The University of the State of New York

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

No. 12-189

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., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney 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 a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2012-13 school year was appropriate. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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 300.514[b]-[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student reportedly has diagnoses of autism, neurofibromatosis type I, and mild scoliosis (Dist Ex. 1 at p. 2; Parent Ex. B at p. 4). Cognitively, the student has been described as "quite low," and according to teacher estimates, the student reads on a kindergarten level and her mathematics skills are at a pre-kindergarten level (Tr. p. 101; Dist. Exs. 1 at pp. 1, 11; 3). The student has also been characterized as "very verbal," and can express her wants and needs through the use of single words, short phrases and sentences (Tr. p. 102; see Tr. pp. 84-85; Dist. Exs. 1 at p. 1; 3). Additionally, the student has the ability to use natural gestures and staff manipulation to obtain desired items (Dist. Ex. 1 at p. 1). The student also exhibits a high frequency of maladaptive, sometimes aggressive behaviors, such as biting her finger and swearing; however, she is redirected the majority of the time (Tr. p. 102; Dist. Ex. 1 at p. 2). Her eligibility for special

education programs and related services as a student with autism is not in dispute in this appeal (Tr. p. 4; Dist. Ex. 1 at p. 11; 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The evidence in the hearing record regarding the student's educational history is sparse. At the time of the impartial hearing, the student was enrolled in a 10:1+ 1special class at the Judge Rotenberg Center (JRC), where she had attended for the last five years (Tr. pp. 84, 105).[1] The student was also receiving related services comprised of one weekly 30-minute session of 1:1 occupational therapy (OT), twice weekly 30-minute sessions of 1:1 physical therapy (PT) and twice weekly 30-minute sessions of speech-language therapy in a small group pursuant to pendency (stay put) (Tr. p. 121; Parent Ex. B at p. 12).

On July 25, 2011, the CSE reconvened to develop the student's IEP for the 2011-12 school year (Parent Ex. B). The July 2011 CSE recommended a 12-month placement in a 12:1+1 special class in a State-approved residential school combined with related services, including OT, PT and speech-language therapy (id. at pp. 1-2, 12). The July 2011 CSE also developed goals and objectives to address the student's behavior, speech-language needs, math, activities of daily living (ADL) skills, OT, PT, and transitional/vocational skills (id. at pp. 6-9). In a letter to the parent also dated July 25, 2011, the district summarized its program recommendation for the student and identified JRC as the particular State-approved school in which the the July 2011 IEP was to be implemented (Parent Ex. C).

On May 17, 2012, a member of a screening team from Springbrook NY, Inc. (Springbrook) conducted an observation of the student at JRC after a referral packet was sent to Springbrook by the district. (Tr. pp. 43, 45).[2] Based on the information combined in the referral packet from the district combined with the observations made by the Springbrook staff member, Springbrook personnel decided to accept the student for admission (Tr. pp. 23-24, 66-67). In a letter to an education administrator at the district's Central Based Support Team (CBST), dated May 25, 2012, the admissions coordinator from Springbrook indicated that the student had been accepted for admission for the 2012-13 school year (see Tr. pp. 42-43; Tr. p. 61; Dist. Ex. 4 at p. 2). According to the admissions coordinator from Springbrook, given Springbrook's bed availability at that time, the student could enroll on June 12, 2012 in order to acclimate to the school environment and "enjoy summer activities" prior to beginning the summer session, although it was noted that the education program was not scheduled to begin until July 9, 2012 (Dist. Ex. 4 at p. 2). By letter to the CSE chairperson dated May 25, 2012, the CBST's education administrator advised that a placement had been secured for the student at Springbrook (Tr. p. 61; Dist. Ex. 4). Additionally, the CBST education administrator further advised the CSE chairperson that the district "must

[1] JRC is a nonpublic residential school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 101, 105; see 8 NYCRR 200.1[d], 200.7).

[2] Springbrook is a nonpublic residential school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 101, 105; see 8 NYCRR 200.1[d], 200.7).

reconvene an IEP meeting to finalize the IEP" (Dist. Ex. 4). On or about May 25, 2012, the parent visited Springbrook (Tr. p. 43).[3]

On June 11, 2012, the CSE was convened to develop the student's IEP for the 2012-13 school year (Tr. p. 85; Dist. Ex. 1). Accompanied by the student, the parent took part in the June 2012 CSE meeting (Tr. pp. 86-87; Dist. Ex. 1 at p. 14). A district representative and a district school psychologist also attended the June 2012 CSE meeting in person, and a clinician from JRC and the educational coordinator from JRC participated in the CSE meeting via telephone (id.). In the student's IEP for the 2012-13 school year, the June 2012 CSE recommended a 12-month program in a State-approved nonpublic residential placement for the student in a 6:1+3 setting, in conjunction with related services comprised twice weekly 30-minute sessions of speech-language therapy in a group of three and one weekly 30-minute session of 1:1 OT (Dist. Ex. 1 at p. 7). The June 2012 CSE also determined that the student presented with interfering behaviors that interfered with learning that warranted the support of a behavioral intervention plan (BIP) (id at p. 2). The CSE also developed long-term adult outcomes and goals for the student's transition needs (id. at pp. 3, 9). Annual goals and short-term objectives were also developed to address, among other things, the student's social/emotional needs, speech-language needs, academic needs, ADL skills, and vocational/transitional needs (id. at pp. 3-6).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2012, the parent requested an impartial hearing, in which she asserted, among other things, that the district did not offer the student a FAPE during the 2012-13 school year (Parent Ex, A at pp. 1-2). The parent alleged that despite "compelling reasons" to justify the student's continued residential placement at JRC, the June 2012 CSE recommended that the student transfer to Springbrook for the 2012-13 school year (id. at p. 2). The parent described the June 2012 IEP as "inappropriate, inadequate and not individualized to address the student's special education needs," and she further submitted that the district denied the student a FAPE for the following reasons, which included, among other things: (1) the June 2012 CSE fundamentally changed the student's program and placement without first properly identifying all of the student's special education needs in a timely fashion; (2) the June 2012 CSE failed to meaningfully consider the results and recommendations set forth in the evaluative data provided by JRC personnel; (3) the June 2012 CSE did not develop a transition plan to facilitate the student's transfer from JRC to Springbrook; (4) Springbrook personnel were not adequately trained or supervised to address the student's unique needs; (5) the June 2012 CSE did not consider the student's need for consistency in her program given her deficits in the areas of transition and generalization; (6) the June 2012 CSE engaged in impermissible predetermination, which resulted in an IEP that would not address the student's needs in the least restrictive environment (LRE); and (7) the June 2012 CSE failed to conduct a functional behavioral assessment (FBA) and subsequently develop an appropriate BIP (id. at pp. 2-3). The parent further contended that the June 2012 CSE did not have any evidence to demonstrate that the student's placement at Springbrook would permit the student to progress toward her educational goals and attain educational benefits (id. at p. 3). Additionally, the parent maintained that transferring the student

[3] The admissions director from Springbrook could not confirm the exact date of the parent's visit to Springbrook; however, she indicated that the parent's visit was subsequent to the notification to the CBST that Springbrook had accepted the student (Tr. p. 43). In contrast, according to the parent, the visit to Springbrook took place on or about June 25, 2012 (Tr. pp. 95-96).

to a more restrictive environment would cause the student to regress academically and behaviorally (id.).

The parent also invoked the student's right to a pendency placement at JRC (Parent Ex. A at p. 3).[4] For relief, the parent requested an order directing payment of the student's tuition at JRC for the 2012-13 school year to be provided at public expense (id.).

B. Impartial Hearing Officer Decision

On August 6, 2012, an impartial hearing convened and concluded after one day (Tr. pp. 1-126). On August 16, 2012, the IHO issued her decision, in which she found that the district offered the student an appropriate program during the 2012-13 school year and denied the parent's request

[4] The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

for relief (IHO Decision at pp. 6, 8). The IHO based her determination that the June 2012 CSE's recommendation to place the student in a 6:1+3 State-approved nonpublic residential program was appropriate in light of documentation from JRC which reflected that the student would benefit from a small class setting to address her academic and social/emotional needs (id. at p. 6). Moreover, the IHO concluded that despite improvements in the student's behavior during her enrollment at JRC, the student would benefit from 1:1 support (id.). With respect to whether Springbrook constituted the student's LRE, the IHO did not deem a change from placement in a 10:1+1 classroom to placement in a 6:1+3 classroom as significant for the student, in light of the student's socially maladaptive behaviors with other students, and also because she did not often engage in group activities (id. at p. 7). Next, the IHO found that a telephone call to the parent regarding Springbrook and a subsequent visit to Springbrook refuted the parent's claims that the district's failure to provide the parent with a written final notice of recommendation (FNR) resulted in a denial of a FAPE to the student (id.). Additionally, the IHO did not find any evidence in the hearing record that supported a finding that the district denied the parent an opportunity to meaningfully participate in the development of the student's IEP (id.). Specifically, the IHO found that the parent attended the June 2012 CSE meeting with the student, and that during the June 2012 CSE meeting, the district offered the parent a different school, to which the parent understood that she was not under any obligation to agree until the visit (id.). Furthermore, the IHO noted that the student's father had passed away around the time of the June 2012 CSE meeting, which affected the parent's mindset at that time, and the IHO further found that the June 2012 CSE advised the parent that she could reconvene the CSE (id.). The IHO noted testimony from the parent that during the June 2012 CSE meeting, the CSE discussed how Springbrook would address the student's needs; however, the parent was not satisfied and consequently, did not agree (id.). According to the IHO, the parent rejected Springbrook, based on the parent's comparison with JRC and due to transportation concerns, reasons which the IHO described as "vague and not justifiable" (id. at pp. 7-8).

IV. Appeal for State-Level Review

The parent appeals and requests a finding that the district did not offer the student a FAPE and that JRC constituted an appropriate placement for the student during the 2012-13 school year. Specific to her claim surrounding the provision of a FAPE during the 2012-13 school year, the parent raises the following allegations, which include, among other things: (1) the June 2012 CSE was not properly constituted due to the absence of a representative of Springbrook; (2) the outcome of the June 2012 CSE meeting was impermissibly predetermined; (3) the hearing record does not support a finding that Springbrook constituted an appropriate placement to address the student's educational and behavioral needs; (4) the June 2012 CSE did not conduct an FBA of the student, nor did it develop an appropriate BIP for her; (5) the hearing record does not demonstrate that the student required placement in a more restrictive setting; (6) the district failed to provide the parent with an FNR identifying the particular public school site to which the student had been assigned for the 2012-13 school year, which contributed to the parent's inability to participate meaningfully in the CSE process; and (7) the district denied the parent an opportunity to meaningfully participate in the creation of the June 2012 IEP. Next, the parent maintains that JRC continues to serve as an appropriate placement for the student.

As relief, the parent requests a reversal of the IHO's decision and an order directing payment of the student's tuition at JRC for the 2012-13 school year to be provided at public expense.

The district submitted an answer admitting and denying the parent's claims set forth in the petition. The district maintains that it offered the student a FAPE during the 2012-13 school year, and that JRC was not appropriate for the student. Initially, the district contends that the parent's claims with respect to the composition of the June 2012 CSE and that the parent's ability to meaningfully participate in the development of the student's program was hampered by the lack of an FNR were not among those enumerated in the due process complaint notice, and therefore, not properly preserved on appeal. Regardless of whether such claims are subject to review on appeal, the district asserts that they lack merit, because the June 2012 CSE was properly constituted and the hearing record supports a finding that the district afforded the parent ample opportunity to participate in the CSE process. The district further alleges that the hearing record lacks support for the parent's claim that the outcome of the June 2012 CSE was predetermined. Next, the district alleges that the recommended 6:1+3 classroom for the student was appropriate based on documentation provided by JRC. The district also maintains that its program recommendation was based on appropriate and sufficient evaluative data, and that the June 2012 IEP properly addressed the student's behavioral needs. Moreover, contrary to the parent's assertion, the district argues that the June 2012 IEP included an appropriate BIP.

Additionally, in light of evidence that Springbrook would have allowed the student to progress toward the goals contained in the June 2012 IEP, and would have fulfilled the student's related services mandates, the district argues that Springbrook would have appropriately implemented the June 2012 IEP. The district alleges that the student would have been appropriately placed at Springbrook, and that Springbrook constituted the student's LRE. The district notes that the June 2012 CSE considered and rejected various program options for the student, and maintains that the recommended 6:1+3 class at Springbrook would have provided the student that she required. Next, the district alleges that JRC was not an appropriate placement for the student, because it was overly restrictive and the student could be appropriately educated within New York State.

The parent submitted a reply. The parent maintains that each of the claims raised on appeal were contained in the due process complaint notice. Regarding her claims surrounding the composition of the June 2012 CSE, the parent contends that her assertion that the absence of a Springbrook representative from the CSE hindered her ability to meaningfully participate in the CSE process was implicit in her claim that the student's program recommendation was predetermined. Furthermore, the parent asserts that the district squarely placed the parent's claims regarding the lack of an FNR at issue during the impartial hearing when it presented a witness from Springbrook.

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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 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. 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 and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. June 2012 CSE Process – CSE Composition

The parent, accompanied by the student, a district representative, and a district school psychologist took part in the June 2012 CSE meeting (Tr. pp. 85-87; Dist. Ex. 1 at pp. 13-14).[5]

[5] While I agree with the district that the issue of CSE composition was not raised in the parent's due process complaint notice, because it is at least arguable that the district "opened the door" to whether the CSE was properly constituted by introducing testimony from the director of the Galisano School at Springbrook (director) (see Tr. p. 20; Tr. pp. 61-62), I will consider this issue (M.H., 685 F.3d at 249-51; see B.M. v. New York City Dep't of Educ., 2013 WL 1972144 [S.D.N.Y. May 14, 2013]).

Additionally, the education coordinator and a special education teacher from JRC participated in the June 2012 meeting via telephone (Tr. p. 107; Dist. Ex. 1 at pp. 13-14). While it is undisputed that no one from Springbrook participated in the June 2012 CSE meeting, there is insufficient evidence in the hearing record to demonstrate that the absence of a Springbrook representative from the CSE meeting impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (Tr. pp. 61-62; 34 CFR 300.325; 8 NYCRR 200.4[d][4][i][a]). Here, the hearing record reflects that the parent does not dispute the district's recommendation that residential placement was appropriate to meet the student's special education needs (Tr. p. 54). I further note that the parent testified that the June 2012 CSE discussed Springbrook as a potential placement for the 2012-13 school year, and there is an indication in the hearing record that they discussed another school, which she did not identify during the impartial hearing; therefore, there is ambiguity in the hearing record regarding whether the June 2012 CSE was indeed confirming Springbrook as the residential placement to implement the student's IEP (Tr. p. 86).[6] Moreover, there is evidence in the hearing record that representatives from JRC expressed their opinions and voiced their concerns regarding the student's possible transfer to a different residential placement (Tr. pp. 85-86, 107-08). Furthermore, although the parent testified that she wished for the student to remain at JRC for the upcoming school year, because the student was content there and had made progress, the requirement for meaningful parent participation in a CSE meeting does not mean that the CSE is required to always agree with the opinions expressed by parents at such meetings (Tr. p. 85; Application of a Student with a Disability, Appeal No. 09-137; Application of a Student with a Disability, Appeal No. 08-035; Application of a Child with a Disability, Appeal No. 07-117; see Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). Under the circumstances, there is insufficient evidence in the hearing record to conclude that the lack of a representative from Springbrook from the June 2012 CSE resulted in a denial of a FAPE to the student.

B. Recommended Placement 2012-13 School Year

Notwithstanding my finding that the hearing record does not establish the existence of any procedural deficiencies that surrounded the CSE process, as expressed in greater detail below, an independent review of the hearing record results in the conclusion that the district ultimately failed to offer the student a FAPE during the 2012-13 school year.

Under the IDEA and State regulations, the "CSE must review each child's educational program at least once each year to determine its adequacy and to recommend an educational program for the next school year" (34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]; see 20 U.S.C. § 1414[d][4][A][i]; Educ. Law § 4402[1][b][2]). A district must have an IEP in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in

[6] The district did not present testimony from the district representative or district school psychologist in attendance at the June 2012 CSE meeting; therefore, it is unclear whether the June 2012 CSE meeting was a "reconvene of IEP meeting" or if the CSE was reconvening to finalize the student's residential placement at Springbrook (Dist. Ex. 1 at p. 11).

September'"]; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088). As a matter of State law, a school year runs from July 1 through June 30 (Educ. Law § 2[15]).

The parent alleges that the district failed to provide her with a written FNR, which contributed to a denial of a FAPE to the student. While nothing in the IDEA, State law, or the regulations implementing these statutes requires a district to formally provide parents with a notice of placement recommendation in a specified format in order to either offer the student a FAPE or in order to implement the student's IEP, in the instant case, the hearing record supports the parents claim insofar as the district did not effectuate the student's IEP at the beginning of the 2012-13 school year school on July 1, 2012 (see Educ. Law § 2[15]; Application of Dep't. of Educ., Appeal No. 12-039). Although the issue of the lack of an FNR was not presented by the parent in the due process complaint, I agree with the parent's argument that the district opened the door to the issue of the student's placement at Springbrook by focusing its direct case to a large degree on evidence regarding whether Springbrook in particular was appropriate for the student. The evidence shows that although the director confirmed that the student had been accepted by Springbrook in May 2012, she also explained that she did not know if the CSE convened to discuss whether Springbrook would constitute an appropriate residential placement for the student for the 2012-13 (Tr. p. 61). Nor did she know if the district actually recommended that the student attend Springbrook during the 2012-13 school year (Tr. p. 62). Similarly, the parent understood that the June 2012 CSE suggested that she visit Springbrook, but there is nothing in the hearing record to establish that the district recommended that the student actually attend Springbrook for the upcoming school year (Tr. pp. 86-92). According to the parent, at the time of the June 2012 CSE meeting, her husband was gravely ill, and as a result, "she wasn't really in the mindset to speak," and therefore, the CSE advised her that a visit to Springbrook was all that was required of her at that point in time and that it was not necessary for her to make a decision regarding the student's placement (Tr. pp. 89-91). Similarly, the student's provider from JRC testified that the student's father was ill at the time of the meeting, which affected the parent's mindset at that time, and although he noted that the CSE was trying to explain to the parent that "they were recommending another placement," it was ultimately the parent's choice (Tr. pp. 109-10). The parent indicated that she was not satisfied during her visit to Springbrook, therefore, the parent decided that the student should remain at JRC (Tr. p. 86). I further note that, while it is not clear from the hearing record if the student's clinician from JRC was referring to Springbrook, the clinician testified that the parent was scheduled to visit another placement within the upcoming week (Tr. p. 114). According to the clinician from JRC, although the June 2012 CSE wanted the parent to visit a specific site, he did not recall any particular recommendation at the time of the June 2012 CSE meeting (Tr. p. 115). The parent added that she did not receive any notice of placement from the district advising her that it had recommended Springbrook for the student for the 2012-13 school year (Tr. pp. 90, 92). Nor did the CSE reconvene following the June 2012 CSE meeting (Tr. pp. 89-90). Regardless of the parent's circumstances at the time, the provider from JRC testified that despite the parent's requests, the CSE was unwilling to reconvene at another time (Tr. p. 110). Moreover, there is no information in the hearing record that the district thereafter followed up with any further efforts regarding placement of the student in a residential school for the 2012-13 school year other than JRC. I further note that the district did not present any testimony from district witnesses in attendance at the June 2012 CSE to rebut the parent's testimony. Accordingly, I find that the IHO's conclusion that the district offered the student a FAPE during the 2012-13 school year is not supported by the hearing record, and must be reversed.

VII. Conclusion

Having found that the district denied the student a FAPE because it did not notify the parent that it had a residential placement in effect at the beginning of the 2012-13 school year, the August 16, 2012 decision of the IHO determining that the district offered the student a FAPE must be reversed. I further note that given that the student was entitled to remain at JRC at district expense as her pendency placement for the duration of the 2012-13 school year, which has since expired, a determination of the appropriateness of JRC or equitable considerations is unnecessary.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that if it has not done so already the CSE reconvene to develop the student's IEP for the 2013-14 school year, and work collaboratively with the parent to secure an appropriate placement for the student in conformity with federal and State regulations.

Dated: **Albany, New York**
September 20, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER