The University of the State of New York

The State Education Department
State Review Officer
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No. 12-046

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Anton Papakhin, P.C., attorneys for petitioner, Anton Papakhin, Esq., and Arthur R. Block, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which remanded the matter to the Committee on Special Education (CSE) to evaluate the student and to recommend an appropriate program and placement for her for the remainder of the 2011-12 school year.[1] Respondent (the district) cross-appeals from the IHO's determination that it failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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

[1] The student's grandmother was appointed as the student's guardian; therefore, consistent with State regulation, the grandmother will be referred to as the "parent" throughout this decision (Tr. pp. 116-17; see 8 NYCRR 200.1[ii][1]).

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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 [FAPE] 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the CSE convened on May 12, 2011 to conduct the student's annual review and to develop her IEP for the 2011-12 school year (Parent Ex. C at pp. 1, 9, 11). Finding that the student remained eligible to receive special education and related services as a student with a learning disability, the CSE recommended placing the student in an integrated co-teaching (ICT) class with one 30-minute session per week of counseling in a group as a related service and testing

accommodations for the 2011-12 school year (id. at pp. 1-2, 5-7, 9).[2,3] The CSE also considered other placement options for the student, including a general education setting with or without special education teacher support services (SETSS)[4]—which the CSE rejected as insufficient to meet the student's needs—and a special class in a community school—which the CSE rejected as too restrictive for the student (see id. at p. 10).

By letter dated September 21, 2011, the parent received notice that the Judge Rotenberg Center (JRC) had accepted the student into its residential program based upon a review of the student's "records" (Parent Ex. P at p. 1).[5]

A. Due Process Complaint Notice

In a due process complaint notice, dated October 7, 2011, the parent asserted that the district failed to offer the student a FAPE for the 2011-12 school year (Parent Ex. A at pp. 1-2). The parent alleged that the information presented at the May 2011 CSE meeting did not support the district's "irrational" recommendation to place the student in an ICT class with counseling as a related service (id. at p. 2).[6] In addition, the parent averred that the district committed procedural and substantive errors in failing to recommend a residential placement for the 2011-12 school year (id.). The parent also alleged that the May 2011 CSE failed to meaningfully consider the "opinion" of the student's treating psychotherapist, who supported a residential placement; the May 2011 CSE ignored reports indicating that the student previously did not make meaningful progress in the recommended program; and the May 2011 CSE had no "reasonable basis" to conclude that the May 2011 IEP appropriately addressed the student's "problematic behaviors" (id.). The parent further maintained that the May 2011 CSE failed to conduct a functional behavioral assessment (FBA) of the student, and failed to develop a behavioral intervention plan (BIP) (id.).

Turning to the proposed relief, the parent "reserve[d] the right to unilaterally enroll" the student at JRC, at district expense, within 10 days after the district received the due process complaint notice (Parent Ex. A at p. 2).[7] With respect to the impartial hearing, the parent requested

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[2] As explained more fully below, the student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]; Parent Ex. A at pp. 1-3; Pet. ¶¶ 2, 48).

[3] Within the continuum of services, State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). State regulations require that an ICT classroom "shall minimally include a special education teacher and a general education teacher," and further, that the "maximum number of students with disabilities" in an ICT class "shall be determined in accordance with the students' individual needs . . . , provided that the number of students with disabilities in such classes shall not exceed 12 students, unless a variance is provided" (8 NYCRR 200.6[g][1]-[2]).

[4] For eighth grade during the 2010-11 school year, the student attended a general education setting with SETSS and counseling as a related service in a district public school (see Parent Ex. O at p. 3; see also Tr. p. 121; Parent Exs. C at pp. 1-2, 10; G at pp. 1-2; W).

[5] The Commissioner of Education has approved JRC as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]).

[6] At the time of the parent's due process complaint notice, the student was attending ninth grade in the ICT class placement recommended by the May 2011 CSE in a district public school (see Tr. pp. 1, 8-9, 117-18).

[7] One U.S. district court in New York has recognized, however, that to allow the parents to raise additional issues

that the IHO find, and order, the following: the district failed to offer the student a FAPE for the 2011-12 school year; the May 2011 IEP was not appropriate to meet the student's needs; the student required an "immediate residential placement" at JRC in order to receive educational benefits; JRC was an appropriate placement in the least restrictive environment (LRE) for the student; the student's IEP should be "amended to reflect the recommended placement" at JRC, or alternatively, order the district to directly fund the student's placement at JRC; the parent cooperated with the CSE; the parent was entitled to costs and fees; and the parent was entitled to "any further relief as the [IHO] deem[ed] just and proper" (id. at pp. 2-3).[8]

B. Impartial Hearing Officer Decision

The parties completed an impartial hearing in this matter on December 16, 2011 (Tr. pp. 1-157).[9] By decision dated January 20, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 12-17). The IHO based her determination upon the district's failure to present sufficient evidence to establish that the CSE properly classified the student as a student with a learning disability and that the CSE's recommended placement in an ICT class with counseling was appropriate for the student (id. at pp. 14-15, 17).[10] The IHO indicated that according to the evidence, "[s]everal relevant events" involving the student occurred prior to the May 2011 CSE meeting (id. at pp. 15-16). However, the IHO concluded that the CSE failed to consider the reports of these events, which resulted in the CSE's failure to "determine an appropriate classification or an appropriate program" for the student (id.). The IHO also found that although the student's IEP referred to her "negative behaviors," the CSE failed to conduct an FBA or to develop a BIP to address the behaviors (id. at p. 17). Moreover, the IHO noted that the CSE failed to conduct "any evaluations" of the student prior to recommending a program that had "clearly failed to meet the [student's] needs in the past" (id.).

Turning to the appropriateness of the unilateral placement, the IHO initially noted that testimonial evidence provided by a JRC clinician "would have satisfied the parent's burden" to establish that JRC was an appropriate placement in that it was "reasonably calculated to meet the [student's] educational needs" as demonstrated by the parent's testimony and documentary evidence submitted into the hearing record (IHO Decision at p. 17). Noting that the parent was not held as strictly to the standard of placement in the LRE, the IHO further noted, however, that the parent had not removed the student from the public school and had not placed the student at JRC (id. at pp. 17-18). In addition, the IHO indicated that although JRC was approved by New

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without the district's agreement pursuant to a reservation of rights clause in their due process complaint notice would render the IDEA's statutory and regulatory provisions meaningless (see B.P. v. New York City Dep't of Educ., 2012 WL 33984, at * 5 [E.D.N.Y. Jan. 6, 2012]; 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; Application of the Dep't of Educ., Appeal No. 11-154; Application of a Student with a Disability, Appeal No. 11-141; Application of a Student with a Disability, Appeal No. 11-010).

[8] In the first paragraph of the due process complaint notice, the parent "demand[ed] residential placement" for the student at JRC and "prospective tuition payment" for the placement (Parent Ex. A at p. 1).

[9] At the time of the impartial hearing, the student continued to attend ninth grade in the ICT class placement recommended by the May 2011 CSE in a district public school (see Tr. pp. 1, 8-9, 117-18).

[10] The district presented one witness at the impartial hearing, and did not submit any documentary evidence into the hearing record (see Tr. pp. 4, 7-47).

York State to serve students with disabilities, JRC had been approved to serve students eligible for special education and related services as students with the following disability classifications: "[e]motional [d]isturbance, [m]ental [d]isability, [i]ntellectual [d]isability, and [a]utism" (id. at pp. 17-18).[11] Consequently, the IHO indicated that JRC was not State-approved to serve students who were eligible for special education and related services as students with learning disabilities, and thus, JRC was not State-approved for this particular student's education since she remained classified as a student with a learning disability (id. at p. 18).

Next, the IHO determined that "even if the residential placement were deemed to be appropriate" for the student, the district could not be "ordered" to place the student at JRC unless the unilateral placement satisfied the "'IDEA's mandate that the student be placed in the LRE'" (IHO Decision at p. 18 [internal citations omitted]). To satisfy this requirement, the IHO indicated that the "CSE must ascertain" whether the student's needs could be met in an appropriate "'in-[S]tate residential facility'" (id. at pp. 18-19). In this case, however, the IHO found that the district failed to satisfy this requirement because the May 2011 CSE did not offer any residential placement, and therefore, the CSE had not assessed whether the student's needs could be met in either an appropriate non-residential facility or an appropriate in-State residential facility (id. at p. 19).[12]

In light of her findings, the IHO remanded the matter to the CSE, and ordered the CSE to evaluate the student (unless the parties agreed otherwise), and to convene a CSE meeting to "reconsider the [student's] classification and recommended program" as a result of all of the evidence adduced at the impartial hearing (IHO Decision at p. 19 [emphasis added]). In addition, the IHO ordered the CSE to consider any "new information" provided by the parent; to allow the parent to meaningfully participate in the IEP process; to allow any of the student's "mental health professionals or any education professionals," as determined necessary by the parent, to participate in the CSE meeting; and to determine "an appropriate program taking into consideration both non-public day and residential programs" (id. at pp. 19-20).

IV. Appeal for State-Level Review

The parent appeals, and initially asserts that the IHO properly determined that the district failed to offer the student a FAPE for the 2011-12 school year, that the parent sustained her burden to establish that JRC was appropriate to meet the student's needs, and that equitable considerations weighed in favor of the parent's claim.[13] However, the parent argues that the IHO's decision did not address the "central issue" in the due process complaint notice: whether the district was obligated to pay the student's tuition costs at JRC for the 2011-12 school year. The parent asserts in the petition that she removed the student from public school, unilaterally placed her at JRC on December 29, 2011, and assumed the financial responsibility for the costs of her tuition at JRC for

[11] A review of the New York State website identifying approved, out-of-State nonpublic schools and the disability codes pertaining to JRC indicates that JRC served the following students with disabilities: "AU" (autism), "ED" (emotional disturbance), "MD" (multiple disabilities), and "ID" (intellectual disability); therefore, it appears that the IHO mistakenly referenced "mental disability" instead of "multiple disabilities" in her decision (compare IHO Decision at p. 18, with http://www.p12.nysed.gov/specialed/privateschools/os.htm).

[12] The IHO also found that equitable considerations supported the parent's request for reimbursement, as the evidence indicated that the parent cooperated with the district throughout the process (IHO Decision at p. 19).

[13] The parent does not challenge any of these determinations on appeal (Pet. ¶¶ 15-18).

the remainder of the 2011-12 school year. In addition, the parent argues that given the IHO's conclusion that JRC was appropriate to meet the student's needs, the IHO's order to remand the matter to the CSE was "inappropriate and unnecessary" and left the parent without a remedy because the CSE had "already failed" to offer the student an appropriate program. Moreover, by remanding the matter to the CSE, the parent asserts that the IHO abdicated her responsibility to determine the rights of the parties, which violated the IDEA's principles of finality.

Thus, on appeal, the parent seeks to reverse the IHO's decision to the extent that the IHO did not award either tuition reimbursement or direct payment of the student's tuition at JRC beginning on the date of student's enrollment on December 29, 2011. Alternatively, the parent requests that an SRO order the district to place the student at JRC and to amend the student's IEP to reflect such placement recommendation. Finally, the parent attaches additional documentary evidence to the petition for consideration on appeal.

In an answer, the district responds to the parent's allegations, and contends that the IHO properly denied the parent's requested relief directing the student's placement at JRC. The district argues that the IHO properly determined that the parent did not sustain her burden to establish that JRC was appropriate to meet the student's needs, noting that the student's classification of a learning disability—coupled with the restrictiveness of the unilateral placement—supports the IHO's determination. In addition, the district asserts that the IDEA does not compel an IHO to order a "parentally-preferred remedy in every circumstance," and thus, the IHO correctly found that the student's placement at JRC and the tuition payment remedies were not appropriate under the circumstances of this case.

Next, the district contends in its answer that the parent did not sustain her burden at the impartial hearing to establish that she was entitled to a remedy of direct payment of the student's tuition at JRC. The district notes that the evidence affirmatively establishes that the student was not attending JRC at the time of the impartial hearing and that the parent was not legally obligated to pay the tuition costs at JRC at the time of the impartial hearing. In addition, the district argues that the hearing record is devoid of evidence that the parent was not financially able to pay the tuition costs at JRC. Thus, to the extent that the parent's actions between the date of the impartial hearing and the date of the IHO's decision have transformed this case into one concerning the remedy of tuition payment, the district contends that the parent cannot now introduce additional evidence to establish an essential element of her claim. Finally, the district argues that the student's tuition costs at JRC are "extraordinarily expensive," the hearing record is devoid of evidence that such expense is reasonable, and the parent has not sustained her burden to establish that the costs of JRC are appropriate under the circumstances.[14]

In a cross-appeal, the district argues that since the parent did not challenge the student's classification in the due process complaint notice, the IHO exceeded her jurisdiction in determining whether the student had been properly classified as a student with a learning disability, and further erred in relying, in part, upon that determination to conclude that the district failed to

[14] The parent submitted a reply to the district's answer. Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, although the district submits additional evidence in support of its cross-appeal, the district did not interpose any procedural defenses in its answer or submit additional evidence with the answer; therefore, consistent with the regulations, the parent was not entitled to submit a reply to the district's answer and it will not be considered.

offer the student a FAPE for the 2011-12 school year. As such, the district seeks to annul this finding. In addition, the district cross-appeals the IHO's decision to the extent that it could be reasonably read to conclude that the parent sustained her burden to establish that JRC was an appropriate placement. The district contends that the parent failed to sustain her burden to establish that the student's placement at JRC was consistent with LRE principles, noting that JRC is located in another state and is approximately 215 miles from the student's home.[15] Furthermore, the district notes that the IHO properly indicated that JRC did not serve students classified as having a learning disability. Thus, the district seeks to annul this finding. Alternatively, the district seeks to uphold the IHO's decision and to dismiss the parent's petition.

In an answer to the district's cross-appeal, the parent admits that she did not challenge the student's classification of a learning disability in the due process complaint notice, but further argues that the district waived any objections to the IHO's jurisdiction over the issue because the student's classification was the subject of testimony and was referenced during closing statements. The parent also argues that she met her burden of proof to establish the appropriateness of JRC regardless of whether JRC was the student's placement in the LRE because the IDEA only requires an appropriate placement, not one that is "'ideal.'" Furthermore, the parent asserts that the "purpose of the LRE requirement is to protect the parent and her child from inadequate placement determinations by local school districts." Finally, the parent alleges that testimony demonstrates that JRC serves and meets the needs of students with learning disabilities, and thus, an SRO should order the district to contract with JRC to provide residential services to the student or order the district to pay the student's tuition costs at JRC.[16]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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.

[15] The district submits additional evidence in support of its cross-appeal, which the parent does not object to in the answer to the cross-appeal (compare Answer & Cr.-App. ¶ 76, with Answer to Cr.-App. ¶ 7).

[16] The district submitted a reply to the parent's answer to the cross-appeal. Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the parent did not interpose any procedural defenses in its answer to the cross-appeal or submit additional evidence with the answer to the cross-appeal; therefore, consistent with the regulations, the district was not entitled to submit a reply to the parent's answer to the cross-appeal and it will not be considered.

Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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 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; 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. Dep't 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 enabling 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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing

Turning first to the cross-appeal, the hearing record supports the district's assertion that the IHO exceeded her jurisdiction in deciding whether the student had been properly classified as a student with a learning disability, and erred in relying, in part, upon this determination to conclude that the district failed to offer the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 14-15, 17; Parent Ex. A at pp. 1-3).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or

even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice asserts that the CSE failed to recommend an appropriate placement for the student, but it cannot be reasonably read to include a claim that the CSE failed to properly classify the student or that the parent otherwise challenged the student's eligibility for special education and related services as a student with a learning disability (see Parent Ex. A at pp. 1-3). The hearing record demonstrates that the issues before the IHO were whether the district's recommended placement offered the student a FAPE, whether JRC was appropriate to meet the student's needs, and what relief the parent was entitled to in the event that she prevailed on her claims (id.). A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend her due process complaint notice.

Based on the foregoing, I find that the IHO's finding that the district failed to present sufficient evidence that the student was properly classified as a student with a learning disability, and in turn, her reliance, in part, upon this finding to conclude that the district failed to establish that it offered the student a FAPE for the 2011-12 school year, exceeded the scope of the issues before her at the impartial hearing. However, even if the issue of the student's classification had been properly raised and relied upon, it was not the sole rationale upon which the IHO concluded that the district failed to offer the student a FAPE. Specifically, the IHO also found that the CSE failed to consider relevant reports and that the district failed to present sufficient evidence to establish that the CSE's recommended placement in an ICT class with counseling as a related service was appropriate to meet the student's needs (see IHO Decision at pp. 14-17). The district has not cross-appealed these specific findings, nor has the district cross-appealed the IHO's order remanding the matter to the CSE to evaluate the student, to "reconsider" the student's classification, or to recommend an appropriate placement for the student. Therefore, regardless of whether the IHO's decision went beyond the scope of the issues in the due process complaint notice, the entirety of the hearing record supports the IHO's conclusion that the district failed to offer the student a FAPE for the 2011-12 school year.

B. Unilateral Placement at JRC

Next, the ambiguity in the IHO's decision regarding whether the parent sustained her burden to establish that JRC was appropriate to meet the student's educational needs must be resolved. Notably, the parent interpreted the IHO's decision to conclude that she sustained her burden to establish that JRC was appropriate to meet the student's needs, and the district interpreted the IHO's decision to conclude that the parent did not sustain her burden to establish that JRC was appropriate to meet the student's needs.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in

favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

Moreover, while parents are not held as strictly to the standard of placement in the LRE as school districts are, courts have routinely and repeatedly considered the restrictiveness of the unilateral placement as a relevant factor in assessing whether the "totality of the circumstances" demonstrates that the "placement reasonably serves a child's individual needs" (Gagliardo, 489 F.3d at 112; see C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 983371, at *11-*14 [S.D.N.Y. Mar. 22, 2012], citing Grim, 346 F.3d at 379 [noting the IDEA's strong preference for educating students with disabilities alongside their nondisabled peers when appropriate]; Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 523-24 [S.D.N.Y. 2011]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 367 [S.D.N.Y. 2010] [indicating that the "level of restrictiveness may be considered in determining whether tuition reimbursement should be ordered"]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *14 [E.D.N.Y. Sept. 2, 2011], citing Frank G., 459 F.3d at 364; M.S., 231 F.3d at 105; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482 [S.D.N.Y. 2007]).[17]

Reading the IHO's decision in its entirety, and noting, in particular, the language used by the IHO in the decision, I agree with the district's interpretation: the IHO concluded that the parent failed to sustain her burden to establish that JRC was appropriate to meet the student's needs (see IHO Decision at pp. 17-20). Although the IHO's analysis of the parent's unilateral placement is somewhat confusing, the language used by the IHO reflects that but for the student's eligibility classification of a learning disability and the relevant LRE standard applicable to assess a unilateral placement, the parent "would have" sustained her burden to establish that JRC was appropriate in this case (see id.). Moreover, the district's interpretation of the IHO's decision is further supported by the IHO's order of relief, which did not directly place the student at JRC, direct the district to place the student at JRC and amend the student's IEP to reflect such placement, or award either tuition reimbursement for the student's unilateral placement at JRC or otherwise order the district to directly fund the student's unilateral placement at JRC (id. at pp. 19-20).

Under State law, the Commissioner of Education may approve the provision of "special services or programs" to students with disabilities through a variety of methods, including contracts entered into by boards of education of public schools and "private residential schools . . . which are outside the state" (Educ. Law §§ 4401[2][h], 4402[2][a]; see 8 NYCRR 200.1[d], 200.7). Although a particular private school may meet the Commissioner's criteria for approval to provide special education programs and services to students with a disability, it is the individualized needs of a student with a disability that will ultimately "determine which of such of services shall be rendered" by an approved private provider (Educ. Law § 4402[2][a]). Thus, while JRC may be approved to provide special education and related services to students with an emotional

[17] U.S. District Courts in New York have upheld denials of tuition reimbursement when the parents' chosen unilateral placement was too restrictive (D.D-S., 2011 WL 3919040, at * 14, citing M.S., 231 F.3d at 104-05 [concluding that the parents' unilateral placement was not appropriate, in part, because it was not "consistent with the IDEA's requirement that children with disabilities be educated in the least restrictive appropriate educational environment"]; S.H. v. New York City Dep't of Educ., 2011 WL 609885, at *9-*10 [S.D.N.Y. Feb. 18, 2011] [denying tuition reimbursement when the parents failed to demonstrate that the student required a residential program "solely for learning disabled students in order to obtain educational benefits"]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 551 [S.D.N.Y.2010] [finding that a "private placement can be appropriately rejected" when a student's opportunities to "participate in the mainstream curriculum were too limited"]; Pinn, 473 F. Supp. 2d at 482–83 [concluding that the unilateral placement was not appropriate because "[m]uch of [the student's] education consisted of one-on-one tutoring, and he did not have the opportunity for taking classes in mainstream settings"]).

disturbance, intellectual disability, multiple disabilities, and autism, contrary to the parent's argument, the district may only be directed to contract with JRC if such direction would be consistent with the student's individualized needs (see Application of a Student with a Disability, Appeal No. 08-103). In this case—and as correctly determined by the IHO—the student's classification of a learning disability precludes such directive to the district.

With respect to the IHO's finding that the student's placement at JRC was not consistent with the applicable LRE principles, the hearing record also supports this finding. In this case, while evidence in the hearing record strongly suggests that the student exhibits school attendance issues, mental health issues, and behavior issues, the evidence in the hearing record also demonstrates that the student—at the time of the impartial hearing—was attending the ICT class and was receiving counseling services at a district public school (see Tr. pp. 1, 8-9, 117-18; see also Parent Exs. E-L). At the impartial hearing, the assistant principal of the district public school the student was attending testified about the student's functioning within the ICT placement and her attendance at her mandated counseling services (see Tr. pp. 7-47). According to the assistant principal—who had developed a rapport with the student—the student exhibited, at times, disrespectful or rude behavior, but the assistant principal indicated that, generally, the student "got along with adults" and, at times, she "had issues" with her classmates "if she felt that someone was attacking her or against her" (Tr. p. 10). The assistant principal also testified that based upon conversations with the student's teachers, the student made an effort to complete her classwork (id.). Based upon her own contact with the student, as well as her observations of the student at school, the assistant principal testified that she appeared "very comfortable" at school; that she had "befriended many, many students;" that she referred to school as her "family away from home;" that she frequently visited the assistant principal's office; and that when or if she experienced an "issue" with another student, she would "express herself" and request "mediation" to resolve those issues at school (Tr. pp. 11-12). During the 2011-12 school year, the student had successfully resolved two incidents through the mediation process, which the student, herself, had requested in order to resolve the problems (see Tr. pp. 14-18). In particular, the student requested mediation at school so that she could return to tutoring sessions (see Tr. pp. 17-18). The assistant principal also testified that the student could articulate and express her concerns, that she had received counseling as a related service as mandated on her IEP, and that the student had a "good relationship" with the counselor at school (see Tr. pp. 14-16, 35-36, 38-40).

With respect to academics, the assistant principal testified that the student worked "hard" and that she was not "afraid to ask questions" if she did not "understand" (Tr. pp. 19-20). Admittedly, the student at times cut classes, arrived to school late, and was not registered as being enrolled in school for a "period in October" 2011 (see Tr. pp. 20-21, 31-33, 42-44). According to the assistant principal, although the student passed all of her classes in the first marking period of the 2011-12 school year, she may have failed two or three classes during the second marking period (see Tr. pp. 33-34). The assistant principal testified, however, that the student was experiencing "some issues at home" during the second marking period that may have contributed to the deterioration in her grades (see Tr. pp. 33-34, 37-38). In addition, although the assistant principal was aware that the student had received therapy from an outside agency, she had not contacted the outside agency for further information about the student because there had not been any need to do so (see Tr. pp. 28-30, 40-41). Based upon the information provided by the student, the assistant principal testified that the student did not have a "good relationship" with her parent and her parent wanted to "send her away" (see Tr. pp. 29-30, 33-34, 37, 40-41, 44-46).

Thus, to the extent that the evidence indicates that the student could function within an educational setting placement alongside her nondisabled peers, the IHO's determination that the student's placement at JRC was not consistent with the IDEA's mandate to educate students in the LRE is supported by the hearing record.[18]

C. Relief

Turning next to the parent's argument that the IHO failed to address the central issue in the due process complaint notice—whether the district was obligated to pay the student's tuition costs at JRC for the 2011-12 school year—I find that in light of the above determinations, the argument is without merit and must be dismissed. Initially, having concluded that the district failed to offer the student a FAPE and that JRC was not an appropriate placement for the student, the parent is not entitled to an award of tuition reimbursement or any other type of tuition payment. In addition, courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). Thus, the IHO properly remanded the matter to the CSE to fully evaluate the student and to reconvene to recommend an appropriate program and placement for the student.[19]

[18] In light of determining that the IHO concluded that JRC was not appropriate, I need not decide whether to accept the additional evidence submitted by the parent in support of the petition.

[19] Moreover, I also note that at the time of the impartial hearing, the parent's request for tuition reimbursement or direct payment of the student's tuition at JRC was not yet ripe for review—and therefore, the IHO lacked jurisdiction over the issue—since the parent had not removed the student from public school, the parent had not unilaterally placed the student at JRC, and the parent was not obligated to pay the costs of the student's tuition at JRC for the 2011-12 school year (see Burlington, 471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192; Mr. and Mrs. A., 769 F. Supp. 2d at 406, 427-30; see also 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; Application of a Student with a Disability, Appeal No. 11-049; Tr. pp. 49-50, 150-53). In addition, statements made by the parent's attorney at the impartial hearing indicate that the parent abandoned tuition reimbursement and direct payment of the student's tuition at JRC as relief (compare Tr. pp. 49-50, 150-53, with Parent Ex. A at pp. 2-3). Specifically, the parent's attorney stated that "this [was] not a tuition reimbursement case," and the parent "ha[d] not signed a contract with a private school obligating her to pay the tuition" (Tr. pp. 49-50; see Tr. pp. 150-53). According to the parent's attorney, the parent was "asking for a placement in a New York State-approved school"—not for "three years in a row" and not "even until the end of the school year"—noting that the CSE could, thereafter, reconvene to change the student's program recommendation (Tr. pp. 49-50; see Tr. pp. 152-53).

VII. Conclusion

Having determined that the district failed to offer the student a FAPE and that the parent did not sustain her burden to establish that JRC was an appropriate placement, the IHO properly remanded the matter to the CSE for further proceedings consistent with the ordered relief. In addition, I have considered the parties' remaining contentions and find that I need not reach them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
May 24 , 2012

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STEPHANIE DEYOE
STATE REVIEW OFFICER