The University of the State of New York

The State Education Department
State Review Officer
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No. 13-051

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail Eckstein, Esq., of counsel

Partnership for Children's Rights, attorneys for respondent, Michael D. Hampden, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found, among other things, that it failed to offer an appropriate educational program to petitioner's (the parent's) daughter in the 2012-13 school year and ordered it to directly fund the costs of the student's tuition at the Cooke Center for Learning and Development ("Cooke"). The parent also cross-appeals certain issues. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

This matter involves a student who, at the time that the IEP at issue was developed, was a 14 year-old middle school student at Cooke (Dist. Ex. 3 a p. 1; Tr. pp. 120-21). The hearing record reflects that the student, who has attended Cooke since the first grade and has hearing loss in both ears (Dist. Exs. 9 at p. 2, 11 at p. 1, 12 at p. 1, 14; Tr. p. 140), exhibited both cognitive and academic delays at the time (Dist. Exs. 11 at pp. 2-5; 12 at pp. 2, 15, 16), as well as specific deficits in areas such as ELA, math and speech (Dist. Exs. 11 at pp 1-5, 12 at p. 2, 13 at p. 1, 15 at pp. 2-7, 16 at pp. 3-5, 9-10, 17 at pp. 3-8, 13-14). The hearing record also reflects that the student, while generally social and well behaved (Dist. Ex. 9 at pp. 1-2, 10 at p. 1, 11 at p. 1, 12 at p. 2, 13 a p. 1, 16 at p. 1) exhibited a low tolerance for frustration (Dist. Ex. 11 at p. 1, 12 at p. 2, 16 at p. 1), was disorganized and easily distractible (Dist. Exs. 10 at p. 2, 11 at p. 3, 12 at p. 2, 13 at p. 1, 16 at p.

1), and was working on things like socialization skills, the ability to self-advocate, and the ability to utilize coping mechanisms during times of conflict (Dist. Ex. 16 at p. 11).

On March 14, 2012, a CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 3 at p. 14). At this meeting was a special education teacher (who was also the district representative), a school psychologist, a parent member, and four individuals from Cooke (id. at p. 17).[1] Absent from the meeting was the parent herself. (Tr. p. 141). Finding that the student remained eligible for special education services as a student with a hearing impairment,[2] the March 2012 CSE developed an IEP that recommend a program including an educational placement in a 12:1+1 special class in a "district 75" school,[3] as well as related services of speech-language therapy (2 times per week for 40 minutes per day in a group of 3), counseling,[4] and hearing education services (Dist. Ex. 3 at p. 11).

According to the district, a final notice of recommendation (FNR) which summarized the program offered in the March 2012 IEP and notified the parent of the public school site to which the student was assigned was sent to the parent on June 6, 2012 (Dist. Exs. 5, 6; Tr. p 25-28). The parent, however, contends that she did not receive this FNR (Tr. p. 155), and on August 3, 2012, she executed a contract for the student's enrollment at Cooke for the 2012-13 school year (Parent Ex. D at p. 2). In addition, by letter dated August 22, 2012, the parent (through her attorney) notified the district that she had not received an FNR and indicated her intention to keep the student enrolled at Cooke because of this (Parent Ex. G at p. 1). The parent, however, indicated that if an FNR was sent, that she would visit the assigned public school and, if it was appropriate for the student, would withdraw her from Cooke (id.). The hearing record does not contain a response to this letter.

A. Due Process Complaint Notice

By due process complaint notice dated December 5, 2012, the parent requested an impartial hearing and contended that district failed to provide the student with a free appropriate public education (FAPE) for the 2012-13 school year (Dist. Ex. 1). In particular, the parent argued that the March 2012 IEP mandated a "District 75 school" which was "totally inappropriate" for the student. In addition, the parent maintained that the March 2012 IEP failed to set forth criteria, procedures or schedules to be used in measuring the student's progress toward meeting her annual goals (id. at p. 1), and that the district, upon information and belief, failed to provide the parent with an FNR (id. at pp. 1-2). Accordingly, the parent requested, among other things, a

[1] The participants from Cooke included a "representative" from the school, the student's math and science teacher (who attended by telephone), a related service provider, and an audiologist (Dist. Ex. 3 at p. 17).

[2] The student's eligibility for special education programs and related services as a student with a hearing impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] Though not defined in the record, a District 75 School (denoted in the March 2012 IEP as "D75 Programming") is essentially a placement in a specialized district public school.

[4] The March 2012 IEP reflects two different "counseling services" for the student, both of which indicate that the service would be provided to the student on an individual basis (i.e. one individual session per week for 40 minutes and another 2 individual sessions per week for 40 minutes each) (Dist. Ex. 3 at p. 11). According to the district's special education teacher, however, one of these services was supposed to provide group counseling to the student, though which of the two was supposed to be the "group" service is not clear from the record (Tr. pp.94-98).

determination that the district failed to offer the student a FAPE for the 2012-13 school year, a determination that Cooke was an appropriate placement for the student, and that the district be ordered to directly fund the student's 2012-13 tuition at Cooke (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 4, 2013, and after three-nonconsecutive days of meetings concluded on February 11, 2013.[5] In a decision dated February 25, 2013, an IHO declined to address the parent's concerns related to her alleged non-receipt of an FNR, but found that the district failed to comply with procedural requirements and did not develop an IEP which was "reasonably calculated to enable the student to receive educational benefits" (IHO Decision at p. 17). In particular, the IHO found that the March 2012 CSE failed to take steps to ensure that the parent was present at the CSE meeting, resulting in the parent not being able to participate in discussions and various concerns not being considered or addressed (id. at pp. 14-15). In addition, the IHO found that some goals in the March 2012 IEP appeared "generic" (id at p. 15), that other goals appeared "vague and immeasurable" (id. at pp. 15-16), and that the March 2012 IEP both failed to include a coordinated set of transition activities for the student and inappropriately recommended a 12-month program (id at p. 16). In addition, the IHO noted additional concerns with the March 2012 IEP, including that it "reflects no testing accommodations" (id.), that it "incorrectly reflects solely individual counseling sessions" (id. at p. 15), and that in some places it refers to the student as a male (id. at 17).

Further, and with respect to Cooke, the IHO agreed with the parent that Cooke was an appropriate placement for the student, finding that evidence in the record showed that the student was doing well there, making progress, and that the school offered an educational program that met the student's special education needs (id. at 17-18). In addition, the IHO found that equitable considerations supported the parent in that she cooperated with the district, was ready to attend the March 2012 CSE meeting, and that she "acted reasonably in corresponding with the [district]" (id. at 19). The IHO, therefore, order the district to, among other things, directly fund the student's 2012-13 tuition at Cooke (id. at 20).

IV. Appeal for State-Level Review

The district appeals and contends that the IHO erroneously considered various issues – including that the parent was not provided with an opportunity to participate in the March 2012 IEP meeting – which were not raised in the parent's due process complaint notice and, therefore, should not have been considered.[6] In addition, the district maintains that the IHO's decision was substantively incorrect. Regarding the IHO's "parent participation" finding, for example, the district argues that the parent was afforded an opportunity to participate in the March 2012 CSE meeting, that she declined that opportunity, that four individuals from Cooke were at the meeting,

[5] The record reflects that no testimony was taken on January 4, 2013, which was a pre-trial conference, or on February 11, 2013, which is when the parties presented their closing arguments.

[6] In addition to the "parent participation" issue, the district contends that the IHO's finding that the IEP's annual goals "appear to be vague and generic," that the IHO's finding that the parent's concerns were not addressed by the March 2012 CSE (including concerns related to what the district refers to as "vocational/transition activities"), and that the IHO's findings regarding the appropriateness of a 12 month program, are issues outside of the scope of the parent's due process complaint notice and should not be considered.

and that that the parent's concerns were addressed in the March 2012 IEP. Furthermore, the district maintains that the lack of a coordinated set of transition activities in the March 2012 IEP was at best a de minimus violation that did not rise to the level of a denial of FAPE, that the IHO's findings with respect to the March 2012 IEP's goals were incorrect, and that the March 2012 CSE appropriately recommended a 12 month program for the student.[7] The district also argues that March 2012 IEP's recommendation of a 12:1+1 placement was the most appropriate placement for the student and that, with respect to the parent's claim regarding the non-receipt of a FNR, it sent the parent an FNR and is entitled to a "mailing presumption." Finally, the district contends that the IHO incorrectly found that Cooke was an appropriate placement for the student and argues that the equities do not favor the parent for various reasons.

The parent generally denies the district's allegations and argues that the IHO correctly found that the district denied the student a FAPE. In this regard, and in addition to contending that IHO's findings relating to the insufficiency of the IEP are correct, the parent contends that the IHO correctly found that the district denied the student a FAPE by impeding her (the parent's) participation in the IEP process, and that the district "opened the door" to this issue.[8] In addition, the parent contends that the district failed to show that a "12:1+1 District 75 class" was appropriate for the student, or that it provided the parent with an FNR. The parent also argues that the IHO correctly found that Cooke was an appropriate placement for the student and that equitable considerations favored her.

In addition to the above, the parent asserts two cross-appeals. Specifically, the parent contends that the IHO "made no finding" regarding whether the district "opened the door" to the "parent participation" issue, and she requests that this matter be remanded for a determination on that issue. In addition, the parent cross-appeals the IHO's lack of a ruling on her allegations regarding the non-receipt of an FNR, and she again requests that this matter be remanded for findings on this issue, as well. In response, the district largely repeats the allegations raised in its petition and argues that whether it "opened the door" to the "parent participation" issue is "of no moment" because the absence of the parent at the March 2012 CSE did not result in any substantive harm. The district also argues that "there is no indication that anything would have turned out differently had the [p]aren't been in attendance at the IEP meeting."

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, 206-07 [1982]).

[7] Specifically, the district argues that there is evidence of "regression" in the record such that the IHO's finding that there was no such evidence was incorrect.

[8] The parent also contends that the district "opened the door" to all of the other issues challenged by the district as being outside of the proper scope of review in this matter.

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. Parent Participation

As noted above, the IHO found that the student was denied a FAPE in large part because the parent did not participate at the March 2012 CSE meeting, and that this significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student. In this regard I note that there is no dispute that the parent did not attend the

March 2012 CSE meeting. The district, however, contends that this matter should not have been considered because it was not raised as a concern in the parent's due process complaint notice.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (20 U.S.C. § 1415[b][6], [7]; 34 CFR 300.507; 300.508; 8 NYCRR 200.5[i], [j]). In general, therefore, that party may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]). However, if a respondent at an impartial hearing raises issues that are outside of the scope of a due process complaint notice in support of its position, the Second Circuit has held that this may "open the door" to such issues being appropriately considered (see M.H., 685 F.3d at 250-51). Such as been deemed to be the case, for example, where a respondent raises an issue at the hearing in its opening statement, and then later elicits questions from witnesses regarding this issue (see, e.g., id. at 250. See also P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 515 (S.D.N.Y. 2013)].

Upon review, I agree with the district that the parent's due process complaint notice cannot reasonably be read to include a claim that the parent was denied meaningful participation in the development of the March 2012 IEP. However, the hearing record in this matter reflects that the district raised the issue of the parent's participation in the development of this IEP to bolster its claims that the IEP itself was appropriate for the student. For example, the district explicitly noted in its opening statement that the March 2012 IEP was created "in collaboration with the parent and representatives from the Cook Center" and was therefore appropriate (Tr. p. 20). In addition, the district's attorney asked questions concerning the composition of the March 2013 CSE, including the roles of each person and what they contributed to the meeting (Tr. pp. 47-51). Accordingly, I find that the district "opened the door" to the issue of the parent's participation in this matter.[9]

The district, however, contends that whether it "opened the door" to the issue of the parent's participation "is of no moment" because the absence of the parent at the March 2012 CSE meeting did not deprive the student of a FAPE.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). CSE meetings may be conducted without a parent in attendance if a district is unable to convince the parents that they should attend (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3]). In such instances,

[9] I light of my finding above, it is not necessary to remand this matter to an IHO to determine whether the district "opened the door" to the issue of "parent participation." Accordingly, the parent's request that I do so is denied.

the district must keep a record of its attempts to arrange a mutually agreed upon time and place for the meeting (id.).

As an initial matter, the district attempts to analogize this case to J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F.Supp.2d 387 (S.D.N.Y. 2010), where it was held that parents, despite not having attended a CSE meeting, were not denied a meaningful opportunity to participate in the development of an IEP where they were offered an opportunity to participate at the CSE, they declined that opportunity, and the parents' concerns were addressed in the IEP (see id. at 395-96). However, J.G. is different from this case in two material respects. First, unlike in J.G. where the district, consistent with obligations noted above, both called the parents when they did not show up for the CSE meeting and kept records of this and other communications offering the parents an opportunity to participate in that meeting (see id. at 392, 396), here there is no evidence that the district made any attempt to contact the parent when she did not show up for the March 2012 CSE meeting. In fact, the district's witness who attended the March 2012 CSE testified that while "normal procedure" would be to call a parent that does not show up for a CSE meeting, he did not recall whether that was done in this case (Tr. pp. 109-10).[10] Moreover, and again unlike the situation in J.G. where the parent – when contacted by telephone – affirmatively declined to participate in the CSE meeting (J.G., 682 F.Supp.2d at 392, 396), the record here contains no indication that the parent made such a declination. Rather, the parent – who indicated that she was unable to attend the CSE meeting in person due to work obligations – testified that while she was told that she could participate in the March 2012 CSE meeting by telephone and was available to do so,[11] nobody called her (Tr. pp. 141-42; 148). Accordingly, I am unable to find that the parent "declined" the opportunity to participate in the March 2012 CSE meeting as the district suggests. In this regard, and to the extent that the district attempts to argue that it was the parent who failed to call anyone on the day of the CSE meeting (Answer at ¶ 21), I note that as indicated above, it is the district that has the responsibility to ensure parental participation and, if need be, to try and convince a parent to attend a CSE meeting before one is held in their absence.

In addition, the district argues that the parent's absence from the March 2012 CSE meeting did not deny the student a FAPE, in essence, because it did not result in any substantive harm to the student. In this regard the district makes a number of allegations, including that four people from Cooke attended the March 2012 CSE meeting, that the IEP resulting from that meeting adequately addressed the student's needs and (even if flawed) provided her with a FAPE, and that "there is no indication that anything would have turned out differently had the [p]arent been in attendance at the IEP meeting" (Petition at ¶¶ 21-22; Answer to Cross-Appeal at ¶ 30). However, such arguments ignore the fundamental importance of parental participation in the development of an IEP which, as has been noted, is as equally important as the development of a substantively appropriate IEP (see, e.g., Rowley, 458 U.S. at 205-06 [noting that it "seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process

[10] While the district argues that there is no evidence that the CSE did not try to contact the parent, I remind the district that, as noted above, the burden of proof regarding such issues is on the school district during an impartial hearing (Educ. Law § 4404[1][c]).

[11] The record reflects that the parent contacted the district before the March 2012 CSE meeting to advise that she would not be able to attend the CSE meeting in person, and that it was at this time that she was told that she could attend the meeting by telephone (Tr. p. 148; Answer at ¶ 21).

. . . as it did upon the measurement of the resulting IEP against a substantive standard"]. See also e.g., Davis v. Wappingers Central School Dist., 431 Fed. App'x 12, 15 [2d Cir. 2011] [holding that procedural violations that significantly affect a parent's ability to participate in developing an IEP constitute a denial of FAPE irrespective of the "substantive merits of the IEP"]; Doug C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1047 [9th Cir. 2013] [holding that significantly impeding a parent's ability to participate in the development of an IEP is "reason alone to conclude that [the student] was denied a FAPE"]; Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892, 895 [9th Cir. 2001] [holding that "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA[, as a]n IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed," and declining to address the substantive adequacy of the IEP]). Accordingly, I am unable to find that these arguments alone establish that the student was not denied a FAPE.

In sum, I am unable to find that the district complied with its obligations to ensure the parent's participation at the March 2012 CSE meeting or that the parent – who indicates that she was available for participation - declined to participate in this meeting. As such, and given the importance of parental participation to the IEP development process, I am constrained to find that the district's actions (or lack thereof) constituted a denial of FAPE in this matter.

B. Unilateral Placement

Having found a denial of FAPE, I need not address the parties remaining contentions related to the provision of a FAPE. However, the district also argues that tuition reimbursement should be denied because the parent has failed to satisfy her burden of proving that Cooke is an appropriate placement for the student.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G.,

459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

Notably, the district does not contend that Cooke does not provide the student with specially designed instruction, nor does it contend that the student has not made progress at Cooke.[12] Rather, the sole basis upon which the district argues that Cooke is inappropriate for this student is that it "does not provide the consistency of a twelve month academic and related services program" (Answer at ¶¶ 29, 30). Specifically, the district contends that due to the student's "deficits in cognitive abilities like memory and processing, hearing challenges, and severe academic delays, it is likely that [she] would be a significant, if not certain risk, to regress over a

[12] Such allegations, if they were made, would not be supported by the record as reports from Cooke reflect that the school provided appropriate academic instruction and support to the student. For example, the reports indicate that the student was educated in small classes and in small groups (See generally Dist. Exs. 16, 17; Parent Exs. E, F) received instruction in areas of noted deficits, including reading, writing and math (Dist. Exs 16 at pp. 3-5, 17 at pp. 3-8; Parent Exs. E at pp. 3-8, F at pp. 2-5), and received related services of counseling, speech-language therapy, and hearing education services (Dist. Exs. 16 at p.1, 17 at p.1; Parent Exs. E at p. 1, F at pg. 1). In addition, these reports indicate that the student made progress during the 2011-2012 school year (Dist. Ex. 17 at pp. 3-17; Parent Ex. E at pp. 2-18).

summer without any academic instruction or even related services" (id. at ¶ 29).[13] However, I am unable to find on the record before me that such is the case.

Specifically, in support of its contention that the student requires 12-month services, the district cites to the testimony of its witness who indicated that the March 2012 CSE felt that the student would regress "more than the typical regression of approximately three to four weeks of a child without a disability" (Tr. p. 85). However, when questioned on this issue the witness indicated that the basis of this opinion was that the student did not make progress on her goals from year-to-year (id. p. 104), and that the student's scores (especially her working memory and processing speed scores) on a psycho-educational evaluation relied upon by the March 2012 CSE were low (id. at p. 85). However, the former is at best evidence of a lack of progress, which is different from regression. Moreover, and with respect to the latter, I note that while the psycho-educational evaluation indicates that the student tested in the "extremely low" range for working memory and processing speed (Dist. Ex. 11 at p. 2), I am unable to find that this alone indicates that the student would significantly regress over the summer such that 12-month services would be necessary. This is especially true where, as here, the psycho-educational evaluation itself indicates that the student (who is hearing impaired) did not bring her FM Unit or a hearing aid to the testing session and that its scores "should be interpreted with caution" as a result. Moreover, I note that progress reports from Cooke do not suggest regression (Dist. Exs. 16, 17; Parent Exs. E, F), and the assistant head of school at Cooke testified that she had spoken with the student's teachers specifically about regression and that there was no indication that the student had regressed over the summer (id. at pp. 121, 133).

In light of the above, I am unable to find that a 12-month program is required for the student or that, relatedly, the lack a 12-month program or services at Cooke would, alone, render it an inappropriate placement for the student. Accordingly, I decline to find on the record before me that Cooke was an inappropriate placement for the student.[14]

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[13] State regulations provide that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106). Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id. [emphasis in original]).

[14] Nothing herein should be constructed as a finding that the district denied the student a FAPE, at least in part, because the March 2012 IEP provided for a 12-month school year. Rather, such a finding would require an analysis of whether the provision of a 12-month school year itself would have prohibited the March 2012 IEP from being reasonably calculated to provide some meaningful benefit to the student (see, Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see also Rowley, 458 U.S. at 192), which is different than simply saying that 12-month school year may not have been required for the student.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

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

The district initially contends that the equities do not favor the parent because she never seriously intended to enroll the student in public school. However, the Second Circuit has recently explained that, so long as parents cooperate with the CSE, "their pursuit of a private placement [i]s not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). Here, there is no evidence that the parent did not cooperate (or at least attempt to cooperate) with the district with respect to the development of the student's IEP. In this regard I note that while parent did not attend the March 2012 CSE meeting, I decline to find that equity would favor the district in this case since, as discussed above, the record reflects that

the parent was available to attend the March 2012 CSE meeting by telephone but was not contacted by the CSE (Tr. pp. 140-42, 148). Accordingly, even assuming that the parent never intended to enroll the student in a public school as the district suggests, this alone would not require a reduction or denial of relief in this case.

In addition, the district contends that the equities do not favor the parent because her 10-day notice was "legally inadequate." Specifically, the district contends that this notice – which is dated August 22, 2012 (Parent Ex. G) and was the parent's first objection to the March 2012 IEP – was late given that the March 2012 CSE had recommended a 12-month school year which began in July 2012 for the student. However, and as noted above, the need for a 12-month school year is not established by the record. Further, the record reflects that the 2012-13 school year at Cooke began in September 2012 (Parent Ex. D at p. 1; Tr. pp. 120-21), and thus the parent's August 22 notice provided the district with notice of the student's removal before she began attending Cooke in that year. Accordingly, the district could have taken steps to address the parent's concerns before the student began attending Cooke. However, I note that there is no indication in the record that the district responded to the parent's notice or in any way attempted to avail itself of this opportunity. Accordingly, I find that the timing of the parent's 10-day notice in this matter does not necessitate a reduction or denial of relief.

D. Relief – Direct Funding

Finally, the district suggests that the parent is not entitled to the direct funding of the student's tuition at Cooke. In this regard the district argues that the parent has not shown that she lacks the financial recourses to pay the tuition at the school.

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. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). Here, I agree with the IHO that the record in this matter establishes that the parent – who reported having a base salary of $54,000 a year at the time of the hearing (Tr. p. 146),[15] and who reported earned income in 2011 of $25,596 (Parent Exs. B at p. 4, C at p. 1) – lacked the resources to pay the $48,500 annual tuition at Cooke (Parent Ex. D at p. 1). In fact, the district itself even argues in its petition that Cooke could not have realistically expected payment from the parent precisely because its tuition was "more than half of the [p]arent's yearly income" (Petition at ¶ 36).

In addition, the district argues that the parent is not legally obligated to pay Cooke anything, and that her contract with the school is a "sham." In this regard the district contends, among other

[15] The record reflects that in addition to this base salary, the parent also received an additional $1500 per month in supplemental support.

things, that the parent has not made any payments to the school, and that the school itself has not taken steps to enforce the contract. However such facts do not warrant a determination that the parent was not obligated under the contract (see E.M., 758 F.3d at 457-58 [examining parental standing in light of contractual obligations to pay, as well as implied obligations to pursue remedies under the IDEA]). This is especially true where, as here, the contract explicitly provides that the parent is responsible for the full payment of the tuition due under this contract (Parent Ex. D at pp. 1-2). Accordingly, under the circumstances of this case, I find that the parent is entitled to direct funding of the student's tuition at Cooke for the 2012-13 school year, as ordered by the IHO, under the factors described in Mr. and Mrs. A. (see 769 F. Supp. 2d at 406).

VII. Conclusion

In summary, I find that for the reasons discussed above the district denied the student a FAPE for the 2012-13 school year, that Cooke is an appropriate placement for the student, and that the IHO properly ordered the district to directly fund the student's tuition at Cooke for the 2012-13 school year.

In light of my determination above, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

THE CROSS APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 4, 2014

HOWARD BEYER
STATE REVIEW OFFICER