The University of the State of New York

The State Education Department
State Review Officer
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No. 12-152

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:
Susan Luger Associates, Inc., attorneys for petitioners, Lawrence D. Weinberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for respondent, Ilana A. Eck, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their requests for prospective payment of, and also to be reimbursed for, their daughter's tuition costs at a 2011 summer camp program and at the Rebecca School for the 2011-12 school year on the basis of standing and which also found that the parents were not entitled to direct and/or prospective funding of their daughter's tuition costs at the summer camp program and at the Rebecca School. The appeal must be sustained in part and the matter remanded to the IHO for a determination on the merits of the parent's due process complaint notice.

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

The student presents with difficulties across all areas of development including neurodevelopmental delays in relating and communicating, gross and fine motor delays (deficits in motor planning secondary to ataxic movement patterns in her extremities), learning and sensory processing difficulties (Tr. pp. 38, 234; Parent Ex. B at p. 5). The student does not present as having autism (Tr. pp. 39, 234, 282). The student is also described as often highly distractible in environments with moderate to high levels of visual input (Parent Ex. B at p. 5). The student exhibits deficits in activities of daily living (ADL) skills (feeding and toileting skills) and has a history of oropharyngeal dysphasia, which necessitates thickening liquids she consumes in order to prevent aspiration (id.). At the time of the February 2, 2011 CSE meeting, the student was

receiving one feeding per day through a feeding tube by the school nurse (id.).[1] The student was also prescribed glasses for distance but does not wear them (id.). She has tubes in her ears to facilitate drainage (id.).

The hearing record reflects that the student received services through the Early Intervention Program (EIP) beginning at the age of three months and attended preschool at an early childhood development center for two years (Tr. pp. 154, 156; Parent Ex. B at p. 3). She then began attending the Rebecca School in September 2010 (Tr. p. 484). The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On February 2, 2011 the CSE convened for an annual review of the student and to develop her IEP for the 2011-12 school year (Parent Ex. B at pp. 1-2). The resultant IEP reflected that the student was classified as a student with multiple disabilities and recommended that the student be placed in a 12-month 6:1+1 special class in a specialized school with related services of speech-language therapy, OT, and PT and receive the assistance of a 1:1 health paraprofessional (Tr. p. 234; Parent Ex. B at pp. 1, 15).[2]

On May 11, 2011 the parents signed an enrollment contract and payment schedule for the Rebecca School for the 2011-12 school year (Tr. pp. 499-500; see Parent Ex. C at pp. 1, 4-6). The hearing record reflects that the Rebecca School received a $5,000.00 deposit for the student's enrollment, which was in the form of a business check signed by the student's grandfather (Tr. pp. 502-04; see Parent Ex. C at p. 5).[3]

According to the parents, the district advised them in a "Final Notice of Recommendation" (FNR) dated June 9, 2011 of the assignment of the particular public school site to which the district had assigned the student (Tr. pp. 485, 495-96; Parent Exs. A at p. 3; D at p. 3).[4] The district also sent the parents an FNR dated June 15, 2011 (Tr. pp. 485-86, 488; see Parent Ex. R; Dist. Ex. 3; see also Tr. p. 485). Among other things, the district's June 15, 2011 FNR summarized the recommendations made by the February 2011 CSE and identified a different public school site as the student's assigned school (see Parent Ex. R; Dist. Ex. 3).

According to the parents, they received the June 15, 2011 FNR, but it lacked an address and when the student's mother called the telephone number on the FNR to set up a site visit,

[1] The student discontinued use of the feeding tube after summer 2011 and it was removed in October 2011 (Tr. p. 238).

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

[3] The parent was unsure if the student's grandfather was a sole owner, officer, or member with an ownership share of the business (Tr. p. 503).

[4] The June 9, 2011 FNR was not submitted as evidence in the hearing record.

she left numerous messages, but no one called back (Tr. pp. 485-86; see Parent Ex. R).[5]

The parents indicated that they contacted the district to arrange to visit the public school site in the June 9, 2011 FNR, but in a letter dated June 20, 2011, the student's mother explained that she was told to visit a site at another location because the site listed in the June 9, 2011 FNR was not yet operational (Tr. p. 487; Parent Ex. D at p. 3). According to the student's mother, the district indicated that she could visit the program while it was operating at the other location so she could "see the environment" (Tr. p. 487; Parent Ex. D at p. 2-3). The hearing record reflects that the parents visited the alternative site on June 16, 2011 (Tr. pp. 487-88, 496; Parent Ex. D at pp. 1-3).

In a letter dated June 20, 2011, the parents advised the district that, based on the June 16, 2011 visit, they believed that the recommended 6:1+1 student-teacher ratio was not an appropriate placement for the student, that insufficient services would be provided to the student, and that the program was insufficiently therapeutic (Parent Ex. D at p. 3). Among other things, the parents additionally stated that the students in the class did not have needs similar to the student and that it was not academically appropriate (id.).

The parents visited the assigned school site recommended in the June 9, 2011 FNR on June 28, 2011 (Parent Ex. D at pp. 1, 3). On June 29, 2011, the parents informed the district that because the program listed in the June 9, 2011 FNR would be operational in July 2011 and that there were issues that needed to be "straightened out," the parents believed that the student's needs would not be met (Parent Ex. D at p. 1; see also Tr. pp. 496-97). The parents advised the district that they would visit the site again when it was "fully up and running" but that "for the summer" they would unilaterally place the student at a State-approved summer camp program (Parent Ex. D at p. 1). The parents further advised the district that if the summer camp could not be added to the student's IEP they would seek reimbursement for the summer camp at public expense (id. at pp. 1-2). The student attended a State-approved residential summer camp, which was described by its director as a seven day per week "sleep away" camp for students with developmental delays and severely handicapped children (Tr. pp. 170-71, 200; Parent Ex. O). The camp began on July 5, 2011 (Tr. p. 200; Parent Ex. O).

A. Due Process Complaint Notice

In a due process complaint notice dated July 7, 2011, the parents requested an impartial hearing (see Parent Ex. A at p. 1). Among other things, the parents asserted that the February 2011 CSE denied the student a free appropriate public education (FAPE) with respect to the 2011-12 school year and that the February 2011 IEP was not appropriate for the student (id. at p. 2). In particular, the parents alleged that the February 2011 CSE was improperly composed, that the February 2011 CSE had predetermined its recommendation, that the February 2011 CSE "failed to recommend an appropriate program" for the student in a timely fashion, and that to date the CSE had "failed to offer an appropriate placement for the [s]tudent" (id. at pp.

[5] Two FNRs dated June 15, 2011 were submitted as evidence in the hearing record. The June 15, 2011 FNR submitted into evidence by the district included the address of the public school, a telephone number, and a contact person (District Ex. 3). However, the parents submitted a June 15, 2011 FNR with a different telephone number and contact person (Parent Ex. R), and the student's mother indicated that she did not receive the June 15, 2011 FNR identified as District Ex. 3 (see Tr. pp. 485-86, 489).

2-3).[6] With respect to the composition of the February 2011 CSE, the parents contended that the CSE did not have a proper "special education teacher/provider" or regular education teacher (id. at p. 3). Regarding the adequacy of the February 2011 IEP, the parents asserted that it was inappropriate to hold the CSE annual review meeting in February 2011 because this precluded the CSE from considering any change in the student's needs in the second half of the school year (id. at p. 2). The parents also asserted that the annual goals and short-term objectives did not address all of the student's educational, social, and emotional needs, and the annual goals lacked evaluative criteria, procedures, or schedules to measure progress (id. at pp. 2-3).

The parents alleged that the recommendation made by the February 2011 CSE "did not comport" with the suggestions and recommendations of those professionals who worked directly with the student and that the February 2011 CSE was unable to provide the parents with information about the proposed program (Parent Ex. A at p.3). The parents contended that the recommended student-to-teacher ratio was inappropriate for the student (id.). With respect to the February 2011 CSE's recommendations, the parents also asserted, among other things, that the student required a more therapeutic program, and that the teaching methodology used did not comport with methodologies that had been used or recommended for the student (Parent Ex. A at p. 3). The parents also asserted that "in not considering a more restrictive environment" the February 2011 CSE failed to place the student in the least restrictive environment (LRE) (id.).

With respect to the public school site identified in the district's June 9, 2011 FNR, the parents restated in the due process complaint notice the same reasons set forth in their June 20, 2011 letter describing why the site they visited on June 16, 2011 was not appropriate for the student (Parent Ex. A at p. 3; see Parent Ex. D at p. 3). In the due process complaint notice, the parents also referenced their June 29, 2011 letter to the district regarding the site they visited on June 28, 2011 and restated the reasons set forth in that correspondence as to why that site was not appropriate for the student (Parent Ex. A at pp. 3-4; see Parent Ex. D at p. 1). The parents also alleged that they could not send the student to a program without being able to see "first-hand" if it would appropriately address the student's "many unique special needs" (Parent Ex. A at p. 4).

With respect to the assigned school recommended in the district's June 15, 2011 FNR, the parents alleged that the FNR lacked a school address or telephone number (Parent Ex. A at p. 4). They also asserted that notwithstanding the student's mother's efforts to arrange a visit to that school, the district had not returned the call to set up a visit (id.).

The parents further asserted that they had advised the district that they would be unilaterally placing the student at a State-approved summer camp program (Parent Ex. A at p. 4).

The parents requested that the IHO make findings including that the district failed to offer the student a FAPE "on both a procedural and substantive basis," that the February 2011 CSE review was "substantively and procedurally flawed," that the parents were "deprived of the opportunity to meaningfully participate" in the development of the February 2011 IEP and

[6] The parents clarified that while they challenged the placement recommendation in the student's February 2011 IEP, they agreed that the related service recommendations in the IEP were appropriate for the student (Parent Ex. A at p. 5).

in the selection of the student's placement, that the district failed to offer an appropriate program or an appropriate placement, that the placement selected by the parents was appropriate for the student, that the parents were unable to pay the tuition for the school, and that the parents cooperated with the CSE and did not impede it from offering the student a FAPE (Parent Ex. A at p. 5). As a proposed remedy, the parents requested that, among other things, the IHO find that they were entitled to the related services of a full-time health paraprofessional as provided for by the February 2011 IEP; "prospective payment" of tuition for the State-approved summer camp program for the summer 2011 term; "prospective payment" of tuition for the Rebecca School from September 1, 2011 through June 30, 2012; "prospective payment" of the cost of related services from July 1, 2011 through June 30, 2012; reimbursement of monies paid to date and for any payments made in the future; and special education transportation in order for the student to attend the summer 2011 State-approved camp program and the Rebecca School (id.).

B. Events Post-Dating the Due Process Complaint

The student attended the residential summer camp through August 17, 2011 (Tr. pp. 170-71, 200; Parent Ex. O). According to the director of the summer camp, the camp included both educational and regular camping related activities for its attendees (Tr. pp. 170-71, 173, 200; see Tr. pp.175-79, 190-94, 198-201; Parent Exs. H; P).

In September 2011, the student was placed at the Rebecca School for the 2011-12 school year (Tr. pp. 231, 485; see Parent Ex. C). On September 26, 2011 the student's mother visited the public school site identified in the June 9, 2011 FNR a second time (Parent Ex. S at p. 1). In a letter dated September 27, 2011, the parents again indicated that they believed that the public school site was inappropriate for the student for a number of reasons and that they were not accepting the "program/placement" (id.). In their September 27, 2012 letter, the parents also notified the district that they had "no alternative" and that they intended to keep the student unilaterally placed at the Rebecca School for the 2011-12 school year and seek reimbursement from the district for the student's placement at the Rebecca School (id.).

C. Impartial Hearing Officer Decision

An impartial hearing convened on October 6, 2011 and concluded on February 3, 2012, after four days of proceedings (see Tr. pp. 1, 87, 216, 473, 512-14). During the first day of the proceedings, the district took the position that the June 15, 2011 FNR superseded any earlier FNR issued by the district and that since the June 15, 2011 FNR was issued prior to the beginning of the school year, at the impartial hearing the district would be defending the school assigned to the student in that FNR, at which time there was no objection or disagreement by the parents (Tr. pp. 18-20). According to the parents, the student's mother and a parent advocate visited the school listed in the June 15, 2011 FNR after the first hearing date and on October 11, 2011 for approximately 50 minutes (Tr. pp. 491-92; Parent Ex. S at p. 2). In a letter to the district dated October 17, 2011, the parents advised the district that they believed that the public school site to which the student was assigned in the June 15, 2011 FNR was not appropriate (id.). During the impartial hearing, the issues and testimony relating to the particular public school site that the student would have attended during the 2011-12 school year focused on the school identified in the district's June 15, 2011 FNR (see Tr. pp. 93-153; Dist. Ex. 3; Parent Ex. R.).

After the third day of the impartial hearing, the parents sought the recusal of the IHO who was then presiding (IHO-1) in a written request (see Tr. pp. 216, 472; Pet. ¶ 24; Pet. Ex. A).[7] On January 24, 2012, IHO-1 recused himself from the impartial hearing (Pet. ¶ 24; Pet. Ex. B). Another IHO was appointed on February 1, 2012 and this IHO issued the final decision challenged in this appeal (Tr. p. 475; IHO Decision at p. 2). For clarity, I will continue to refer to the IHO who issued the final written decision in this case as the "IHO" and the IHO who presided until January 24, 2012 as "IHO-1."

In a decision dated June 27, 2012, the IHO denied the parents' request for relief (IHO Decision at p. 17). In his decision, the IHO determined, among other things, that the cost of the student's summer camp, including related services, was invoiced at $9,000.00 rather than the $12,500.00 sought by the parents and that the Rebecca School tuition for the student for the 2011-12 school year program was $78,960.00 (id. at p. 12). The IHO examined evidence offered by the parents to show that they were responsible for the cost of the Rebecca School tuition and that the parents earned $13,129.00 in 2010 according to their tax return (id.; see Parent Ex. J at p. 1). However, the IHO also found that the parents omitted schedules from their tax return for business earnings and deductions related to the business operated by the student's father (IHO Decision at p. 13). The IHO further found that the only payments made to the Rebecca School or to the summer camp program were $5,000.00 to the Rebecca School made by a company owned by the student's grandfather and that the student's mother testified that they had no obligation to repay the $5,000.00 to her father-in-law (id. at pp. 12-13, 15). The IHO also found that there was no evidence that the Rebecca School or the summer camp program ever sought payments from the parents or that there was an intention of doing so prior to the end of the 2011-12 school year (id. at pp. 14-15); however, the IHO also acknowledged the possibility that the Rebecca School did not have the ability to seek recourse against the parents for nonpayment until after June 1, 2012 (id. at p. 14).

Upon further examination of the Rebecca School enrollment agreement, the IHO also found that, "taken as a whole," the relevant provisions and payment schedule contemplated that the district would pay the student's tuition at the Rebecca School due to the parents' financial status and that a new payment schedule "may" be put in place in the event that the parents did not prevail at an impartial hearing (IHO Decision at pp. 13-14). Additionally, the IHO found that the Rebecca School contract was "ambiguous and indefinite in its terms" (id. at p. 14). With regard to the contract and invoice for the student's summer camp program, the IHO determined that it did not contain "any contract terms or payment schedules" (id.). The IHO concluded that, under the circumstances, it was "hard to fathom" how the Rebecca School and the summer camp program "could reasonably expect" the parents to perform under the contact, that the parents could not reasonably expect to pay the tuition costs at either the Rebecca School or the summer camp program, and that the testimony by the parents that they would "fundraise" was "speculative at best" (id.).

The IHO found that under the circumstances, the parents did not have standing to seek tuition reimbursement or prospective relief on behalf of the private placements (IHO Decision at p. 15). The IHO further found that the evidence in the hearing record supported a finding that it was the private school and the summer camp, and not the parents, who incurred the financial

[7] It also appears that prior to the appointment of IHO-1 on August 9, 2011, a third IHO had been appointed and had recused him or herself prior to any of the hearing sessions (IHO Decision at p. 2; see Tr. p. 463).

burden associated with the student's education for the 2011-12 school year; that the private school and summer camp were not parties to the case, and were therefore not entitled to relief under the IDEA; and that the parents could not assert a claim for the relief they were requesting on behalf of a private entity, which lacked standing under the IDEA to maintain a claim against the district in its own right (id. at pp. 15-16). The IHO also concluded that where a parent sought prospective payment for a student's unilateral placement, a parent had the burden to establish that the parent lacked the financial resources to front the tuition costs (id. at p. 16). Further, the IHO found that the parents were not entitled to "direct funding" under Connors v. Mills, 34 F. Supp. 2d 795, 805-806 (N.D.N.Y. 1998), because unlike that case, the district did not concede that it failed to offer the student a FAPE and that the parents' unilateral placement was appropriate (IHO Decision at p. 16). The IHO also found that for all of these reasons, the parents were "not entitled to direct and/or prospective funding of tuition" at the summer camp or the private school (id. at pp. 16-17).[8]

IV. Appeal for State-Level Review

The parents appeal from the IHO's denial of their tuition claims, contending that it should be determined that the district failed to offer the student a FAPE because the CSE meeting was inappropriately conducted in February 2011 and the outcome of the meeting was predetermined, the annual goals and short-term objectives in the resulting IEP were inappropriate, the parents were not given an address to visit the school in the June 15, 2011 FNR, the student should not be grouped with a class of students all of whom have autism, and Applied Behavioral Analysis (ABA) and "PECS" should not be used with the student. The parents also assert that it should be determined that the summer camp and the Rebecca School programs were appropriate to address the student's needs during the 2011-12 school year. The parents allege that equitable considerations favor them, and they had standing to seek direct payment from the district (notwithstanding that they did not pay out-of-pocket all of the costs of the student's tuition for the unilateral placements during the 2011-12 school year). The parents seek reversal of the IHO's decision and an order directing reimbursement of the costs of the summer camp and the Rebecca School for the 2011-12 school year. As a further basis for their claims, the parents allege that both IHOs who presided over the impartial hearing engaged in misconduct, and they offer additional evidence to support these allegations.

In its answer, the district agrees with the IHO that the parents lacked standing. The district also denies the parents' allegations that the February 2011 CSE meeting was held "too early," the IEP lacked sufficient annual goals, the CSE recommendation was predetermined, the June 15,

[8] In his decision, the IHO erroneously set forth that the parents had the burden of persuasion to demonstrate that the district failed to offer the student a FAPE (see IHO Decision at p. 11). Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, after Shaffer, the New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007 (see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7-*8 [S.D.N.Y. Aug. 27, 2010]). I note additionally that the IHO's erroneous statement that the parent had the burden of proof to demonstrate that the district failed to offer the student a FAPE was immaterial to, and had no effect on, the IHO's analysis as his decision did not address whether the district offered the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 8-17).

2011 FNR was insufficient, the grouping at the public school site was not proper, and the methodologies used in the assigned classroom were not appropriate for the student.[9] The district also alleges that the Rebecca School was not appropriate for the student because it did not address her specific needs; it lacked sufficient academic instruction; it lacked 1:1 support for the student for feeding, which was necessary even after removal of the feeding tube; and it failed to address the student's toileting needs. The district also argues that equitable considerations favor the district because the parents never seriously intended to enroll the student in a public school. The district contends that the parents were not prejudiced by the alleged misconduct of the IHOs. The district requests that the IHO's decision be affirmed in its entirety; and in the alternative, requests findings that the district offered the student a FAPE, that the Rebecca School is not appropriate for the student, that equitable considerations do not favor the parents, that the parents are not entitled to the remedy of direct funding, and that the petition be dismissed with prejudice.

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., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2];

[9] The district argued that a lack of related service providers at the CSE meeting was not raised in the parents' due process complaint notice and that therefore they should not have raised this issue for the first time on appeal. While the district is correct that this issue was not set forth the due process complaint notice, my view is that the remark in the petition that there were no related service providers is merely part of the parents' statement of facts and not an effort by the parents to raise this as a new issue.

8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 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, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by

the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Standing

I first turn to standing as a preliminary matter. For the reasons set forth below, I find that the IHO incorrectly found that the parents lacked standing after making determinations that the parents had not paid any tuition or incurred out-of-pocket expenses and that the student's private school undertook the financial risk of the student's education rather than the parents (see IHO Decision at pp. 14-15). Under the IDEA and State law, a parent is entitled to an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. §1415[b][6][A]; Educ. Law §4404[1]; Winkelman, 550 U.S. at 531). The parents were therefore entitled to file a due process complaint notice asserting that the district had failed to offer the student a FAPE on the basis that the February 2011 CSE had not complied with the procedural requirements set forth in the IDEA and that the February 2011 IEP was substantively inadequate and not reasonably calculated to enable the student to receive appropriate educational benefits (see Winkelman, 550 U.S. at 531, 533; 34 CFR 507[a], 8 NYCRR 200.5[i]).

The IHO mistakenly mixed two related inquiries—on the one hand, whether the parents had standing to pursue their claims that the district failed to offer the student a FAPE, and on the other, whether the evidence in the hearing record supported their request for relief—and, as a result, unfortunately failed to address the heart of the parties' disagreement, whether the district failed to offer the student a FAPE. Although courts have disagreed on what is sufficient to

constitute "injury in fact," the only courts that have addressed this issue in New York have found that the denial of a FAPE or of a procedural right created by the IDEA is sufficient to satisfy the "injury in fact" requirement (S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 359-360 [S.D.N.Y.2009] [finding that a denial of a FAPE constituted an injury in fact which was redressable by direct retrospective payment, but declining to address whether direct retrospective payment was an allowable remedy under the IDEA]; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, at *6 [S.D.N.Y. March 14, 2011] [finding a denial of a FAPE or a procedural right under the IDEA was a statutorily created injury in fact to satisfy standing]; see also Heldman v. Sobol, 962 F.2d 148, 154-56 [2d Cir. 1992] [holding that the IDEA may create a statutory right, the alleged violation of which is an injury in fact]; see also Fetto v. Sergi, 181 F. Supp. 2d 53, 66 n.22 [D. Conn. 2001] [finding a denial of a FAPE was a statutorily created injury in fact]; but see Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007] [parents lacked standing on claim for reimbursement for services where student's estate, rather than parents, had actually expended resources]; Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005] [finding a denial of a FAPE as an injury in fact was not redressable by tuition reimbursement, as the student's education had already been paid for by the student's father's insurance carrier]; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006] [finding that the student and parent lacked an injury in fact because the private school had paid for education of student rather than student or parent]).[10]

Because courts in New York have determined that a denial of a FAPE by a district is an injury in fact under the IDEA and because the parents' July 2011 due process complaint notice includes such an assertion, the only other relevant factors here in determining standing are (1) whether the petitioners can maintain a proceeding as parents of the student in this case, and (2) whether the relief requested is likely to redress the injury (see Raines v. Byrd, 521 U.S. 811, 818-19 [1997]; S.W., 646 F. Supp. 2d at 359, E.M., 2011 WL 1044905, at *6; Parent Ex. A). [11] In this case, there is no dispute that petitioners are the parents of the student within the meaning of the IDEA (20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; see 8 NYCRR 200.1[ii]; Fuentes v. Bd. of Educ., 569 F.3d 46 [2d Cir. 2009]; Fuentes v. Bd. of Educ. 12 N.Y.3d 309, 314 [2009]; see Tr. pp. 482-83; Parent Ex. B at p. 1). Consistent with the court's determinations in S.W. and E.M., the parents' request for prospective payment would redress the denial of a FAPE in circumstances where a private school has provided an education to the student (see S.W., 646 F. Supp. 2d at 359; E.M., 2011 WL 1044905, at *6). Further, the parents' alternate request for tuition reimbursement could also redress the denial of a FAPE in circumstances where a private school has provided an

[10] The IHO relied heavily on an additional finding in S.W., wherein the court reasoned that because the parent was relieved from any financial liability by the terms of the contract with the private school, the parent did not have a financial harm to satisfy the injury in fact requirement of standing (S.W., 646 F. Supp. 2d at 356-358). The IHO appears to have missed the later finding in S.W. that the parent had standing based on a denial of FAPE, an injury in fact created by the IDEA (S.W., 646 F. Supp. 2d at 359). Because the parents in this matter also have standing based on a claim for the denial of a FAPE as an injury in fact, I need not address whether the parents also had a financial harm sufficient to support standing (see E.M., 2011 WL 1044905, at *6). I also note that the hearing record reflects that the 2011 summer camp program sent the parents' invoices requesting payment for services provided to the student (Parent Ex. O; see Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 427-30 [S.D.N.Y. 2011]).

[11] I note that the requirement of standing that the alleged injury in fact be "fairly traceable to the [district's] allegedly unlawful conduct" is not at issue here as it is both understood and undisputed that the district has the obligation to offer the student a FAPE (Raines, 521 U.S. at 818-19; see 20 U.S.C. § 1412[a][1][A]; 34 CFR 300.101[a]).

education to the student and the parent has made or will make payments to the private school for such an education (see Burlington, 471 U.S. at 369-370). The inquiry regarding standing ends here, without the need for determining whether the relief requested is in fact available (S.W., 646 F. Supp. 2d at 359; E.M., 2011 WL 1044905, at *6).[12] I note that a party has standing even if the relief requested is ultimately unavailable (see New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *7-8 [S.D.N.Y. Mar. 17, 2010]).

The IDEA and New York State law specifically provide that an IHO must make a substantive determination based on whether the student "received a free appropriate public education" (20 U.S.C. § 1415[f][3][E]; 8 NYCRR 200.5[j][4]). By terminating this action based in part on standing, the IHO—albeit with good intentions—did not address the alleged violations set forth in the parents' due process complaint notice or make a substantive determination on whether the district offered the student a FAPE and to address, as necessary, the relief requested.

While the IHO considered the question of whether the parents would be entitled to direct and/or prospective funding (IHO Decision at pp. 16-17), courts have reached the issue only after examining the Burlington/Carter factors and determining whether (1) the district failed to offer the student a FAPE, (2) the parents selected a unilateral placement that was appropriate for the student, and (3) equitable considerations favor the parent or the district (see P.K., 819 F. Supp. 2d at 118; Mr. and Mrs. A., 769 F. Supp. 2d at 406, 415-16, 427; S.W., 646 F. Supp. 2d at 359-60, 360 n.3; Connors, 34 F. Supp. 2d at 805-806).[13] In this case, the IHO considered the question of such relief without first determining the sequential Burlington/Carter factors (see IHO Decision at pp. 16-17). He therefore erred (see P.K., 819 F. Supp. 2d at 118; Mr. and Mrs. A., 769 F. Supp. 2d at 406, 415-16, 427; S.W., 646 F. Supp. 2d at 359-60, 360 n.3; Connors, 34 F. Supp. 2d at 805-806).

Moreover, there appears to remain a question of whether the parents should be reimbursed for payments made by the student's family toward the costs of the Rebecca School. One possible inference that can be drawn from the IHO's decision is that he believed the parents were not entitled to seek reimbursement for the sums expended by the student's grandfather

[12] For a more thorough analysis of relief and the viability of prospective and retrospective direct payment as an available remedy, there are a number of SRO decisions applying the district court's ruling in Mr. and Mrs. A in the context of relief, but only after making determinations that a FAPE was offered by the district, the parent's unilateral placement was appropriate, and equitable considerations favored an award of the costs of the private school tuition (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; see also P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 118 [E.D.N.Y. 2011]). With respect to the question raised by the IHO regarding whether a parent may seek tuition reimbursement without first making a payment of tuition costs or incurring out-of-pocket expenses to a unilateral placement, I note that while there is no requirement that relief can only be sought under such circumstances, the obtaining of such relief is premised upon monies actually expended. As a consequence, an order by an IHO providing for tuition reimbursement is appropriately coupled with a parent showing proof of payment(s) actually made (see e.g., Application of the Dep't of Educ., Appeal No. 11-131; Application of the Dep't of Educ., Appeal No. 11-106). Additionally, I note that in considering appropriate relief in a tuition reimbursement case, an IHO may consider whether the parent is obligated to repay a third party for payments made to a unilateral placement by that third party.

[13] I note that in S.W., the first and second prongs of the Burlington/Carter analysis were not at issue as the district did not appeal the SRO's finding not to disturb the IHO's determination that the district had failed to offer the student a FAPE, and the district did not appeal the IHO's finding that the parent's unilateral placement was appropriate to the SRO (S.W., 646 F.Supp. 2d at 355).

and/or his company toward the costs of the Rebecca School, apparently because there was no intra-family agreement for the parents to repay student's grandfather for the sums expended on behalf of the student (see IHO Decision at p. 13). I might agree that funds expended for a student's unilateral placement may not be recoverable in an impartial due process proceeding if such funds were the property of a party that lacks a sufficient personal connection to the student's educational interests and is unlikely to have responsibility for the student's welfare (i.e., a third-party company or organization). However, where there is a close familial relationship between the student and the individual who gifted the funds to the parents, it would not be consistent with the purpose of the IDEA or equitable principles to preclude tuition reimbursement relief solely because the funds contributed by a student's grandparent had gifted, rather than loaned, the funds to the parents. The IDEA was not enacted to discourage familial support of a student with a disability, and in some circumstances the IDEA itself contemplates that a grandparents may be among the individuals that may maintain an impartial due process proceeding on behalf of a student (20 U.S.C. §1401[23][C]; 34 CFR 300.30[a][4]; 8 NYCRR 200.1[ii][1]). Accordingly, I find it extraordinarily unlikely that when fashioning an equitable remedy for a district's denial of a FAPE a court would preclude reimbursement of tuition costs expended by a student's grandparent due solely to the absence of an intra-family loan agreement between the parents and the grandparent. As applied to this case however, the IHO could not ascertain whether the funds belonged to the grandfather because they had been drawn using a business check signed by the student's grandfather (see, e.g., Parent Ex. K) and the student's mother was uncertain whether the grandfather was a sole owner, officer, or member with an ownership share of the business (Tr. p. 503).

Because the IHO (1) erred in concluding that the parents lacked standing, (2) did not address the parents' claims that the student was denied a FAPE or conduct an analysis of the Burlington/Carter factors, and (3) did not have an adequate hearing record to determine whether the deposits paid to the Rebecca School were reimbursable to the parents, I will remand the matter to the IHO for a determination on the merits of the claims set forth in the parents' July 2011 due process complaint notice (see Educ. Law § 4404[2]; F.B. and E.B. v. New York City Dep't of Educ., 2013 WL 592664, at *15 [S.D.N.Y. Feb. 14, 2013]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also Parent Ex. A).

B. Hearing Officer Misconduct/Incompetence

With regard to the parents' allegations relating to hearing officer misconduct, the extent to which any alleged misconduct has or has not affected the outcome of the impartial hearing cannot be ascertained at this juncture. Therefore, I will exercise my discretion and refer these allegations and findings to the Office of Special Education, which has been designated by the Commissioner of Education to address matters regarding IHO misconduct and incompetence (8 NYCRR 200.21[b][4][iii]). Due to the allegations, I will also direct that the matter be remanded to a new IHO.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the matter be remanded to a new IHO to determine the merits of the claims set forth in the parents' July 2011 due process complaint notice.

Dated: **Albany, New York**
July 5, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER