The University of the State of New York

The State Education Department
State Review Officer
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No. 12-202

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the NEW YORK CITY DEPARTMENT OF EDUCATION

Appearances:
The Law Firm of Tamara Roff, PC, attorneys for petitioner, Tamara Roff, Esq. and Tuneria Taylor, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Rebecca School (Rebecca) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination insofar as it denied an extension request made by the district prior to the impartial hearing. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

In light of the limited issues presented in this appeal, only a brief recitation of the facts and procedural history is necessary. On March 26, 2012, a CSE convened to develop the student's program for the 2012-13 school year (Tr. pp. 72-73, 127).[1] Finding the student eligible for special

[1] Because the district did not introduce the challenged IEP into evidence at the impartial hearing, I have relied upon references contained in the hearing record to ascertain the date of this meeting.

education and related services, the CSE recommended a 6:1+1 special class placement (Tr. pp. 74-75).[2]

In a letter dated June 18, 2012, the parent detailed alleged deficiencies with both the IEP and the assigned public school site (Parent Ex. E at pp. 1-2). First, with respect to the March 2012 IEP, the parent alleged that it "d[id] not adequately reflect [the student's] current functioning level" (id. at p. 2). The parent further alleged that some of the IEP's annual goals were "insufficient" as the student had already mastered them (id.). Also, the parent argued that the IEP did not "adequately reflect or address [the student's] sensory/behavioral needs" (id.). The parents further objected to the "6:1[+]1 class size" as it would "not provide [the student] with the individualized attention and support he require[d]" (id. at p. 1).

Regarding the assigned public school site, the parent indicated that, based upon her observations during a tour four 6:1+1 classrooms, each would be inappropriate for the student (Parent Ex. E at p. 1). These classrooms, according to the parent, were composed of students who "function[ed] significantly higher" than the student (id.). Students in these classrooms were allegedly able to express themselves vocally, engage in certain academic tasks, and use computers and iPads, all of which were skills the student did not possess (id.). Additionally, the parent alleged that the observed classrooms lacked a classroom behavioral plan and employed a school-wide reward system in which the student would be unable to participate (id.). The parent further contended that the assigned public school site could not address the student's sensory needs as it lacked a sensory gym (id. at p. 2). The parent also averred that the school was too large and lacked sufficient air conditioning (id.). Finally, the parent alleged that the assigned public school site would not be able to implement the student's IEP, including related services (id. at pp. 1-2). Based upon these concerns, the parent rejected the district's recommended placement and indicated that she would place the student at Rebecca at public expense (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2012, the parent alleged that the district failed to offer a student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of the parent's request for relief (Parent Ex. A at pp. 1-3).

The parent contended that the March 2012 CSE was improperly composed because it lacked an additional parent member (Parent Ex. A at p. 2). The parent also argued that the district did not conduct sufficient evaluations of the student, including a triennial evaluation (id.). An April 2008 evaluation utilized by the March 2012 CSE was, according to the parent, "insufficient" to assess the student's needs (id.). The parent further alleged that the district's recommendations were predetermined insofar as its recommendations were based upon district policies (id.). Additionally, the parent contended that the CSE ignored the "objections" of the parent and the student's teachers in making its placement recommendation of a 6:1+1 classroom (id.).

[2] The hearing record is unclear as to whether the CSE recommended additional services or modifications, including related services. The parent's due process complaint notice alleges that the March 2012 IEP recommended "related services" (Parent Ex. A at p. 2).

With respect to the March 2012 IEP, the parent alleged that the present levels of performance were "insufficient to provide an adequate baseline" of the student's skills (Parent Ex. A at p. 2). This failure, the parent argued, would prohibit the assigned public school site from "determin[ing] progress" in several areas of need for the student (id.). The parent also contended that the March 2012 IEP did not address the student's "social/emotional difficulties" or indicate which "sensory tools" the student required (id.). The parent further objected to the March 2012 CSE's recommendation of a 6:1+1 special class placement, arguing that the student required a "more structured and individualized setting" (id.). Additionally, the parent averred that the IEP was bereft of parent counseling and training services required by State regulations (id.).

The parent further alleged that, following the March 2012 CSE meeting, the district failed to provide prior written notice to the student (Parent Ex. A at p. 1). The parent also objected to a final notice of recommendation (FNR) issued by the district on June 6, 2012 because it did not "specify the particular class [the student] would be placed in" (id. at p. 2).

Regarding the assigned public school site, the parent contended that it would not provide appropriate or legally sufficient functional grouping; could not implement the student's IEP; could not address the student's "sensory/behavioral needs"; would not offer "appropriate classroom instruction" to the student; was "too large and overwhelming"; and did not offer "sufficient air conditioning" (Parent Ex. A at pp. 2-3). The parent further contended that no equitable considerations would preclude or diminish an award of tuition reimbursement (id. at p. 3). In this regard, the parent alleged that she wrote to the CSE and expressed her concerns about the IEP and assigned public school site but received no response (id.). For remedies, the parent invoked her right to the student's pendency (stay-put) placement at Rebecca and sought the costs of the student's education at Rebecca for the 2012-13 school year (id.).

B. Facts Postdating the Due Process Complaint Notice

Following the parent's submission of her due process complaint notice, the district submitted a request for an extension to the IHO in an e-mail dated August 2, 2012 (IHO Ex. I at pp. 5-6). In this e-mail, the district argued that an extension was needed because "one of the [district's] witnesses ha[d] left for the [s]ummer" (id. at p 5). The IHO denied this request in an e-mail dated August 3, 2012 on the grounds that State regulations explicitly identified school vacations as an improper basis for granting an extension request (id. at p. 4). In this e-mail, the IHO indicated that she would entertain a request for an extension if the district could "establish a compelling reason or substantial hardship" justifying such an extension (id.). The district replied in an e-mail dated August 3, 2012 indicating that the school psychologist who served on the March 2012 CSE was on vacation and, moreover, that his union contract prevented the district from contacting him while on such a vacation (id. at pp. 2-4).

In an e-mail dated August 27, 2012, the IHO again indicated that she could only grant a request for an extension based upon a "compelling reason" (IHO Ex. I at p. 7). Specifically, the IHO requested that the district's attorney provide the "names and contact information for each witness, and a statement of the steps you have taken to have them participate in the hearing in person or via telephone" (id.). There is no indication in the hearing record that the district responded to this request.

C. Impartial Hearing Officer Decision

This matter proceeded to an impartial hearing on August 30, 2012 (Tr. pp. 1-138). In a decision dated September 12, 2012, the IHO found that the district failed to prove that it offered the student a FAPE for the 2012-13 school year in that the district failed to present a case at the impartial hearing (IHO Decision at p. 8). The IHO found that Rebecca was an appropriate unilateral placement for the student, in that Rebecca "addresse[d] [the student's] individual needs" by providing "a specific methodology and curriculum" as well as appropriate related services (id. at pp. 9, 10). The IHO additionally observed that Rebecca's student body was composed of students, like the student, with "neuro-developmental disabilities and autism" and that the building was "small" and equipped "with an elevator so that [the student] does not have to negotiate flights of stairs" (id. at p. 10).

Framing the discussion as a review of equitable considerations, the IHO further found that the parent failed to establish her inability to pay the cost of tuition owed to Rebecca and that the contract entered into between the parent and Rebecca was collusive (id. at pp. 10-14). The IHO did not find the student's supplemental social security income (SSI) relevant to the question of whether the parent could pay the student's tuition because the payments were "intended to support [the student] and not his [parent]" (id. at p. 12). Although the IHO acknowledged that the parent testified that she was unemployed, had not filed an income tax since 2010, and that her parent (i.e. the student's grandparent) provided necessary living expenses, the IHO found that the parent did not sufficiently "establish her own finances and her inability to make payments to . . . Rebecca" (id.). Turning to the enrollment contract between the parent and Rebecca, the IHO found that it was "not a contract" and that the evidence indicated it was the product of collusion (id. at p. 12). First, the IHO noted that, although the contract identified the cost of the tuition as $97,700, an attached payment schedule to the contract identified anticipated payments by the parents totaling only $12,500 (id.). Based on this discrepancy, the IHO found that "there [wa]s no fixed amount that the [parent] must pay in this document" and that it constituted "merely an agreement that she may pay something" (id. at pp. 12, 13).[3] Second, the IHO found that the contract lacked "financial consideration" because the parent "made no payments, and . . . Rebecca . . . did nothing about it" (id. at p. 13). In support of this finding, the IHO observed that the parent wrote a $500 check to Rebecca that bounced and that Rebecca took no action in response (id. at pp. 12-13). Finally, the IHO found that the contract was the "product of . . . collusion" because the parties entered into it "merely in order to bind the [district] to payments" (id. at pp. 13, 14). As evidence of this conclusion, the IHO found that neither party "followed the provisions of th[e] [contract]" (id. at p. 13). Accordingly, the IHO denied the parent's request for direct payment because equitable considerations did not support her claim (id. at p. 14).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determinations that the contract between her and Rebecca was invalid and that she failed to meet her burden to demonstrate an inability to pay the costs of the student's tuition at Rebecca. First, the parent alleges that the IHO applied an

[3] In this regard, the IHO also cited a contractual provision indicating that Rebecca "may change t[he] amount and schedule [of the parents' owed payments] if the [district] d[id] not pay the private school by June 1, 2013" (IHO Decision at p. 12).

incorrect legal analysis regarding equitable considerations and failed to consider the parent's cooperation throughout the CSE process. Second, the parent argues that the IHO improperly placed the burden on her to demonstrate her inability to pay the costs of the student's education at Rebecca. Third, even assuming that the parent bore the burden to demonstrate her inability to pay the student's tuition at Rebecca, the parent alleges that she met this burden by offering testimonial and documentary evidence at the impartial hearing. Fourth, the parent alleges that the IHO erred in determining that the contract between her and Rebecca was collusive.

The district answers, denying the parent's material assertions and arguing that the IHO correctly determined that the parent failed to not prove she was unable to pay the costs of the student's education at Rebecca and that the contract between the parent and Rebecca was collusive. The district also interposes a cross-appeal asserting that the IHO erred by denying the district's request for extension. The district argues that the IHO unreasonably denied the district's request, and that the district presented both a "compelling reason" and a "specific showing of hardship" to the IHO (see 8 NYCRR 200.5[j][5][iii]). Additionally, the district argues that the student would not have been prejudiced by an extension in this matter as she attended Rebecca during the impartial hearing pursuant to pendency. Finally, the district argues that the IHO erred by not allowing the district to present its case on a subsequent hearing date, an arrangement that the parent was amenable to. Accordingly, the district requests a remand to the IHO so that the district may present its case.

In an answer to the district's cross-appeal, the parent denies the district's material assertions and, further, argues that additional evidence submitted by the district on appeal should not be considered. The parent further contends that the IHO properly refused to grant the district's request for extension based upon the plain language of State regulations. Finally, the parent argues that remand to the IHO is an inappropriate remedy because the district was afforded an opportunity to present its case and elected not to.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 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, 486 Fed. App'x 954, 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).

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. Additional Evidence

Both parties have submitted additional documents together with their pleadings that were not introduced at the impartial hearing. Documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision).

After reviewing the parties' submissions on appeal, it appears that all of the evidence submitted on appeal was available at the time of the impartial hearing and is not necessary to render a decision in this matter. Accordingly, this additional evidence has not been accepted.[4]

B. Conduct of the Impartial Hearing

On appeal, the district argues that the IHO improperly denied its request for an extension, thereby prejudicing its ability to present a case at the impartial hearing. This contention is not supported by the evidence in the hearing record.

First, I observe that the IHO permissibly denied the district's request for extension in accordance with State regulations, which provide that "[a]bsent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations . . . ." (8 NYCRR 200.5[j][5][iii]). State regulations further prohibit requests for extension based upon "avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). The evidence in the hearing record demonstrates that the district requested an extension based upon witness unavailability due to a school vacation (IHO Ex. I at pp. 2-6). Accordingly, based upon the plain language of State regulations, the IHO was within her discretion to deny the district's request for an extension under these circumstances.

To the extent the district argues that the IHO did not adequately consider whether the district offered a "compelling reason" or "substantial hardship" in support of its request, this inquiry is foreclosed by the district's failure to comply with the IHO's reasonable directives. In an e-mail dated August 3, 2012, the IHO rejected the district's request for an extension and invited the district to "establish a compelling reason or substantial hardship" in writing (IHO Ex. I at p. 4). The district responded on the same day, explaining that a necessary witness was unavailable over a school vacation (id. at pp. 2-4). In an e-mail dated August 27, 2012—three days prior to the date scheduled for the impartial hearing—the IHO again indicated to the district that she required a compelling reason to grant an extension, asking the district's attorney for the "names and contact information for each witness, and a statement of the steps you have taken to have them participate in the hearing in person or via telephone" (id. at p. 7). There is no evidence in the hearing record indicating that the district responded to this directive. Instead, the district renewed its request at the impartial hearing, failing to elucidate, among other things, the steps it took to secure witnesses for the impartial hearing (see Tr. pp. 13-14).

After examining the hearing record and in light of the broad discretion an IHO has in conducting an impartial hearing, I find that the IHO appropriately denied the district's request for an extension and insisted that, in accordance with federal and State law, a hearing be commenced in a timely manner (see 34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]).

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[4] The additional evidence submitted by the parent consists of correspondence pertaining to a request for a pendency order from the IHO. To the extent the district may not have complied with its pendency obligations--which operate automatically as a matter of law—I will order that the district fund the student's placement at Rebecca through the pendency of these proceedings.

C. Equitable Considerations

If an IHO determines that a district failed to offer a student a FAPE and his or her parents placed the student in a unilateral placement that provided specially designed instruction to meet his or her needs, the IHO must still consider whether parents' claim are supported by equitable considerations (Burlington, 471 U.S. at 374; E.M., 2014 WL 3377162 at *16; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728, at *3-*4 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *5-*8 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533-34 [N.D.N.Y. 2001].

The Second Circuit has indicated that among the equitable considerations that a court or administrative officer may review are:

> [W]hether [the parent's] unilateral withdrawal of her child from the public school was justified, whether [the parent] provided the [district] with adequate notice of the withdrawal, whether the amount of private-school tuition was reasonable, whether [the parent] should have availed herself of need-based scholarships or other financial aid from the private school, . . . whether there was any fraud or collusion in generating (or inflating) the tuition to be charged to the [district], or whether the arrangement with the [private] school was fraudulent or collusive in any other respect.

(E.M. v. New York City Dep't of Educ., 2014 WL 3377162, at *16 [July 11, 2014]).

In this respect the IHO erred in failing to consider these equitable factors, in that the IHO discussed the factors relating to whether the parent was entitled to the relief of direct funding, but failed to address those factors relevant to equitable considerations (cf. E.M., 2014 WL 3377162, at *8, *15-*16 [observing that the questions of whether or not the parent could afford the full tuition amount and whether a parent is bound by a contract with a private school were not an appropriate inquiries in assessing whether equitable considerations supported an award of the costs of tuition and indicating that the latter pertained to the issue of standing]).

Here, the district failed to respond to the parent's written letter identifying her concerns with the IEP and the assigned public school site and appeared at the impartial hearing without any

documentary or testimonial evidence to support a finding that it offered the student a FAPE for the 2012-13 school year (see Tr. pp. 5, 14, 16). By contrast, the parent visited the assigned public school site, communicated her concerns related to the IEP and assigned public school site, and provided timely notice of the student's removal from the public school system (see Parent Ex. E). Under these facts, the equities tip in favor of the parent (see N.R. v. Dep't of Educ., 2009 WL 874061, at *7 [S.D.N.Y. Mar. 31, 2009] ["the [district's] abdication of its responsibility to provide . . . FAPE is so clear from the record . . . that . . . the equities favor the parents"] [internal quotations omitted]).

D. Relief

Turning to the crux of the parties' dispute, the parent appeals the IHO's determinations that the parent failed to establish her inability to pay the student's tuition at Rebecca and that the contract between the parent and Rebecca was not a legally binding agreement.

With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M., 2014 WL 3377162, *8-*9 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" (id. at *8 [internal quotations omitted]). The Court in Mr. and Mrs. A. held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 360). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430). Since the parent selected Rebecca as the unilateral placement, and her financial status is at issue, it is the parent's burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of Rebecca and whether she is legally obligated for the student's tuition payments (see, e.g., 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; Application of a Student with a Disability, Appeal No. 11-041).

First, with respect to the parent's inability to pay the costs of the student's education, the evidence in the hearing record demonstrates that she was unable to afford the student's education

at Rebecca for the 2012-13 school year. The parent testified at the impartial hearing that she was unemployed for the preceding two and one-half to three years and had not filed a tax return since 2010 (Tr. pp. 93, 96). Additionally, the parent testified that she and the student lived with the student's grandmother, who provided necessary living expenses for the parent (Tr. pp. 111-12). Further, the parent indicated that monthly supplemental SSI payable to the parent on behalf of the student constituted her sole source of income (Tr. pp. 88-89; see Exhibit D). The parent introduced an SSI payment letter from March 2012 into evidence at the impartial hearing (Parent Ex. D; see Tr. p. 7). Based upon this testimony and evidence, I find that the parent offered sufficient evidence of her inability to pay the costs of the student's education at Rebecca for the 2012-13 school year at the impartial hearing.

The IHO found that the contract between the parent and Rebecca was collusive (see IHO Decision at p. 14). As evidence of this collusion, the IHO found that the tuition amount ($97,700) did not match the amount provided for in an attached payment schedule to the contract ($12,500) (see Parent Ex. C at pp. 1, 5). The evidence in the hearing record reveals that the parent was, contrary to the IHO's conclusion, obligated to pay $97,700 in tuition expenses according to the plain language of the enrollment contract. The Rebecca enrollment contract unequivocally states on the first page that "[t]uition for the 2012-2013 school year is $97,700" (id. at p. 1). The contract proceeded to state that this amount was "subject to the [p]ayment [s]chedule attached hereto" (id.). The payment schedule reiterated that the "[a]mount of [the] [c]ontract [was] $97,700." (id. at p. 5). The payment schedule next identified six scheduled payments between June 2012 and November 2013 that total $12,500 (id.). However, another provision of the contract indicated that "if [p]ayment [in accordance with the payment schedule] is not received by June 1, 2013, a new [p]ayment [s]chedule may be put into place and the remaining balance may become due immediately" (id.). Another section of the payment schedule indicated that if the parent failed to receive "prospective payment of tuition" from the district, the "[p]arent[ ] . . . remain[ed] responsible for tuition costs per the [e]nrollment [a]greement and the balance of [s]tudent's tuition w[ould] be due immediately" (id. at p. 6).

Thus, a review of the contract reveals that the parent was legally responsible for the full tuition amount of $97,700 (Parent Ex. E at pp. 1, 5-6). Although the amounts specified in the payment schedule amounted to only $12,500, the plain language of the contract bound the parent in the amount of $97,700, an amount identified in both the contract and the payment schedule (id. at pp. 1, 5). With respect to the IHO's findings regarding a lack of contract consideration based on the parent's nonpayment and Rebecca's failure to enforce the contract in response, such facts do not warrant a determination that the parent was not obligated under the contract (see E.M., 2014 WL 3377162, at *12 [examining parental standing in light of contractual obligations to pay, as well as implied obligations to pursue remedies under the IDEA]). Therefore, under the circumstances of this case, the parent is entitled to direct funding of the student's tuition at Rebecca for the 2012-13 school year under the factors described in Mr. and Mrs. A. (see 769 F. Supp. 2d at 406).

VII. Conclusion

A review of the evidence in the hearing record reveals that the IHO permissibly denied the district's request for an extension in this matter. A further review of the hearing record reveals no equitable considerations that would diminish or preclude an award of the costs of the student's

tuition. Accordingly, the district is ordered to directly fund the costs of the student's tuition at Rebecca for the 2012-13 school year.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated September 12, 2012, is modified by reversing those portions which determined that the parent was not entitled to an award of direct funding of the costs of the student's tuition at Rebecca for the 2012-13 school year; and

IT IS FURTHER ORDERED that, to the extent that it has not already done so, the district is ordered to pay for the costs of the student's tuition pursuant to pendency.

Dated: **Albany, New York**
July 29, 2014

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JUSTYN P. BATES
STATE REVIEW OFFICER