The University of the State of New York

The State Education Department
State Review Officer
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No. 13-157

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

**Appearances:**
Partnership for Children's Rights, attorneys for petitioner, Thomas Gray, Esq., of counsel

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

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at the Cooke Academy (Cooke) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's failure to decide whether district offered the student a free appropriate public education (FAPE) for the 2012-13 school year. 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]; 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**

On May 22, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (Dist. Ex. 3 at pp. 1, 12-13; see Dist. Ex. 11 at pp. 1-4). Finding that the student remained eligible for special education and related services as a student with autism, the May 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school, and the following related services: three 45-minute sessions per week of individual speech-language therapy, one 45-minute session per week of individual counseling, and one 45-minute session per week of counseling in a small group (id. at

p. 9-10).[1] The May 2012 CSE also developed annual goals with corresponding short-term objectives and a transition plan (id. at pp. 3-11).

In a final notice of recommendation (FNR) dated June 15, 2012, the district summarized the recommendations made by the May 2012 CSE, and identified the public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 17). The parent visited the assigned public school site on June 20, 2012, and by letter dated June 21, 2012, rejected it because—based upon her observations—the level of academic work fell below the student's current levels, the "chaotic and noisy" environment was not appropriate for the student's social/emotional needs, and the public school site focused on job placement (Parent Ex. B at p. 1). The parent also indicated that the student had not been evaluated since 2009, and thus, the May 2012 CSE did not have sufficient evaluative information to develop an appropriate IEP (id.). As a result, the parent notified the district that until the student was placed in an "appropriate classroom," she intended to reenroll the student at Cooke for the 2012-13 school year and to seek reimbursement for the costs of the student's tuition (id.).[2]

On June 25, 2012, the parent executed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year (see Parent Exs. D at pp. 1-2; E at pp. 1-2).

By letter dated August 22, 2012, the parent informed the district that the 12:1+1 special class placement and related services recommended in the student's May 2012 IEP were not appropriate (see Parent Ex. C at p. 1). The parent also indicated that the May 2012 IEP did not address the student's academic management needs or social/emotional needs, and the May 2012 IEP did not assist the student in transitioning to independent living (id.). In addition, the parent reiterated her concerns about the assigned public school site, which had been set forth in her previous letter, dated June 21, 2012 (id. at pp. 1-2). The parent notified the district of her intentions to reenroll the student at Cooke for the 2012-13 school year and to seek direct payment of the costs of the student's tuition (id. at p. 2).

**A. Due Process Complaint Notice**

In a due process complaint notice dated March 18, 2013, the parent alleged that the district failed to offer the student a FAPE for the 2012-13 school year (see Dist. Ex. 1 at p. 1). The parent asserted that the May 2012 CSE failed to conduct a triennial evaluation and a vocational assessment of the student; the May 2012 CSE did not change the student's IEP despite the parent's expressed concerns that the 12:1+1 special class placement was not appropriate; the May 2012 IEP did not provide an appropriate balance between academic instruction and vocational training; the May 2012 CSE did not adequately integrate the student's related service with his academic instruction, vocational training, and independent skills development; and the May 2012 CSE did not consider or recommend transitional teacher support services or parent counseling and training (id. at pp. 2-3). The parent also asserted that the assigned public school site was not appropriate because it primarily functioned as a vocational training center and did not focus on academic

[1] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 200.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has continuously attended Cooke since the 2008-09 school year (see Parent Ex. N at p. 2).

instruction, the level of academic instruction was below the student's own instruction levels, the public school site did not provide the "personal training" required by the student's May 2012 IEP, the public school site could not effectively implement the student's May 2012 IEP, the vocational work site placements offered through the public school site were not individualized and could not assist the student in meeting annual goals on the May 2012 IEP; the public school site was too large, noisy and unstructured; and given the age range of students at the public school site, it was not appropriate because the student was "highly susceptible to peer influence" (id. at pp. 3-4).

The parent also asserted that Cooke was an appropriate placement for the student because it provided an appropriate "mix of academic instruction, workplace training, and personal skills training," as well as an "intensive travel training" program (Dist. Ex. 1 at p. 4). In addition, the parent noted that the student made progress at Cooke (id.). As relief, the parent requested direct payment of the costs of the student's tuition at Cooke for the 2012-13 school year (id. at pp. 4-5). The parent also requested an interpreter at "any proceedings" related to the due process complaint notice, as well as "translations of all future documents produced" by the district concerning the student (id. at p. 4).

**B. Prehearing Order and Impartial Hearing**

On April 24, 2013, the IHO conducted a prehearing conference with the parties, which resulted in a written order (see Parent Ex. O at p. 1; see also IHO Ex. II at pp. 1-3). In relevant part, the IHO's order referred to State regulation allowing "direct testimony by affidavit in lieu of in-hearing testimony" so long as the "witness giving such testimony shall be made available for cross-examination" (IHO Ex. II p. 1). Accordingly, the IHO directed that "each party should present the direct testimony by affidavit and then call the witness . . . for cross-examination" (id.). The IHO's order allowed for the presentation of "[a]dditional direct examination that [was] not repetitive or irrelevant," and further indicated that both parties had the opportunity to submit a list of witnesses to the IHO who "need[ed] to testify at hearing, the sum and substance of their testimony and the necessity for their direct testimony to be verbal instead of by affidavit" (id.).

In an e-mail dated April 24, 2013, the parent's attorney acknowledged receipt of the IHO's prehearing order, and asked the IHO for direction concerning the "procedures for translating the affidavits of both parties prior to the hearing," noting that the parent's due process complaint notice included a request for an interpreter (Pet. Ex. 8 at p. 1). The parent's attorney also expressed concern about the additional time needed to translate the affidavits (see id.).

In a letter dated April 29, 2013, the parent's attorney objected to and sought clarification of portions of the IHO's prehearing order (see Parent Ex. O at pp. 1-5). In pertinent part, the parent's attorney asserted that the use of affidavits in lieu of direct testimony "may inhibit the ability" of the IHO to make credibility determinations, and therefore, it would be more appropriate to hear oral testimony at the impartial hearing (id. at p. 1).[3] In addition, the parent's attorney asserted that the use of affidavits would inhibit the parties' ability to "challenge lines of questions or testimony that may be irrelevant to the proceedings and which may be prejudicial to the parent" (id. at p. 2). The parent's attorney also expressed "[g]rave [c]oncerns" with respect to translating the parent's

[3] In a May 1, 2013 response, the district's attorney affirmatively did not oppose the parent's request for live testimony or the parent's request for translation of the affidavits (see Parent Ex. Q at p. 1). The district's response also noted concern about the parent's due process rights if the affidavits were not translated (id.).

affidavit from her native language into English, and the consequences that an "[i]nadequate or [u]ntimely" translation of the parent's affidavit may have upon the parent's due process rights (id. at p. 3).

Although the IHO did not respond to the parent's April 24, 2013 e-mail, a district case manager responded via e-mail dated April 30, 2013, and offered to send the affidavits for translation if the parent's attorney sent the affidavits to her (Pet. Ex. 8 at p. 1). According to the hearing record, the IHO conducted a telephone conference on April 30, 2013, and denied the parent's request to order the district to translate the affidavits "for either party to or from" the parent's native language because it was the "responsibility of [p]arent's counsel to translate the affidavits" (see Parent Ex. P at pp. 1-2).[4] In an April 30, 2013 motion seeking to reverse the IHO's directive issued at the telephone conference, the parent argued that such a ruling placed an "undue and prejudicial burden" on the parent since it involved additional time and expense to translate the affidavits, and deprived the parent of due process rights (id. at p. 2). The parent indicated that as noted during the April 30, 2013 telephone conference, her own affidavit would be submitted in her native language (id.).

On May 16, 2013, the parties proceeded to an impartial hearing, which concluded on June 19, 2013 after three days of proceedings (Tr. pp. 1, 112, 255). An interpreter of the parent's native language appeared and provided services throughout the first two days of the impartial hearing (see Tr. pp. 1-254). On the second day of the impartial hearing (June 6, 2013), the parent's attorney requested that the interpreter translate the parent's affidavit prepared in her native language into English by reading it into the hearing record (see Tr. pp. 226-33). The district's attorney also indicated that she wanted the interpreter at the impartial hearing to "read [the parent's affidavit] into evidence" because a "co-worker" who read the English interpretation of the parent's affidavit "disagreed with some" of the interpretation (Tr. pp. 227-29, 231). The IHO did not allow the interpreter to read the parent's affidavit into the hearing record (Tr. pp. 227-30). The IHO explained that the impartial hearing office did not provide "official interpreters to provide services to [the attorney's] clients," and moreover, the hearing office could not be responsible for interpreting a document submitted by a party because it placed an undue burden upon the interpreter and the "[h]earing [o]ffice" to provide an accurate translation of that document (id.; Tr. p. 252). The interpreter also stated on the hearing record that she was "not supposed to do translation" (Tr. p. 232).

On June 7, 2013, the IHO issued an order in response to the parent's request for the interpreter at the impartial hearing to translate the parent's affidavit from her native language into English (see IHO Ex. IV; see also Tr. pp. 226-33). In the order, the IHO indicated that the "Impartial Hearing Office provide[d] interpreters for the purpose of translating testimony during the course of a hearing and not for the parties' preparation of the hearing" (IHO Ex. IV). In addition, the IHO noted that the parent's attorney "failed to appreciate the pre-hearing order" that allowed for the opportunity to verbally present testimony as opposed to the submission of an affidavit (see id.). Notwithstanding this determination, the IHO indicated that the impartial hearing would continue on an additional date for the "purposes of the direct testimony of the parent" unless

[4] The hearing record does not contain a transcription or a written summary of the April 30, 2013 conference with the IHO.

both parties stipulated to the translation of the parent's affidavit as it had been submitted into evidence (id.).

On June 19, 2013, the impartial hearing continued, but due to the delayed arrival of the interpreter, the parties dealt with evidentiary issues (Tr. pp. 255-67).[5] Next, the IHO informed the parties that although a written decision in the case was imminently due, if the parties "want[ed] to have another hearing date, [they could] have another hearing date," and the IHO allowed the attorneys for both parties to further discuss the issue (Tr. pp. 267-69). As a result, the attorneys for both parties acknowledged that the "Hearing Office" had translated the parent's affidavit from her native language, and the parent's translated affidavit was submitted into the hearing record as an exhibit (Tr. pp. 268-73).[6] At that time, the parent's attorney made an application to "redo the cross-examination, because of the translation" (Tr. pp. 273-74). The parent's attorney explained that after completing the second full day of the impartial hearing where six witnesses—including the parent herself—were cross-examined, the parent indicated that she "wasn't able to fully understand the question[s]" at times and that the "full hearing" had been a "problem" due to the interpretation services (Tr. pp. 274-80, 283-85, 291-92).[7] However, the parent's attorney acknowledged that she had not yet reviewed the June 6, 2013 transcript with her client (Tr. p. 282). The IHO then asked the parent's attorney to question the parent about her concerns with the translation during the June 6, 2013 hearing date (Tr. pp. 285-87). Based upon the testimony, the IHO indicated that another hearing date was necessary to recall all of the witnesses who testified on June 6, 2013 (Tr. pp. 287-88). However, the parent's attorney indicated that it would be "adequate . . . if the [p]arent had an opportunity to review a translated transcript" of the witnesses' testimony, and then to allow the parent to testify after completing that review (Tr. pp. 288-90).[8] The parent's attorney also renewed her application to have all of the English language affidavits translated into the parent's native language, and the IHO indicated that she would ask the Hearing Office if it could provide this service (Tr. pp. 294-95). Prior to concluding for the day, the IHO scheduled a hearing date for July 3, 2013 to address the concerns raised by the parent's attorney (Tr. p. 293).

In an e-mail dated July 2, 2013, the parent's attorney wrote to the IHO that upon the parent's review of the June 6, 2013 transcript with an individual within her office, the parent found no "clear errors in the translation that need to be corrected," and therefore, there was "no need for the hearing to continue [on July 3, 2013]" (Pet. Ex. 3 at pp. 1-2). In addition, the parent's attorney indicated that the parent considered the "hearing concluded" and rested her case (id. at pp. 1-3).

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[5] Although unclear, it appears that the parties convened on June 19, 2013 to remediate the parent's direct testimony in light of the issues that arose at the June 6, 2013 hearing date (see Tr. pp. 279-80, 282-83).

[6] The parent's translated affidavit was marked and submitted into the hearing record as Parent Exhibit X (see Tr. p. 273). However, the IHO did not list Parent Exhibit X in the list of documents entered into the hearing record, which she attached to the IHO Decision (see IHO Decision at pp. 12-13). The parent included a copy of the parent's translated affidavit in the additional documentary evidence submitted with the petition (Pet. Ex. 4 at pp. 1-4).

[7] The parent's attorney also indicated that she had requested a translated copy of the transcript from the second impartial hearing date (Tr. p. 275). The parent's attorney did not, however, request a translated copy of the transcript from the first impartial hearing date because "the translation was fine on the first day" (id.).

[8] The district's attorney acknowledged that the Hearing Office would translate the transcripts (Tr. pp. 291-93).

### C. Impartial Hearing Officer Decision

In a decision dated July 18, 2013, the IHO initially focused upon the evaluative information available to the May 2012 CSE in the development of the student's IEP (see IHO Decision at pp. 7-9). The IHO then described the concerns related to the interpretation services provided during the impartial hearing, and the scheduling of an additional hearing date to allow the parent the opportunity to "review" a translated transcript of the testimony and to "present translation problems with questions or answers" (id. at p. 9). The IHO also noted, however, that the parent's attorney "cancelled" the additional hearing date and rested her case (id.).

Next, the IHO determined that in light of the evidence presented, the parent's failure to notify the district that she had requested a private psychological evaluation of the student and to provide the district with the results of that evaluation precluded an award of tuition reimbursement based upon equitable considerations (see IHO Decision at pp. 8-9). The IHO also concluded that she need not "review the district's program . . . because the IEP team was at a disadvantage without this updated evaluation, and therefore, could not recommend an appropriate program" (id. at p. 9).[9]

## IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO's order requiring the presentation of direct testimony by affidavit violated the IDEA and State regulations, and compromised the parent's ability to communicate with her attorney and meaningfully participate in the impartial hearing. In addition, the parent asserts that the IHO's refusal to direct the translation of affidavits into the parent's native language further impeded the parent's participation at the impartial hearing. The parent also asserts that the IHO erred by not allowing the translated affidavits to be submitted into evidence until after the close of testimony. As a result, the IHO's "affidavit scheme" infringed upon the parent's ability to present her case in accord with due process, and required that the case be remanded for a new hearing and decision.

Next, the parent asserts that the IHO erred in not making any determinations regarding whether the district offered the student a FAPE for the 2012-13 school year and whether Cooke was an appropriate placement for the student. For these reasons, the parent also argues that the case must be remanded for a new hearing, or alternatively, that the hearing record supports a finding that the district failed to offer the student a FAPE for the 2012-13 school year and that Cooke was an appropriate placement.

Finally, the parent asserts that the IHO erred in finding that equitable considerations precluded an award of tuition reimbursement. The parent argues that she fully cooperated with the district in its efforts to provide the student with an appropriate program, and thus, equitable considerations weigh in favor of the requested relief. In addition, the parent asserts that she was entitled to direct payment of the student's tuition because the evidence revealed a lack of financial means to pay for the tuition at Cooke. As relief, the parent seeks to remand the case to a different IHO for a new impartial hearing, or in the alternative, for a determination on appeal that the district

[9] In a letter dated July 24, 2013, the parent's attorney requested that the IHO issue a corrected decision to specifically include evidence omitted from the exhibit list and to ensure a complete and accurate hearing record in this case (Pet. Ex. 9 at pp. 1-2).

failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate placement, and that equitable considerations weigh in favor of the requested relief.

In an answer, the district responds to the parent's allegations and argues that the petition should be dismissed in its entirety. The district argues that the State regulation supports the IHO's prehearing order to present direct testimony by affidavit, and as a reasonable directive, the parties were obligated to comply with the order. In addition, the district asserts that the IHO's prehearing order did not restrict the number of witnesses, the length of the affidavits, or the ability to cross-examine witnesses, and the parent's attorney had the opportunity to present live testimony, as set forth in the prehearing order. The district also refutes the parent's allegations concerning the translation of the affidavits into her native language, and argues that the parent abandoned this issue when she cancelled the additional hearing date scheduled to address these concerns. As such, the IHO's prehearing order did not affect the parent's ability to present her case, her ability to meaningfully participate at the impartial hearing, or depriver her of her due process rights, and the parent's request to remand the case to a new IHO must be dismissed.

The district also argues that the parent did not sustain her burden to establish that Cooke was an appropriate placement, and further, that the IHO properly concluded that equitable considerations precluded an award of tuition reimbursement.

Next, the district cross-appeals the IHO's failure to issue a determination regarding whether the district offered the student a FAPE for the 2012-13 school year. The district also cross-appeals to the extent that the IHO concluded that the May 2012 CSE could not recommend an appropriate program without the parent's private psychological evaluation report. With respect to the parent's contentions about the assigned public school site, the district asserts that the IHO properly declined to address them, as such contentions relate to the implementation of the student's May 2012 IEP and the student never attended the public school site. Alternatively, the district asserts that the evidence supports a finding that the district offered the student a FAPE, and moreover, that Cooke was not an appropriate placement.

In a reply, the parent asserts that she properly preserved issues on appeal related to the IHO's prehearing order affidavit requirement, the IHO's refusal to order translations of the affidavits, and the May 2012 CSE's failure to relay upon sufficient evaluative information to develop the student's May 2012 IEP. With respect to the district's cross-appeal, the parent admits that the IHO erred in failing to determine whether the district offered the student a FAPE for the 2012-13 school year, and rejects the district's assertions that the May 2012 CSE relied upon sufficient evaluative information, the May 2012 CSE developed an appropriate IEP, and that the allegations related to the assigned public school site were speculative.

## V. Discussion

### A. Conduct of Impartial Hearing

As correctly noted in the IHO's prehearing order, State regulation allows an IHO to "take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination" (8 NYCRR 200.5[j][3][xii][f]; IHO Ex. II at p. 1). In this case, the IHO's prehearing order also allowed for the presentation of "[a]dditional direct examination that [was] not repetitive or irrelevant," and for both parties to submit a list of all witnesses to the IHO who needed to verbally testify at the impartial hearing, along with a

summary of the expected testimony, and the necessity to present the testimony verbally (see id.). Initially, the parent objected to the use of affidavits for direct testimony because it would inhibit the IHO's ability to make credibility findings and prevent the parent from objecting to potentially irrelevant or prejudicial questions or testimony (see Parent Ex. O at p. 1-2). The parent also objected to the use of affidavits for direct testimony because an inadequate or untimely translation of the parent's affidavit could deprive the parent of her due process rights (id. at p. 3).

Contrary to the parent's argument, however, a review of the hearing record does not support a conclusion that the IHO's prehearing order directing the use of affidavits for direct testimony violated either the IDEA or State regulation, or otherwise compromised the parent's ability to communicate with her attorney or meaningfully participate in the impartial hearing. The IHO's prehearing order, while directing the use of affidavits, also allowed the parent to submit a request to testify verbally, and the parent did not avail herself of that opportunity (Tr. pp. 1-296; Dist. Exs. 1-22; 25-27; Parent Exs. A-G; I-R; IHO Exs. I-II; IV). In addition, the hearing record establishes that the IHO provided the parent with an opportunity for an additional day of impartial hearing (July 3, 2013), in order to give the parent additional time to review a translated transcript of the testimony given on June 6, 2013, to determine if more testimony was needed and to present that additional testimony (Tr. pp. 290-93). The hearing record shows that upon review of the translated transcript, the parent cancelled the additional day of impartial hearing and rested her case (Pet. Ex. 3 at p. 1). Based on the above, the evidence establishes that the IHO's prehearing order requiring the presentation of direct testimony by affidavit was within the sound discretion of the IHO, and did not violate the parent's due process rights. Contrary to the parent's assertion, if anything, the IHO's order providing for testimony by affidavit, in addition to live direct testimony if needed, only served to enhance the parent's opportunity to thoughtfully prepare testimony by affidavit outside the confines of an in person hearing as well as to review the district's direct testimony by affidavit more carefully than would be possible with live testimony only.

With respect to the parent's assertion that the IHO's refusal during the impartial hearing to direct the translation of affidavits into the parent's native language further impeded her participation at the impartial hearing, State regulation requires that at all stages of an impartial hearing a district shall provide an interpreter fluent in a parent's native language at district expense, when required (8 NYCRR 200.5[j][3][vi]; see IHO Ex. IV; see also Tr. pp. 226-33). A review of the hearing record reveals that immediately after the IHO issued the prehearing order, the parents' attorney asked about the "procedures for translating the affidavits of both parties prior to the hearing," and expressed concern about the additional time needed to translate the affidavits (Pet. Ex. 8 at p. 1). A district case manager responded to this inquiry, and agreed to provide translations of the affidavits if the parent sent the affidavits to her (Pet. Ex. 8 at p. 1). However, near the conclusion of the second day of the impartial hearing, the IHO did not allow the interpreter to translate or read the parent's affidavit—submitted in her native language—into the hearing record (Tr. pp. 227-30, 252). Notwithstanding this determination, the IHO issued an order scheduling an additional day of impartial hearing "for the purposes of the direct testimony of the parent" unless the parties stipulated to a translation of the parent's affidavit and its submission into evidence (IHO Ex. IV). Upon return to the impartial hearing, the parent's attorney raised issues with respect to the interpreter's translation of the testimonial evidence of all of the parent's witnesses that had been presented on the second day of the impartial hearing (Tr. pp. 273-80, 283-85, 291-92). After discussing these concerns, the parent's attorney also renewed her previous request to have all of the affidavits submitted in English translated into the parent's native language (Tr. pp. 294-95).

In this instance, a review of the hearing record demonstrates that all of the direct testimony affidavits and all of the transcripts produced as a result of the impartial hearing have been submitted in English (Dist. Exs. 21-22; Parent Exs. I-K; M-N; see Tr. pp. 1-296).[10] However, the parent does not cite to any case law or regulation requiring the district—at its own expense—to translate the direct testimony affidavits of the parent's own witnesses into the parent's native language, and I have found none (see Bethlehem Area School Dist. v. Zhou, 976 A.2d 1284, 1287 [Pa. Cmwlth. 2009] [overturning a state administrative due process decision requiring the translation of hearing transcripts into the parent's native language when such directive was upon the authority of a hearing policy manual that lacked the force of law]).[11] In addition, when given the opportunity to review the transcript from the second day of testimony when the parent's witnesses testified, the parent voluntarily cancelled the additional date and rested her case (Pet. Ex. 3 at p. 1). In view of what transpired, it cannot be said that the parent's ability to participate in the impartial hearing was impeded based upon the failure to provide her with translated affidavits of her own witnesses' direct testimony.

**B. Determination on the Merits**

Both the parent and the district assert that the IHO erred in not making findings with respect to whether the district offered the student a FAPE and whether the student's unilateral placement at Cooke was appropriate prior to making a decision regarding whether equitable considerations weighed in favor of the parent's claim for tuition reimbursement. 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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

As noted above, parents may qualify for tuition reimbursement if the district fails to offer the student a FAPE, and the private educational services obtained by the parents were appropriate to meet the student's needs (Carter, 510 U.S. at 12-13; Burlington, 471 U.S. at 370). "Once this two prong test is satisfied, 'equitable considerations are relevant in fashioning [the appropriate] relief'" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533-34 [N.D.N.Y. 2001], quoting Burlington, 471 U.S. at 374; Carter, 510 U.S. at 16). Thus, the equitable considerations

[10] The hearing record includes a copy of the parent's direct testimony affidavit submitted in her native language (Parent Ex. L at pp. 1-5).

[11] State regulations expressly provide that the prior written notice and procedural safeguards notice be translated into the parent's native language (8 NYCRR 200.5[a][4], [f][3]). State law applicable to court proceedings, but not clearly applicable to administrative proceedings, indicates that affidavits must be filed in English, but that affidavits may be filed in another language provided they are "accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate" (CPLR § 2101[b]).

analysis relates only to the fashioning of relief, i.e., the reduction or limitation of the tuition award (see 20 U.S.C. § 1412[a][10][C][iii]), once it has been determined that the parents qualify for an award of tuition reimbursement under the Burlington/Carter analysis (see Gadsby v. Grasmick, 109 F.3d 940, 955 [4th Cir. 1997] [finding that an appropriate level of relief is considered "once it is determined that reimbursement costs should be awarded"]; see generally M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67-68 [2d Cir. 2000]).

It is axiomatic that one must first find a harm before one can fashion a remedy. In the Burlington/Carter analysis, a court or administrative agency must first determine if the relief is warranted before it can determine how the relief should be fashioned to fit the circumstances of the case (see Wolfe, 167 F. Supp. 2d at 533-534; see also (Bernardsville Bd. of Educ. v. J.H., 42 F.3d 149, 158 [3d Cir. 1994][recognizing that "the school district has the duty in the first instance to provide an appropriate IEP, and moreover, to demonstrate by a preponderance at a due process hearing that the IEP it offered was indeed appropriate"]; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 96-72). Because, in the instant case, the IHO failed to initially establish whether the district failed to offer the student a FAPE, it was not appropriate to proceed directly to the equitable considerations analysis, and under the circumstances of this case, it must be remanded for determinations on these issues.

**VI. Conclusion**

Based on the above, the case must be remanded to an IHO for determinations regarding whether the district offered the student a FAPE for the 2012-13 school year, and if necessary, the appropriateness of the parent's unilateral placement of the student at Cooke and whether equitable considerations weigh in favor of an award of tuition reimbursement (J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n4 [S.D.N.Y. 2012] [noting the authority to remand undecided matters to an IHO for a determination]). Upon reconvening, if new and relevant testimony is required as rebuttal as a result of continued concerns over the transcribed testimony or direct testimony by affidavit, the presiding IHO may, in his or her discretion, offer another opportunity to schedule additional impartial hearing dates to accommodate such rebuttal testimony. In addition, the presiding IHO's final decision with respect to whether the district offered the student a FAPE for the 2012-13 school year shall be limited to the following issues set forth in the due process complaint notice, unless otherwise agreed to by the parties: whether the May 2012 CSE failed to conduct a required triennial evaluation and/or vocational assessment of the student, and if so, whether such violation resulted in a denial of a FAPE; whether the May 2012 CSE inappropriately failed to modify the student's IEP in view of the parent's expressed concerns that a 12:1+1 special class was not appropriate educational placement; whether the May 2012 IEP was inappropriate due to an improper balance between academic instruction and vocational training; whether the May 2012 IEP was inappropriate due to the alleged failure to adequately integrate the student's related service with his academic instruction, vocational training, and independent skills development; and whether the student was denied a FAPE because May 2012 CSE did not consider or the IEP did not include transitional teacher support services or parent counseling and training.[12]

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

[12] As the student did not attend the assigned public school site, the IHO's determination regarding whether the district offered the student a FAPE for the 2012-13 school year is limited to the issues identified above.

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the case is remanded to an IHO for determinations consistent with this decision; and,

**IT IS FURTHER ORDERED** that, if the IHO who initially presided over this case is either unavailable within the stated time frame, or is otherwise unable to render a written decision within the above time frame, the district shall remand the case to a new IHO to issue a decision consistent with this decision.

**Dated:** **Albany, New York**
**November 8, 2013**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**