The University of the State of New York

The State Education Department
State Review Officer
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No. 12-076

Application of a STUDENT WITH A DISABILITY, by his 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:
Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 denied her request for the full amount of her son's tuition costs at the Rebecca School (Rebecca) for the 2011-12 school year.[1] The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representatives (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

[1]The Rebecca School 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).

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 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]).[2] 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

Briefly, on or about July 6, 2011, the CSE met for an annual review and developed the student's IEP for the 2011-12 school year (Parent Ex. E).[3] Finding that the student remained

[2] During closing arguments, regarding an evidentiary matter, the parent indicated that she had called the Office of State Review because "they give guidance" about the law "to parents who are advocates" (Tr. p. 313). I note that the Office of State Review does not give legal advice to parties to an impartial hearing.

[3] The first page of the IEP is dated July 5, 2011, however, page 14 of the IEP is dated July 6, 2011 and the parent testified that she attended the CSE meeting on July 6, 2011 (Tr. p. 96; Parent Ex. E at pp. 1, 14).

eligible for special education and related services as a student with autism, the July 2011 CSE recommended a special class in a district school with related services, and found that the student was eligible for a 12-month school year (id. at pp. 1, 8-9).[4] The student's July 2011 IEP did not identify a recommended class size (maximum student-to-staff ratio) for the special class (id.). The hearing record reflects that the projected date of IEP implementation was September 8, 2011, and that the district did not recommend a particular school for the student for the 2011-12 school year (Tr. pp. 104-106; Parent Ex. E at pp. 1, 8). The hearing record further reflects that on September 9, 2011, the parent entered into a contract with Rebecca for the student's attendance at the school for the 2011-12 school year; that the contract term was September 12, 2011 through June 22, 2012; and that the student began attending Rebecca on September 12, 2011 (Tr. pp. 108, 168; Parent Ex. G at pp. 1, 4).

A. Due Process Complaint Notice

In a due process complaint notice dated August 2, 2011, the parent asserted that the district did not offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) (Parent Ex. A at p. 2). The parent's assertions included, among other things, that the CSE failed to follow proper procedures and that the IEP was not appropriate (id.). Some of the parent's concerns delineated in the August 2011 due process complaint notice included that the district had changed the student's recommended program, failed to conduct "formal evaluations" to determine why the student was not progressing, failed to specify the size and staffing ratio of the recommended program, and failed to specify a placement for the student (id.). As relief, the parent sought direct payment of the cost of tuition for the student to attend Rebecca for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 15, 2011 and concluded on January 11, 2012, after four days of proceedings (Tr. pp. 1-340). An unsigned decision dated February 23, 2012 was issued (see Feb. 23, 2012 IHO Decision at p. 18). A "corrected" decision was issued on March 13, 2012, which included a signature on the signature page (see March 13, 2012 Corrected IHO Decision at p. 18). A "second corrected" IHO decision was also issued on March 13, 2012, which included a signature and corrected an inconsistency that appeared in the previous decisions between the language in the order and the language in the decision regarding relief awarded (see March 13, 2012 Second Corrected IHO Decision at p. 18).

At the impartial hearing, the district conceded that it did not offer the student a FAPE for the 2011-12 school year (Tr. pp. 42, 44, 46, 48-49). The district did not enter any documentary evidence into the record, nor did it call any witnesses to testify (see Tr. pp. 1-340). In the "second corrected" March 13, 2012 decision, the IHO noted the district's concession and found that it did not offer the student a FAPE (March 13, 2012 Second Corrected IHO Decision at p. 15). In addition, the IHO found that the Rebecca School was appropriate for the student, although the IHO discounted the parent's testimony as "lacking credibility and reliability" (id. at pp. 15-16).[5]

[4] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[5] The IHO "credited" the testimony of the Rebecca School program director and found that it supported a finding that the school was appropriate (March 13, 2012 Second Corrected IHO Decision at p. 16).

Regarding equitable considerations, the IHO found that the case was "very troubling" (id. at p. 16). The IHO noted the district's concession that it did not offer the student a FAPE, but also noted that the parent "gave an untrue account of the origin of the [student's] increased behavioral difficulties" when he was attending the district's school and then tried to blame the district's attorney for "her resort to falsehood" (id.). Also, the IHO found that although he had told the parent and advocate not to discuss the parent's testimony between hearing dates,[6] it was clear to the IHO from statements made by them that the parent and advocate had nevertheless discussed the testimony (id. at p. 17). In addition, the IHO found that the parent never informed the district of her intent to place the student in private school at public expense (id.). The IHO concluded that "[u]nder the circumstances" the equitable considerations warranted a reduction of the tuition awarded by 25 percent (id.). Therefore, the IHO ordered the district to directly pay 75 percent of the student's tuition at the Rebecca School for the 2011-12 school year (id. at p. 18).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in reducing the amount of tuition awarded to the parent based upon equitable considerations. The parent specifically asserts that the IHO erred in finding that the parent failed to satisfy the statutory 10-day notice requirement. The parent asserts that there was no program offered by the district for her to reject and that there was no placement given to the student, meaning that there was no public school site provided by the district from which to remove the student. In addition, the parent asserts that she filed the due process complaint notice on August 2, 2011, which was 36 days before the beginning of the 2011-12 school year, providing the district with more than sufficient time for the CSE to convene to provide the student with a program recommendation and placement. Moreover, the parent asserts that the district did not provide her with the procedural safeguards notice and that she was not aware of the 10-day notice requirement. Regarding the IHO's finding that the parent's testimony regarding the student's behavior was not credible, the parent asserts that she never discussed previous testimony with her advocate and that there was nothing in the hearing record confirming the IHO's suspicion that the advocate and parent had discussed her past testimony. Regarding the parent's testimony about the student's behavior referenced by the IHO in her decision, the parent asserts that she had misspoken during her first day of testimony during cross-examination and subsequently tried to clarify her answer, but used the wrong words to describe that she wanted to clarify her testimony. The parent further asserts that her credibility is not relevant to the issue of equitable considerations. As relief, the parent requests an order for the full amount of the cost of tuition for the Rebecca School for the student's attendance for the 2011-12 school year.

In an answer, the district asserts that the petition should be dismissed because it was not timely served. The district asserts that the IHO decision was served by mail to the parent on February 23, 2012; that the petition needed to be served by the parent upon the district no later than April 3, 2012; and that the parent did not serve the petition until April 4, 2012. The district further asserts that the parent failed to demonstrate or allege good cause for untimely service in the petition and that accordingly, the parent's petition should be dismissed as untimely. Regarding equitable considerations, the district asserts that the IHO properly found that the equities warranted a reduction of an award of tuition by 25 percent. Although the district submits that the IHO erred in concluding that the parent failed to provide sufficient notice to the district because the parent

[6] The parent initially testified on October 28, 2011 and the matter was adjourned to December 14, 2011, at which time she completed her testimony (see Tr. pp. 85-257).

submitted an August 2, 2011 due process complaint notice that was sufficient to provide notice of intent to enroll the student at the Rebecca School and seek tuition reimbursement, the district asserts that the hearing record still reflects that the IHO properly found that the equities warrant a reduction of an award of tuition relief by 25 percent. In support of its position, the district asserts that the IHO properly found that the absence of credibility and reliability in the parent's testimony warranted a finding against the parent on the equities. The district further asserts that the IHO properly found that the parent disregarded the IHO's directives and that parties to an impartial hearing are obligated to comply with the reasonable directives of an IHO.

In a reply, among other things, the parent asserts that the lack of a signature on the initial February 23, 2012 IHO decision should render the decision a nullity and her petition was timely served.

V. Discussion

A. Preliminary Matters

1. Timeliness of the Appeal

I will initially address the district's assertion that the parent's petition for review is untimely and should therefore be dismissed. An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of the Dep't of Educ., Appeal No. 12-008; Application of a Student with a Disability, Appeal No. 10-119; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-142; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 05-082).

As to the time period for initiating an appeal, a petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b], [c]). State regulations expressly provide that if the IHO's decision has been sent by mail to the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition for review (8 NYCRR 279.2[b], [c]).

In this case, a draft of the IHO's original findings of fact and order was dated February 23, 2012 but this draft was not signed by the IHO (see Feb. 23, 2012 IHO decision at p. 18). The hearing record further reflects that the unsigned February 23, 2012 decision was transmitted to the parent by letter on district letterhead from its impartial hearing office dated February 23, 2012 (see Answer Ex. 1). I recognize that districts bear certain responsibilities for several matters related to due process proceedings, such as arranging for the appointment of an IHO in accordance with the rotational selection process (8 NYCRR 200.2[e][1][ii], 200.5[j][3][i]-[ii]) and the certification and submission of administrative hearing records to the Office of State Review (8 NYCRR 279.9), and it may be permissible for district personnel to assist an IHO with certain ministerial functions related to a due process proceeding (i.e. arrangements for a hearing room, telephonic access etc.); however, matters such as the sealing, imprimatur, and issuance of a written decision in a case remains a formal, non-ministerial matter of great consequence falling traditionally within the province of the administrative hearing officer. In this case, there is also no attempt by the district to describe the interaction between the IHO and district personnel from the impartial hearing office or details that describe how or when the IHO authorized the issuance and transmittal of the three

versions of the decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-047 [providing some description of the interactions between impartial hearing office and the IHO]). In determining whether the parent's petition for review is untimely, I note the parent's assertions in her reply that she believed she had "extra time" to submit her petition because the February 23, 2012 IHO decision did not have a signature and that the lack of a signature on the decision should render the decision a nullity. I find under the circumstances of this case, that the February 23, 2012 unsigned IHO decision did not begin the time period for purposes of initiating an appeal to an SRO, but rather that the time period ran from the date that the first signed decision was issued on March 13, 2012. The hearing record reflects that the parent's petition was personally served on April 4, 2012 (Parent Aff. of Service). The evidence reflects that the parent served the petition within the prescribed time limits regardless of the manner in which the signed March 13, 2012 IHO decisions were transmitted. Accordingly, I find that the petition is timely (see 8 NYCRR 279.2[c]).

2. Scope of Review

In determining the scope of review of this appeal, I note that the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 school year and that the Rebecca School was appropriate for the student have not been appealed, and therefore have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; (see March 13, 2012 Second Corrected IHO Decision at pp. 15-16). The sole issue before me in this appeal is whether the IHO erred in reducing the award of tuition at the Rebecca School by 25 percent based upon equitable considerations (see March 13, 2012 Second Corrected IHO Decision at p. 17).

B. Equitable Considerations

Turning to the IHO's determination to reduce the amount of tuition reimbursement to the parent, 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; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

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

In reducing the award of tuition by 25 percent, as discussed above, the IHO concluded that "[u]nder the circumstances," the equities warranted the reduction (see March 13, 2012 Second Corrected IHO Decision at p.17). Specifically, the IHO found that the parent did not inform the district of her intent to place the student in private school at public expense (see March 13, 2012 Second Corrected IHO Decision at p. 17). On appeal, the district does not disagree with the parent that she provided sufficient notice to the district, based upon the parent's August 2, 2011 due process complaint notice (see Parent Ex. A). A review of the parent's August 2, 2011 due process complaint notice indicates that the parent provided more than ten days notice regarding her concerns arising from the July 2011 IEP, and that such concerns included, among other things, a change in the student's recommended program, the failure to specify the size and staffing ratio of the recommended program, and the failure to specify a placement for the student (id. at p. 2). In addition, the parent's August 2, 2011 due process complaint notice indicated the relief sought from the district, specifically, the cost of tuition for the student to attend the Rebecca School for the 2011-12 school year (id.). Accordingly, upon review of the hearing record, I find that the IHO erred in finding that the parent failed to provide 10-day written notice to the district of her intent to place the student in a private school because the parent's August 2, 2011 due process complaint notice substantially complied with the statutory requirements and provided the district with an opportunity to remedy the parent's objections at least ten days prior to the date that the student was enrolled at the Rebecca School (see Parent Ex. A; see also Application of a Student with a Disability, Appeal No. 10-095).

Next, the district asserts in its answer that the IHO properly found that the equities warrant a reduction of an award of tuition relief by 25 percent based upon the findings by the IHO as to the absence of credibility and reliability of the parent's testimony; that the parent provided untruthful testimony; and that the parent disregarded the IHO's directives. The parent disagrees with the IHO's credibility determinations regarding her testimony as well as the finding that the parent did not comply with directives of the IHO and further asserts that the reduction was based only on the IHO's finding regarding the parent's failure to comply with the notice requirement.

Prior to concluding that the equities warranted a 25 percent reduction of tuition awarded, the IHO indicated that "[t]his was a very troubling case regarding equities" (March 13, 2012

Second Corrected IHO Decision at p. 16). The IHO noted testimony of the parent that included an "untrue account" of the beginning of the student's increased behavioral difficulties when attending the district's school, attempting to blame the district for her misstatement, and that despite "several admonishments" to the parent and her advocate not to discuss the parent's testimony between hearing dates, it was clear that they had discussed the testimony with the intent of "'clarifying'" earlier testimony (March 13, 2012 Second Corrected IHO Decision at pp. 16-17; see Tr. pp. 132, 195-96, 232-253). The IHO added that the parent's advocate also stated falsely that the conversation did not occur, and that her statement was clearly contradicted by the advocate's explanation of questions while trying to rehabilitate her client's testimony (March 13, 2012 Second Corrected IHO Decision at pp. 16-17; see Tr. pp. 195-96). The IHO further noted a motion by the parent after the hearing seeking certain statements to be stricken from the record, including her own comments about her testimony and the instructions given to the parent as well as blaming the district's attorney (March 13, 2012 Second Corrected IHO Decision at pp. 16-17; see IHO Ex. III). The IHO concluded that the parent "clearly demonstrated a singular absence of credibility and reliability" (March 13, 2012 Second Corrected IHO Decision at p. 17).

Accordingly, upon review of the IHO's decision, I find that the 25 percent reduction of tuition awarded was not based solely on the IHO's finding that the parent failed to comply with the notice requirement, but also upon her findings regarding the parent's credibility and failure to comply with a directive of the IHO (see March 13, 2012 Second Corrected IHO Decision at pp. 16-17).

A State Review Officer gives due deference to the credibility findings of the IHO, unless the hearing record, read in its entirety, would compel a contrary conclusion (see Carlisle Area School v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *4 [N.D.N.Y. Jan. 2, 2008]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 11-074; Application of a Student with a Disability, Appeal No. 11-064; Application of a Student with a Disability, Appeal No. 10-018; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Bd. of Educ., Appeal No. 08-074; Application of the Dep't of Educ., Appeal No. 08-037). A review of the complete hearing record does not compel a contrary conclusion and in this circumstance, there is no reason to disturb the IHO's credibility determinations (see March 13, 2012 Second Corrected IHO Decision at pp. 16-17; see also J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [District Court does not "second-guess" IHO's credibility determination]). Therefore, I am compelled to give due deference to the IHO's findings regarding the credibility of the parent's testimony and therefore, I must uphold those findings.

Regarding compliance with directives of the IHO, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing, and I find no authority that precludes an IHO from considering the parties' conduct during the impartial hearing process while exercising his or her broad equitable power to fashion relief (see generally Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 09-007; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). An IHO is authorized to administer oaths and to issue subpoenas in connection with the administrative

proceeding (8 NYCRR 200.5[j][3][iv]). An IHO may ask questions of attorneys or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]). The parents, school authorities, and their respective attorneys or representatives, shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses at the impartial hearing (8 NYCRR 200.5[j][3][xii]). The IHO may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination (8 NYCRR 200.5[j][3][xii][f]). In the instant case, when the impartial hearing was adjourned for another hearing date before completion of the parent's testimony, the IHO directed that the parent not discuss her testimony with her advocate between hearing dates (see Tr. pp. 143-44, 146). The IHO is charged with the responsibility of maintaining the order and integrity of the impartial hearing process and I find that this was a reasonable directive and that the parent was obliged to comply with this reasonable directive. Although I note the parent's assertion that she did not discuss her previous testimony with her advocate, I reference here the credibility determination by the IHO above and find that a complete review of the hearing record does not compel a contrary conclusion, and that in this case, I am hard-pressed to disturb the IHO's credibility determinations, including those that pertain to the specific issue of complying with reasonable directives of the IHO (see March 13, 2012 Second Corrected IHO Decision at pp. 16-17; see, e.g., Tr. pp. 238-45).

Upon review of the entire hearing record, I find that it does not compel a contrary conclusion with regard to the IHO's credibility determinations and in particular, the finding that the parent did not act reasonably by failing to comply with the IHO's directive not to discuss her testimony. Accordingly, I find that the IHO acted within her discretion in declining to award the parent the full amount of the student's tuition at the Rebecca School for the 2011-12 school year, but not to the extent of a 25 percent reduction of tuition that resulted from the combination of her findings regarding the 10-day notice and compliance with IHO directives. As a result, I find, that a significantly smaller reduction in tuition reimbursement is appropriate due to the parent's conduct of failing to comply with the IHO's directives related to the integrity of the impartial hearing process and that a reduction of the full amount of tuition by $2,500.00 for the student's attendance at the Rebecca School for the 2011-12 school year is an appropriate remedy.

VI. Conclusion

In accordance with the discussion above, I will modify the IHO's order regarding the amount of reduction of tuition awarded for the student's attendance at the Rebecca School for the 2011-12 school year.

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's "Second Corrected" decision dated March 13, 2012 is modified by reversing those portions which found that the parent did not inform the district of her intent to place the student in private school at public expense and ordered the district to pay 75 percent of the student's tuition at the Rebecca School for the 2011-12 school year; and

IT IS FURTHER ORDERED that upon submission of proof of the student's attendance the district is directed to pay the costs of the student's tuition for his attendance at the Rebecca School for the 2011-12 school year but reduced by $2,500.00.

Dated: **Albany, New York**
October 24, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER