5-6). For relief, the parents sought district funding of the costs of the student's attendance at Dwight for the 2020-21 school year, as well as the costs of the April 2019 independent psychological evaluation (id. at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 25, 2021 and concluded on August 9, 2021, after six days of proceedings (see Tr. pp. 1-116). During the impartial hearing, the district offered exhibits as documentary evidence but indicated that it did not intend to offer any testimonial evidence (see Tr. pp. 14-15, 20-26, 47; see generally Dist. Exs. 1-15). Later, the district's representative also indicated to the IHO that the district was "not presenting a Prong I in this matter" (Tr. p. 43).

In a decision dated August 23, 2021, the IHO found that "[d]ocumentary evidence, unsupported by any testimony, [wa]s not sufficient to establish that a school district offered a student a FAPE" and that, therefore, the district had not met its burden to prove that it offered the student a FAPE for the 2020-21 school year (IHO Decision at pp. 8, 14). Regarding the unilateral placement, the IHO found that Dwight was appropriate for the student for the 2020-21 school year, noting that the evidence in the hearing record showed that the student was able to make progress (id. at pp. 9-12, 14).

However, the IHO determined that equitable considerations did not support a full award of tuition reimbursement (IHO Decision at pp. 12-14). Citing the parents' July 1, 2020 letter and proof of mailing, which was dated August 3, 2020 and did not include the name and address of the intended recipient, the IHO found that the hearing record did not include "persuasive, credible evidence" of the parents' request to the district to convene a CSE to develop an IEP for the student (id. at p. 13). In addition, noting the estimated delivery date on the proof of mailing for the July 1, 2020 letter (August 6, 2020), the IHO found that the parents' notice to the district of their intent to unilaterally place the student was dated only four days later on August 10, 2020 (id.). The IHO also cited the timing of the parents' contract with Dwight and the date on which the full tuition was due—July 1, 2020—which was the same date that the parents purportedly requested that an IEP be developed (id.). The IHO also found that the district promptly responded to the parents' September 10, 2020 letter and that the proof of mailing for that letter via Federal Express included the full name and address of the recipient (id. at pp. 13-14). Upon weighing these factors, the IHO found that the parents were entitled to that portion of the costs of the student's tuition which was due to be paid after July 1, 2020 (i.e., $35,856.95) (id. at p. 14).

Finally, the IHO found that the parents were not entitled to public funding of the April 2019 independent psychological evaluation (IHO Decision at pp. 12, 14).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in reducing the amount of tuition to be reimbursed based on equitable considerations. First, the parents argue that the IHO erred in relying on evidence about events that took place prior to the parents' request for an IEP for the student.

Next, the parents assert that the IHO erred in reducing the award of tuition reimbursement based on issues that were not litigated at the impartial hearing. In particular, the parents note that, during the impartial hearing, neither the district nor the IHO raised an issue regarding the parents' mailing of their July 1, 2020 letter requesting an IEP be developed or their August 10, 2020 notice of unilateral placement. The parents argue that, because the issue was not raised at the hearing, they were not permitted an opportunity to explain any purported discrepancy about the mailing. The parents assert that the district did not preserve the issue and it should be assumed that the letters were sent to and received by the district absent any evidence to the contrary. In addition, the parents contend that, by relying on the lack of a name or address on the mailing receipt to question the mailing of the July 1, 2020 letter, the IHO improperly imposed a burden on the parents "to speak to the postal practices of the United States Post Office."

The parents also allege that the IHO erred in relying on the timing of the parents' contract with and remittance of payment to Dwight to find that equitable considerations did not warrant full tuition reimbursement. The parents assert that they were interested in a district program for the student and that the evidence showed that they would have forfeited their initial deposit to Dwight if an appropriate district program and placement had been offered. The parents also argue that they cooperated with the district by consenting to evaluations, attending CSE meetings, and corresponding with the district.

The parents request that the district be required to reimburse them for the full costs of the student's tuition at Dwight for the 2020-21 school year. In the alternative, the parents request that

if the parents' evidence was found insufficient, the matter be remanded to the IHO for further development of the hearing record.

In an answer, the district responds to the parents' allegations with general admissions and denials and requests that the IHO's decision be upheld in its entirety. In addition, the district argues that the parents' appeal should be dismissed for failure to comply with practice regulations governing appeals to the Office of State Review.

In a reply, the parent argues that the district lacks standing to raise the issue of the parent's noncompliance with the practice regulations and that the procedural defect in the parents' request for review was de minimus.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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]). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), 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]).[8]

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

[8] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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).

VI. Discussion

A. Compliance with Practice Regulations

The district asserts in its answer that the parents' request for review should be rejected for failing to comply with form requirements for pleadings.[9] In particular, the district asserts that the parents' request for review exceeds the page limit for a request or review.

State regulation provides that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents (8 NYCRR 279.8[a]-[b]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Here, the parents' request for review was 12 pages long, in excess of the 10-page maximum set forth in State regulation (8 NYCRR 279.8[b]). Viewing the request for review as a whole, it appears that the page limitations violation could have easily been avoided had the parents' attorney avoided quoting the IHO's decision at length (see Req. for Rev. ¶ 18) and continued the formatting used on pages 1 through 4 of the pleading (i.e., double spaced with the first line of each paragraph indented) (see id. ¶¶ 1-18), rather than switching the formatting to include extra spacing after each paragraph and indenting of every line rather than just the first line of each paragraph (see id. ¶¶ 19-39). In addition, the parents were authorized to submit a memorandum of law of up to 30 pages in length (8 NYCRR 279.4[g]; 279.8[b]) but elected not to do so. A memorandum of law may be utilized to further argue the relevant facts in the hearing record and legal authority to support the contentions raised in the request for review (8 NYCRR 279.8[d]) but may not be used to circumvent the page limitations for a request for review by adding issues not raised in the request for itself (8 NYCRR 279.8[c][4]).

While I decline to exercise my discretion to reject the parents' pleading due to this irregularity in this instance (see 8 NYCRR 279.8[a]), the parents' attorney is cautioned that, while

[9] The parent's argument that the district does not have standing to raise the issue of the parent's failure to comply with the practice regulations is wholly without merit. The parent seems to argue that, by raising the procedural noncompliance, the district is rejecting the pleading when it is solely within an SRO's discretion to do so. However, it is entirely permissible for the district to raise the procedural defect and request that an SRO reject the pleading consistent with State regulation, which is what the district did in this instance.

a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review, an SRO may be more inclined to do so after a party or an attorney's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).[10] I expect the parents' attorney to carefully examine and comply with Part 279 going forward in other proceedings before the Office of State Review at the risk of sanctions up to and including dismissal of an appeal or outright rejection of a pleading should the noncompliance continue. The parents' attorney should also consult the appeals process guide on the of Office State Review's web site for further guidance and examples of how pleadings in conformity with Part 279 should appear (see https://www.sro.nysed.gov/book/overview-part-279-revised-effective-january-1-2017).

B. Scope of Review

Next, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, the district has not appealed the IHO's findings that it denied the student a FAPE for the 2020-21 school year or that Dwight was an appropriate unilateral placement for the student (see IHO Decision at pp. 8-12, 14). Nor have the parents appealed the IHO's denial of their request for district funding of the April 2019 independent psychological evaluation (see id. at pp. 12, 14). Therefore, the IHO's determinations on these issues have become final and binding and they will not be reviewed on appeal (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]).[11] The sole issue on appeal relates to the IHO's reduction of the amount of tuition to be reimbursed based on equitable considerations.

[10] In addition to violation of the page limitations cited by the district, the parents' appeal has other procedural nonconformities. For example, the parents' appeal did not include a notice of request for review (which is distinct from a notice of intention to seek review) (see 8 NYCRR 279.3).

[11] As noted above, on appeal, the parents argue that the IHO erred in relying on evidence about events that predated their request for an IEP for the student. The parents assert that the IHO's reliance on the district's actions during this timeframe "should not be evidence of the [district's] provision of FAPE" (Req. for Rev. ¶ 22). However, as the IHO found that the district denied the student a FAPE and the district did not appeal from that finding, I will not further address the parents' argument on this point.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 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"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). 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]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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 their removal of 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., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the evidence in the hearing record shows that the parents shared the April 2019 independent psychoeducational evaluation with the district, provided consent for the district to evaluate the student, and attended the March 2020 and October 2020 CSE meetings (see Parent Ex. F; Dist. Exs. 4; 5; 7; 8 at p. 14; 13 at pp. 18-19).

The timing of the parents' contract with Dwight for the student's attendance for the 2020-21 school year (executed February 25, 2020) (see Parent Ex. L) is not determinative of this matter because, generally, the parents' pursuit of a private placement to the exclusion of a district offer is not a basis to deny tuition reimbursement on equitable grounds (E.M., 758 F.3d at 461; C.L., 744

F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

Regarding the parents' correspondence with the district, the IHO relied on some conjecture to conclude that certain letters were not delivered or were not delivered timely.

The first correspondence at issue was the parents' letter to the district, dated July 1, 2020, which requested that a CSE convene and develop an IEP for the student (Parent Ex. H).[12] Here, the IHO focused on the proof of delivery of the July 1, 2020 letter. The parents offered into evidence a mailing receipt showing that something was mailed via certified mail through the United States Postal Service on August 3, 2020 to an unspecified recipient and that such mailing was estimated to be delivered to the recipient by August 6, 2020 (Parent Ex. I); however, the mailing receipt in evidence does not identify what was mailed and there was no testimony or other evidence presented during the impartial hearing to demonstrate that the mailing receipt in evidence was associated with the July 1, 2020 letter. I find it significant in this case that the district did not deny that it received the July 1, 2020 letter or argue that it received it in an untimely manner.

The next correspondence was the parents' 10-day notice letter to the district, dated August 10, 2020 (Parent Ex. N). In her decision, the IHO emphasized that the evidence in the hearing record did not include a receipt evidencing the mailing of this letter (see IHO Decision at p. 7). However, during the impartial hearing, the again, the district made no argument that it did not receive the parents' 10-day notice letter.

Finally, the parents' September 10, 2020 letter to the district reiterated their request for an IEP for the student (Parent Ex. K). The parents offered into evidence a mailing receipt showing that something was mailed to the CSE chairperson via Federal Express and that such mailing was estimated to be delivered to the recipient by September 14, 2020 (Parent Ex. I). Once again, the mailing receipt in evidence does not identify what was mailed and there was no testimony or other evidence presented during the impartial hearing to demonstrate that the mailing receipt in evidence was associated with the September 10, 2020 letter, although given the date, it is more likely than not that this receipt was associated with the delivery of the parents' September 10, 2020 letter. The IHO relied on what she deemed to be more reliable evidence of the mailing of the September 10, 2020 letter to contrast the less reliable evidence regarding the earlier letters (see IHO Decision at p. 13). In addition, the IHO cited actions taken by the district to convene a CSE soon after the September 10, 2020 letter to imply that the district received the September 2020 letter but perhaps did not receive the earlier letters (see id. at pp. 13-14).

It is altogether unclear why the parents offered mailing receipts into evidence without presenting any evidence, testimonial or otherwise, to connect the receipts to the other documents in evidence. Further, it was appropriate for the IHO to critically examine the documentary evidence offered by the parent into the hearing record. If the evidence bore out to establish that

[12] Courts have grappled with the effect of a parent's intention to parentally place a student at a nonpublic school on the district's obligation to provide the student with an IEP and at least one court has noted that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *16 [S.D.N.Y. Nov. 26, 2012]).

the parent sent correspondence pre-dated by several weeks compared to the timing of the actual transmission of the correspondence to the district, it would be appropriate to weigh such circumstances in the consideration of equitable factors. But in this case the IHO drastically cut the parent's expected contribution toward tuition and fees for Dwight of $67,600[13] down to $35,856.95, because it was "specifically the balance due after July 1, 2020."[14] Ultimately, however, the district in this proceeding never denied receiving any of the parents' letters and did not raise a question regarding the timing of the correspondence or its effect on the district's efforts to meet its obligations to the student. Thus, without more, the I find that the IHO's criticisms of the parent's earlier letters—left completely unvoiced during the impartial hearing— were too speculative to support the reduction of the award of tuition reimbursement based on equitable considerations.

VII. Conclusion

For the reasons set forth above, the evidence in the hearing record does not support the IHO's determination to reduce the amount of tuition to be reimbursed by the district for the student's attendance at Dwight for the 2020-21 school year on equitable grounds.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated August 23, 2021 is modified by reversing that portion which found that equitable considerations did not support an award of district funding of the full amount of tuition for the student's attendance at Dwight for the 2020-21 school year; and

IT IS FURTHER ORDERED that, upon receipt of proof of payment, the district shall reimburse the parents for the full costs of the student's tuition and fees at Dwight for the 2020-21 school year.

Dated: **Albany, New York**
November 5, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

[13] The student was awarded a scholarship to attend Dwight and as the IDEA does not contemplate the award of either punitive or compensatory damages, the district is not responsible to pay the scholarship amount (see Dist. Ex. M).

[14] IHOs are vested with broad discretion when making reductions such as using percentages or round figures, however in this case it is not clear from the cited exhibit how the IHO reached the particular dollar figure in her decision or why the July 1, 2020 date was relevant, especially when she took issue with the parent's July 1, 2020 letter.