



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-152

Application of the BOARD OF EDUCATION OF THE WILSON CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Hodgson Russ LLP, Attorneys for Petitioner, Melanie J. Beardsley, Esq., and Ryan L. Everhart, Esq., of Counsel

Neighborhood Legal Services, Inc., Attorneys for Respondent, Linda J. DeTine, 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 which determined that the respondent (the parent) was entitled to equitable relief allowing her daughter to attend an extracurricular program. The parent cross-appeals from that portion of the impartial hearing officer's decision which found that the district's actions did not violate the IDEA and State Law. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings conclusions and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

During the 2010-11 school year, the student was eligible for special education services as a student with an intellectual disability (Dist. Ex. 53 at pp. 1, 6). .On or about September 2010, the student began attending an after-school program called Respite (Tr. pp. 138, 258-59). This program, operated by a third-party, provides socialization and daily life skill activities for students with developmental disabilities between the ages of 10 and 21 (Tr. pp. 136-37). The program is held from 2:00 P.M. to 6:00 P.M. Monday through Friday and hosted at a public high school in the district where the student previously resided (Tr. pp. 136, 257-59).

The student moved in November 2010 to petitioner's district (Tr. p. 257). The district continued to transport the student to the Respite program, even though the program was located out of district (Tr. p. 258-59, 261). On or about August of 2011, the district informed the mother that it would no longer provide transportation to the Respite program (Tr. pp. 61-62, 261; see also Dist. Exs. 50; 51). In an undated letter written after December 20, 2011, the district claimed that it was prohibited from transporting the student "to or from a point other than [the] student's residence and the school [she] attend[s]" (Dist. Ex. 51; see Tr. pp. 62-63). When attempts to reinstate the transportation proved fruitless, the parent requested that the district arrange an alternative extracurricular activity for the student (see, e.g., Dist. Exs. 25; 32). The parties exchanged correspondence and information but did not reach agreement on what, if any, activities the student would or could participate in (see Dist. Exs. 13; 15; 21; 25; 27; 31; 32; Parent Exs. C; D; E; F; G; I; J; K).¹ The parties eventually agreed to reconvene a CSE to discuss the student's participation in extracurricular activities (Dist. Exs. 11; 12; 14; Parent Ex. K).

The CSE reconvened its meeting on October 25, 2012 (Dist. Exs. 8; 10; 11). The parties briefly discussed the student's participation in extracurricular activities but made no progress (Dist. Ex. 8). Following the CSE meeting, the district sent the parent a letter dated November 14, 2012 indicating that the district "supported the [prior] recommendations of the Committee on Special Education" (Dist. Ex. 4).²

At the time of the events relevant to this appeal, the student was 19 years old and remained eligible for special education services as a student with an intellectual disability (IHO Ex. 1 at p. 1; see Dist Ex. 40; Parent Ex. B). She attended an out of district Board of Cooperative Educational Services (BOCES) program (Parent Ex. B at p. 1; IHO Ex. I at p. 1). She is being educated under an IEP dated April 18, 2013 for the 2013-14 school year (Tr. pp. 163-66).³

A. Due Process Complaint Notice

In a due process complaint noticed dated February 11, 2013, the parent alleged that the district violated state and federal law in six respects (Parent Ex. A at pp. 3-4). First, the district did not indicate on the student's IEP what supplementary aids and services she required to participate in extracurricular activities (id. at p. 3).⁴ Second, the district erroneously told the parent that the district was not legally required to provide said aids and services (id.). Third, the district failed to establish and maintain administrative procedures ensuring that students with disabilities have an equal opportunity to participate in extracurricular activities (id. at p. 4). Fourth, the district did not provide adequate transportation to extracurricular activities because it was at a greater cost

¹ I remind the IHO that he has an obligation to avoid burdening the record with duplicate exhibits (Tr. p. 29).

² This letter references the date of the CSE reconvene as October 17, 2012 (Dist. Ex. 4). This appears to have been a typographical error.

³ This IEP, though discussed and presented to a witness at the impartial hearing, was not made a part of the hearing record (see Tr. pp. 163-66). The parties did, however, provide the student's IEPs for the 2011-12 and 2012-13 school years (District Ex. 53; Parent Ex. B). Because I do not find the student's IEP at issue in this appeal, as discussed below, the parties' failure to submit the 2013-14 IEP does not affect my disposition of the parties' claims.

⁴ In this decision all references to the district's obligations regarding extracurricular activities should be read to impliedly include "nonacademic activities" in accordance with the language of 34 CFR 300.107.

to the student as compared to other district students (id.). Fifth, the student's BOCES program did not have services and activities comparable to those located within petitioner's district (id.). Sixth, the district did not provide the student with an equal opportunity to participate in extracurricular activities (id.)

B. Impartial Hearing Officer Decision

An impartial hearing was held on May 23, 2013 (Tr. pp. 1-305). In a decision dated July 5, 2013, the IHO found that the district did not violate either the IDEA or State law (IHO Decision at pp. 13-14, 16-18). The IHO briefly addressed and rejected the six claims contained in the parent's due process complaint (IHO Decision at pp. 16-18). The IHO found that the district was not required to indicate supplementary aids and services on the student's IEP because "no extracurricular or non-academic activities were made a part of the [s]tudent's I.E.P." (id. at p. 17). The IHO further dismissed the parent's erroneous advisement claim relating to supplemental aids and services, noting that it was without merit and, even if such statements were made, they did not violate any law or regulation (id.). The IHO disposed of the parent's claim that the district did not adopt administrative procedures ensuring equal opportunity regarding extracurricular activities by noting that it was a "systemic complaint" outside of his jurisdiction (id.). The IHO noted that the parent's request for adequate transportation was "addressed . . . in the main of th[e] decision" (id.). The IHO found that the parent waived any right to challenge the services and activities at the BOCES program as compared to those offered by the district because the parent willingly agreed to the placement knowing that it did not offer extracurricular activities (id. at pp. 17-18). Finally, the IHO found that the district "met its obligation" to provide the student with an equal opportunity for participation in extracurricular and nonacademic activities (id. at p. 18).

Nevertheless, asserting "equitable authority" under Sch. Comm. of Burlington v. Dep't of Educ. (471 U.S. 359 [1985]), the IHO ordered the district to drop the student off at the Respite program (IHO Decision at pp. 15-16, 19). The IHO also ordered the parent to execute a waiver relieving the district of all liability, excluding its own negligence, and indicated that the order would remain in effect so long as the current district bus route remained unaltered (id. at pp. 16, 19). The IHO also rejected an argument by the district that Education Law § 3635, which relates to a school district's authority to provide transportation services, operated as a bar the parent's request to transport the student to the Respite program (id. at pp. 11-13).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erroneously ordered relief in the absence of a violation of the IDEA or State law. The district further contends that in error the IHO's order forces it to violate Education Law § 3635 and its own internal policy.

In an answer and cross-appeal, the parent argues that the IHO properly exercised equitable authority. The parent contends that the IHO did not go far enough and should have ordered the district to transport the student to the Respite program irrespective of the current bus route. According to the parent, the IHO's order does not violate Education Law § 3635, and that any district policy regarding transportation is superseded by the district's obligations under the IDEA and the Education Law. The parent also cross-appeals all six claims contained in her due process

complaint notice. Finally, the parent requests that the IHO's order be placed in effect during the pendency of this appeal.

Answering the cross-appeal, the district argues the three claims it raised in its petition. The district also argues that the IHO properly dismissed the six claims contained in the parent's due process complaint. The district additionally contends that a recently issued IHO opinion resolving the parent's Section 504 claims provides persuasive authority in this appeal. Finally, the district requests that the parent's request for temporary relief be denied.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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. Participation in Extracurricular Activities

The crux of the parent's arguments is that the student was denied the equal opportunity to participate in extracurricular activities (see 34 CFR 300.107). Although the IHO concluded that the "district met its obligation in this regard" (IHO Decision at p. 18), I find that this issue required greater depth of analysis to support such a conclusion and that upon review I do not agree with some of the determination reached by the IHO.

1. Overview

A district's duties under the IDEA regarding student participation in extracurricular and nonacademic activities can be found in three regulations, 34 CFR Sections 300.107, 300.117, and 300.320. A brief review of the history of these regulations may be helpful. 34 CFR 300.107 (Nonacademic services) and 34 CFR 300.117 (Nonacademic settings) were originally proposed by the Department of Health, Education, and Welfare to implement Section 504 of the Rehabilitation Act.⁵ The first IDEA implementing regulations, issued August 23, 1977, included nonacademic services and settings provisions ("extracurricular regulations") almost identical to the comparable Section 504 regulations (Nonacademic Services, 42 Fed. Reg. 42489 [Aug. 23, 1977]; Nonacademic Settings, 42 Fed. Reg. 42497 [Aug. 23, 1977]).⁶ When the Department of Education became a cabinet level post in 1979, the extracurricular regulations regarding the IDEA were redesignated and moved to Section 34 of the Code of Federal Regulations (see Transfer and Redesignation of ED Regulations, 45 Fed. Reg. 77368, 77370 [Nov. 21, 1980]).⁷ The extracurricular regulations pertaining to Section 504 were also transferred and redesignated (id. at 77368, 77369).⁸

The IDEA was amended in 1997 requiring that CSEs determine what supplementary aids and services, if any, are necessary for equal participation in extracurricular and nonacademic activities and parallels were incorporated into the 1999 implementing regulations (see Matter of Roslyn Union Free Sch. Dist. v. University of State of New York, 274 A.D.2d 848, 850 n.2 [3d

⁵ The Department of Education was made a cabinet level post in 1979 (Pub. L. 96-88, enacted October 17, 1979). Before that time, the duties now held by the Department of Education were exercised by the Department of Health, Education, and Welfare.

⁶ An analysis of comments to the nonacademic settings regulation explicitly indicated that it "[wa]s taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973" (Comment, Nonacademic Settings, 42 Fed. Reg. 42497 [Aug. 23, 1977]). There are minor differences in the language of the regulations to reflect the differing scope of the respective acts; however, they offer similar protections (compare Nonacademic Services, 42 Fed. Reg. 42489 [Aug. 23, 1977] and Nonacademic Settings, 42 Fed. Reg. 42497 [Aug. 23, 1977] with Educational Setting, 42 Fed. Reg. 22682 [May 4, 1977] and Nonacademic Services, 42 Fed. Reg. 22683 [May 4, 1977]).

⁷ After being re-designated, the provisions were renumbered in the 2006 implementing regulations. 34 CFR 300.306 was changed to 300.107, and 34 CFR 300.553 was changed to 300.117 (Nonacademic Settings, 71 Fed. Reg. 46765 [Aug. 14, 2006]; Nonacademic Services, 71 Fed. Reg. 46763 [Aug. 14, 2006]).

⁸ 45 CFR 84.37 (Nonacademic services) is now 34 CFR 104.37, and 45 CFR 84.34 (Nonacademic settings) is now 34 CFR 104.34.

Dep't 2000]; see also 34 CFR 300.347 [as amended, 1999]). In 2006, 34 CFR 300.117 was amended to explicitly indicate that "supplementary aids and services" must actually be provided to students participating in extracurricular activities (Nonacademic Settings, 71 Fed. Reg. 46541, 46589 [2006]). The purpose of the 2006 amendment was "to clarify that . . . each child with a disability has the supplementary aids and services determined by the child's [IEP] to be appropriate and necessary for the child to participate with nondisabled children in . . . extracurricular services and activities" (Least Restrictive Environment, 71 Fed. Reg. 46541 [Aug. 14, 2006]).

Accordingly, as it currently stands, 34 CFR 300.107 requires that districts take steps to provide nonacademic and extracurricular activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities. 34 CFR 300.117 indicates that participation of a student with a disability in extracurricular activities is subject to LRE mandates. 34 CFR 300.320[a][4][ii] outlines the content of IEPs, including the provision of supplementary aids and services to enable the student to participate in nonacademic and extracurricular services and other nonacademic activities.⁹

Courts and administrative agencies have provided further interpretive guidance to assist parties in determining compliance with the extracurricular regulations. First, a district must consider a student's request to participate in certain extracurricular activities (See, e.g., *Indep. Sch. Dist. No. 12 v. Minnesota Dep't of Educ.*, 788 N.W.2d 907, 915 [Minn. 2010]; *Rettig v. Kent City Sch. Dist.*, 788 F.2d 328, 332 [6th Cir. 1986]; see also *Application of the Board of Educ.*, Appeal No. 06-033; *Application of a Child with a Disability*, Appeal No. 04-047; *Application of the Board of Educ.*, Appeal No. 93-023; *Application of the Board of Educ.*, Appeal No. 92-011).

Second, a district must take steps to provide students with disabilities an equal opportunity to participate in extracurricular activities which are available to all other students enrolled in the public schools of the district (34 CFR 300.107; see 8 NYCRR 200.2 [b][1]; Roslyn, 274 A.D. 2d at 850; Application of a Child with a Disability, Appeal No. 04-047; Application of the Board of Educ., Appeal No. 93-023; Application of the Board of Educ., Appeal No. 92-011). This obligation exists separate and apart from a district's duty to determine whether extracurricular activities are a necessary part of a student's educational program.

In this case, the parent does not challenge the educational program that is being implemented at the BOCES placement and the parties agree that the BOCES program was appropriate and sufficiently meeting the student's educational needs (see Tr. p. 45).¹⁰ While the parent indirectly argues that the student's IEP should have identified certain aids and supplementary services, I agree with the IHO that the particular aids and services could not be identified until the parties reached some consensus about which extracurricular activity or activities the student would participate in.¹¹ Moreover, it appears that the student has already

⁹ A 2006 amendment to 34 CFR 300.117 reinforces this by requiring that students receive the supplementary aids and services recommended in the student's IEP in nonacademic settings, if any (34 CFR 300.117).

¹⁰ The IHO indicated, however, that the parent challenged this program insofar as it did not have "services and activities comparable to those of [the current] district" (IHO Decision at p. 7). This claim, however, is outside of my jurisdiction, as addressed below.

¹¹ This is further reinforced by the fact that the parent does not indicate what specific aids and services should have been identified on the IEP. While the parent has suggested that the student requires an aide to participate in

successfully accessed the Respite program in the past (Tr. p. 137-38; Dist. Ex. 44). Thus, it is not necessary to address whether additional supports and services to access extracurricular or nonacademic activities needed to be added to the student's IEP since the question to be considered is the extent to which the student is entitled to access the extracurricular activities at issue. Therefore I will address whether the student was afforded an equal opportunity to participate in such activities.

Additionally, I limit my discussion and review to the student's participation in the Respite program. Months ago, it appears the district and parent reached an impasse regarding the selection of a suitable district-provided extracurricular activity for the student. The district and parent both insist that they cannot proceed until the other party picks and/or suggests accommodations for an extracurricular activity. This places the cart before the horse and the parties must first consider which activities may be of interest or benefit to the student, determine whether the student is entitled to equal access similar to his non-disabled peers, and if so, then consider which particular aides or supports may be needed for the particular activity. In this case, the question of which extracurricular activities are of interest to the student is a matter between the student and the parent and I express no opinion on the matter, other than it appears abundantly clear that the parent is interested in having the student continue to attend the Respite program as she has in the past.

a. Equal Access to Extracurricular Activities

The parent argues that the district denied the student an equal opportunity to participate in extracurricular activities. As a preliminary matter, I note that the district does not dispute its duty to provide equal access to equal access to extracurricular activities for the student (see, e.g., Tr. p. 47, 66-68, 204-06). Therefore, the only question is whether the district has met this obligation.

Under 34 CFR 300.107, a district must "take steps . . . to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation." Generally, this requires districts to provide the same degree of access to nonacademic and extracurricular services and activities that similarly situated students in the district possess (see Jefferson Cnty. Bd. of Educ. v. S.B., 788 F. Supp. 2d 1347, 1352 [N.D. Ala. 2011] ["All of the uncontroverted evidence indicates, however, that a non-disabled student in [the student's] same situation would . . . be [treated identically]. Accordingly, [the student was not denied an] equal opportunity to participate . . ."]; see also Application of the Board of Educ., Appeal No. 06-033 [No denial of equal opportunity to participate in extracurricular activities where "there was no significant difference between [the student's] situation and that of other district . . . school children"]).¹² It does not require that extracurricular or nonacademic

any extracurricular activity, this is belied by the fact that the student did not require an aide at the Respite program (Tr. pp. 140-41; Parent Ex. F). In any event, the non-identification of aids and services on the IEP under these facts, without more, would not result in a denial of FAPE.

¹² Prior SRO opinions have spoken of a district's failure to provide "meaningful access" to extracurricular activities. Upon review of these decisions, I find that references to a denial of "meaningful access" refer to the result of a district's failure to provide equal opportunity to a student with a disability. In other words, a district's failure to provide equal opportunity results in a lack of meaningful access to extracurricular activities. To hold otherwise would contradict the plain language of the regulation (34 CFR § 300.107; see Letter to Anonymous, 17 EHLR 180 [OSEP 1990]) [nonacademic services regulation "merely requires school districts to take the steps necessary to afford [students] an equal opportunity for participation"]; S.B., 788 F. Supp. 2d at 1351-52

activities actually be provided (Letter to Anonymous, 17 EHLR 180 [OSEP 1990]). Nor it does not require a district to create "a [] program which would be . . . beneficial for [a] child" or "provid[e] equivalent or alternative transportation simply because [a student's] existing after-school program . . . is not suitable for the child's participation" (Matter of Rosalyn Union Free School Dist., 274 A.D.2d at 850).¹³

Here, I find that the district has not established that it provided the student an equal opportunity to participate in extracurricular activities because existing transportation is utilized by at least one other district student to the location where the Respite program is conducted (Tr. p. 105). The record indicates that, at the time of the hearing, the student's home-bound bus maintained a schedule where it stopped and let at least one district student on at the location of the Respite program (Tr. p. 105; IHO Decision at pp. 7, 14; Parent Ex. A at p. 3).¹⁴ Thus, the district has already provided transportation to the same location as the Respite program to effectuate at least one other district student's access to that location (Tr. pp. 58-59, 105) The district has not identified any legitimate reason as to why the student in this case should be treated differently. Accordingly, and as further detailed below, I find that the district did not "take steps" to allow the student equal opportunity to participate in extracurricular activities (34 CFR 300.107).

The student's individual educational needs, coupled with the distant location of the BOCES program to address those needs, make it difficult to find a desirable extracurricular activity in which she may participate (Tr. pp. 106, 109; Dist Ex. 40; Parent Ex. B. The student's needs are significant (Tr. pp. 157-60, 263-64; Dist Ex. 40; Parent Ex. B). She is classified as intellectually disabled and experiences "significant cognitive delays" (Parent Ex. B at p. 8). Additionally, she requires adult assistance for her personal hygiene needs and must be monitored for fleeing

["[300.107 and 300.117] evidence a concern with ensuring that individuals with disabilities are afforded equal, not superior, access to certain activities outside the classroom."). The "meaningful access" standard is a familiar one within special education law (see Rowley, 458 U.S. at 192 ["Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful"] and Alexander v. Choate (469 U.S. 287, 301 (1985); see also A.M. v. NYC Dep't of Educ., 840 F. Supp. 2d 660, 679 [E.D.N.Y. 2012] aff'd sub nom. Moody v. NYC Dep't of Educ., 2013 WL 906110 [2d Cir. Mar. 12, 2013] [applying the "meaningful access" test in determining whether "substantial claims" raised by parent plaintiff on behalf of minor child]).

¹³ I additionally note that out-of-district transportation is generally not required when a student's educational program is sufficient and a transportation request is made for reasons of preference or convenience (Ms. S. v. Scarborough Sch. Comm., 366 F. Supp. 2d 98, 99 [D. Me. 2005] [request that district ensure that both an adult is home when student is dropped off and that the student is transported home on a general education bus unrelated to student's educational needs and beyond the scope of the IDEA]; Fick v. Sioux Falls Sch. Dist. 49-5, 337 F.3d 968 [8th Cir. 2003]) [district not obligated to drop student off at child care location because request unrelated to student's educational needs]; N. Allegheny Sch. Dist. v. Gregory P., 687 A.2d 37, 38 [Pa. Commw. Ct. 1996] [district not obligated under the IDEA to provide transportation to out-of-district parent's house to accommodate parents' joint physical custody arrangement]).

¹⁴ The record is unclear as to whether the district picks up one or two students. The parent's due process complaint indicates that that the student "has advised her [parent] that her bus already goes to the location of the [Respite] program to pick up another [district] student who has been placed there for the school day" (Parent Ex. A at p 3). The district's Transportation Director, upon review of transportation records, testified that the district picks up two students (Tr. p. 105). The IHO's decision, reflecting this discrepancy, noted that the bus "pick[ed] up another [district] student who has been placed in a special program at [the former school]", and later referred to testimony indicating that two students were picked up (IHO Decision at pp. 7, 14).

behaviors (*id.* at pp. 6, 8). And due to the location of student's program at BOCES, the student cannot leave her day program and arrive by bus in time to meaningfully participate in any of the extracurricular activities hosted at the district's location (Tr. pp. 106, 109, 237-38, 272-74; IHO Ex. I at p. 2). However, the parent located an appropriate program where the student "flourished" in her socialization skills, developed activities of daily living skills, and participated in many activities (Tr. pp. 140-42, 267; Dist. Ex. 44). Additionally, the parent asserts, and the district does not dispute, that the program itself provides an aide to escort the student from the bus drop-off point into the program and the parent will pick the child up at the program's conclusion (Tr. pp. 50, 53-54).

All that is required to allow the student to participate, as the IHO observed, is for the district to allow the student to exit the bus (IHO Decision at p. 15). It appears from the record that there are no barriers to the student's acceptance into the Respite program student (Tr. pp. 138-40). Although such cases as Roslyn have held that a district need not create new extracurricular or transportation opportunities (274 A.D. 2d 848), I find that the present scenario—in which the student is already using existing transportation that benefits of at least one other district student and which allows access to the location of an appropriate extracurricular activity—is distinguishable. The district's steadfast refusal to allow the student to access this program that is already available has, under these facts, denied the student an equal opportunity to participate in extracurricular activities.

The IHO agreed with this conclusion, but felt that he was constrained from ordering the district to facilitate transportation to a program operated by a third party (*see* IHO Decision at p. 13-14). However, the IDEA and Education Law contain no such restriction, although certainly to the IHO's credit, the district would lack the authority to force an unwilling third party operating the extracurricular activity accept the student, and if the third party withdraws its consent to allow a student from the district to participate in these circumstances, the district would be under no further obligation to ensure the student's access to the program. I also note that the district may have had discretion regarding this transportation if no other district students were transported to the out-of-district school in question (*see* Letter to Miller, 211 EHLR 468 [OSEP 1987] [stating that districts have "some discretion when making decisions on the extracurricular activities to which it provides transportation"]; *see also* Application of the Bd. of Educ., Appeal No. 06-033 [no right to participate in extracurricular activities where "after-school activities were eliminated for all district students at the elementary level"]). However, as noted above, there is a separate, obligation grounded in the plain language of 34 CFR 300.307 that requires districts to "take steps" to provide "equal opportunity" for students with disabilities to participate in extracurricular activities (34 CFR § 300.107; *see* 8 NYCRR 200.2 [b][1] and Roslyn, 274 A.D. 2d 848; Application of a Child with a Disability, Appeal No. 04-047; Application of the Board of Educ., Appeal No. 93-023; Application of the Board of Educ., Appeal No. 92-011). Accordingly, this portion of the IHO's opinion is reversed.

B. IHO Authority

The district contends that the IHO exceeded his authority by ordering relief to the parent, notwithstanding a finding that there was no violation of the IDEA or the Education Law. I agree with the district. While IHOs have the authority to craft equitable remedies, this does not encompass a general grant of power to effectuate a desired result (*see* L.M.P. v. Florida Dep't of

Educ., 2008 WL 4218120 at *4 [S.D. Fla. Sept. 15, 2008] aff'd, 2009 WL 2837554 [11th Cir. Sept. 4, 2009] ["the power to award a remedy is contingent on a violation of the IDEA"]; Letter to Kohn, 17 IDELR 522 [OSEP 1991] ["OSEP's position is that . . . an [IHO] has the authority to grant any relief he/she deems necessary . . . to ensure that a child receives the FAPE to which he/she is entitled" (emphasis added)]. An IHO only has the authority to decide disputes "with respect to any matter relating to the identification, evaluation, or educational placement of the student" (Educ. Law § 4401[d]; see 8 NYCRR 200.5[j]). These statutory and regulatory provisions do not confer broad equitable authority to impose provisional remedies.

Although the Supreme Court's decision in Forest Grove interpreting 20 U.S.C. § 1415[i][2][C][iii] may be viewed as possible support for the proposition that an administrative officer may issue equitable relief in the form of a preliminary injunction, I note that the issue before the Forest Grove Court involved an administrative officer's authority in fashioning appropriate equitable relief after a final determination that the district failed to offer the student a FAPE (Forest Grove, 557 U.S. at 244 n.11). No authority has been cited for the proposition that the statute conferred upon administrative hearing officers the extraordinary powers of equitable remedies such as a temporary restraining order or a preliminary injunction, which have traditionally been the province of the judiciary (see Honig v. Doe, 484 U.S. 305, 327 [1988] [discussing the equitable power of district courts in IDEA cases]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 384-86 [N.D.N.Y. 2001] [issuing a preliminary injunction conferring a placement for a student who was over the age of twenty-one during the pendency of an administrative hearing]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 357 [S.D.N.Y. 2000] [holding that parents seeking to invoke the stay-put provision of the IDEA need not exhaust their administrative remedies first because were exhaustion required, it would defeat the purpose behind the stay-put provision, which determines the child's interim placement during the pendency of administrative proceedings]; Mayo v. Baltimore City Pub. Schs., 40 F. Supp. 2d 331, 334 [D. Md 1999] [noting that in the absence of a viable stay put placement or an administrative hearing officer's decision, a parent who is likely to prevail may attempt to obtain a preliminary injunction from the Court]; Mediplex of Massachusetts, Inc. v. Shalala, 39 F. Supp. 2d 88, 94 [D. Mass. 1999] [explaining that the District Court considers injunctions while administrative review is pending after determining that administrative law judge lacked the power to issue a stay]; Jacobsen v Dist. of Columbia Bd. of Educ., 564 F. Supp 166, 170-71 [D.C.D.C 1983] [holding that a District Court has the power to prevent abuse of the administrative process with matters such as dilatory tactics] see also Cosgrove, 175 F. Supp. 2d at 384, citing Honig, 484 US at 327 [holding that the requirement to exhaust administrative remedies does not apply where the moving party demonstrates that the administrative process would be futile or inadequate]).

Therefore, although I have reached a similar conclusion as the IHO, those portions of the IHO's opinion grounded in an assertion of "equitable powers" is without authority and must be reversed.

C. Transportation

On appeal, the parties argue whether Education Law § 3635 prohibits, permits, or requires the student to be transported to the respite program. As I have based my determination on the equal access provision under the IDEA and State regulations and the specific facts present in this case, I need not resolve this issue. Additionally, the State-level review process for IDEA claims

would not be the appropriate forum for general complaints related to school districts' transportation obligations under Education Law § 3635.

D. Other Issues

I briefly address the remaining issues on appeal below.

1. Comparable Facilities

The parent cross-appeals the IHO's dismissal of her claim that the district failed to ensure that the student's placement offered services and activities comparable to those provided to other district students. On appeal, the parent indicates that her claim is based on a violation of 34 CFR 104.34. This regulation was promulgated by the Office of Civil Rights to enforce Section 504 of the Rehabilitation Act of 1973 (see 34 CFR 104.1 ["The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973"]). Unlike the extracurricular regulations discussed above, the IDEA does not contain a comparable regulation. Therefore, because this issue solely relates to Section 504, I lack jurisdiction to resolve this claim and it is accordingly dismissed.

2. Lack of District Policy

On appeal, the parent argues that the district has not adopted a "written policy" that ensures that student with disabilities have the "opportunity to participate in . . . nonacademic and extracurricular programs and activities." 8 NYCRR 200.2[b][1]. The IHO dismissed this claim because he found it a "systematic complaint" not subject to administrative jurisdiction. I agree with the IHO under these circumstances. Here, the district's actions and inactions under the specific facts of the cases, and not the existence of a written policy, affected the student's educational rights. Accordingly, the parent's argument under 8 NYCRR 200.2[b][1] is dismissed.

3. Erroneous Advice

Similarly, the parent claims on appeal that the district erroneously advised her that it was not obligated to provide supplementary aids and services for the student to participate in extracurricular activities. I have addressed the district's obligation to take steps to provide nonacademic and extracurricular activities in the manner necessary to afford children with disabilities an equal opportunity for participation and then consider any supplementary aids and services needed for this purpose. However, as noted by the IHO, all that was needed was to let the student exit the bus (IHO Decision at p. 15). Any "advice" given in with regard to the provision of supplementary aids and services, even if erroneous, would be de minimus in these circumstances. Thus, the parent's erroneous advice claim must be dismissed.

4. Violation of District Policy

The district claims on appeal that the IHO's order, requiring it to drop the student off at the out-of-district school, violates the district's policy. The parent correctly notes that a district's internal district policy cannot contravene the district's obligations under the IDEA. To the extent dropping off the student in this circumstance differs from any of the district's internal policies, the

district's obligations under the IDEA and State regulation control.¹⁵ I express no opinion regarding whether the district's policy is permissible or impermissible in any other circumstances.

5. Adequate Transportation

The parent appeals the IHO's dismissal of her claim that the district did not provide adequate transportation to extracurricular activities. Because the parent's allegations on appeal relate solely to transportation to Respite and I have determined that the district must otherwise take steps to accommodate the student's access to Respite under these circumstances, this claim regarding the adequacy of transportation services has been rendered moot. The parent has, however, also requested that the district be ordered to transport the student irrespective of the existing bus schedule. Because I may only base my determination upon evidence presented in the hearing record and there is no evidence regarding the district modifying its schedules, this request is denied (see 8 NYCRR 279.12).

6. Section 504 Determination

The district requests that I consider a recent IHO's ruling on the parent's Section 504 claims. Given the different standards of review governing actions under the IDEA and the Rehabilitation Act, I decline to do so. Even if I were to rely on this opinion, I note that its discussion of the student's right to equal participation in extracurricular activities only considered the facts and did not analyze the text of the extracurricular regulations or any relevant case law (see Answer to Cross-Appeal Memorandum of Law, Ex. A at pp. 7-10). Thus, I would not find it persuasive with respect to the issues in this proceeding.

7. Preliminary Relief on Appeal

Finally, I note that the parent requested "preliminary relief" placing the IHO's order in effect while this appeal was pending. While the IDEA and Education Law provide for educational pendency, this request exceeds the scope of my authority and, accordingly, is denied (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062).

¹⁵ It is unclear to me that the district's transportation policy even addresses this situation. The policy provides, in relevant part, that the "purposes of the transportation program are to transport students to and from school, to transport them for extracurricular activities . . . and to transport those requiring special services" (Parent Ex. O at p. 2). The district does not elaborate as to how this statement prohibits the student from being dropped off at the location of the Respite program.

VII. Conclusion

I have considered the parties' remaining contentions and find them without merit. Consistent with the foregoing discussion that the district did not establish that it had taken steps to allow the student equal access to extracurricular activities by precluding the student from exiting the school bus in order to attend the Respite program when it also provided transportation services to at least one other student at the same time and location.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the district shall facilitate the student's attendance at the Respite program by allowing the student to exit the school bus.

Dated: **Albany, New York**
 September 13, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER