



The University of the State of New York

The State Education Department State Review Officer

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No. 14-032

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

Appearances:

Law Offices of Anton Papakhin, PC, attorneys for petitioner, Anton Papakhin, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the decision of respondent's (the district's) Committee on Special Education (CSE) to "eliminate" an aversive intervention utilizing a Graduated Electronic Decelerator (GED) from her daughter's (the student's) individualized education program (IEP) for the 2013-14 school year was appropriate. The 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 IEP, which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

This matter involves a student who, at the time of the CSE meeting at issue was 19 years-old (Dist. Ex. 1 at p. 1; Tr. p. 45).¹ The record reflects that the student is non-verbal, has limited communication skills, exhibits significant delays across all areas, and has a medical history that includes diagnoses of autism, "mental retardation," and a seizure disorder (Dist. Ex. 1 at pp. 1-2,

¹ The 2013-14 school year is the student's last year of eligibility under the IDEA as the student will turn 21 years old prior to the start of the 2014-15 school year (20 U.S.C. § 1412[a][1]; Educ. Law § 4402[5][b]; 8 NYCRR 200.1[zz]; see also 8 NYCRR 100.6[c], 100.9[e]).

4; Parent Ex. K at pp. 1, 3).² In addition, the student has a history of encephalitis meningitis and moderate hearing loss (Dist. Ex. 1 at p. 4). The student also exhibits significant behavioral difficulties and requires a "highly structured small group setting with 24 hour supervision and . . . 1:1 supervision" (Dist. Ex. 1 at pp. 3, 4).

Since 2005, the student has attended the Judge Rotenberg Educational Center (JRC), a nonpublic residential school located outside of the state that has been approved by the Commissioner of Education as a school with which school districts may contract for the education of students with disabilities (Dist. Ex. 1 at p. 2; Parent Ex. K at pp. 1-2; see 8 NYCRR 200.1[d]; 200.7). The record reflects that in April 2006, the GED was introduced by JRC as a method of treating the student's behaviors (Parent Exs. K at p. 8; S at p.2), and that the GED has been incorporated into the Student's IEPs in the past (Parent Ex. E at pp. 4, 13). However, it appears that the district's CSE eventually stopped incorporating the GED into the student's IEP, and that this has been the subject of previous due process proceedings (see, e.g., Parent Ex. C). According to the parties, the "last agreed-upon IEP" that included the GED was dated April 29, 2010 (Pet. at ¶ 9; Answer at ¶ 1; Parent Ex. E at pp. 4, 13).

On April 9, 2013, a CSE met to develop an IEP for the student for the 2013-14 school year (Dist. Ex. 1 at p. 12). Finding that the student remained eligible for special education and related services as a student with autism, the April 2013 CSE recommended placement in a State-approved nonpublic residential school and deferred to the district's central based support team (CBST) to recommend a specific school (id. at pp. 1, 8, 11). Further, and more relevant for purposes of this appeal, the IEP developed by the April 2013 CSE did not include a recommendation for the use of the GED (see generally id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2013, the parent requested an impartial hearing challenging the April 2013 IEP (Parent Ex. A). Contending that neither the student's classification nor the "program and placement recommendation" was in dispute (id. at p. 2), the parent asserted the "only issue in dispute [was] the CSE's repeated failure to include certain behavioral interventions in the Student's Behavior[al] Intervention Plan ('BIP') at JRC" (id.). In this regard, the parent asserted that the April 2013 CSE's failure to include these "aversive behavioral interventions" (identified as the GED) resulted in both a substantively and procedurally deficient IEP for a number of reasons, including that such decision was predetermined, that the April 2013 CSE did not consider the opinions of the student's clinician and providers (who all recommended continuation of aversive behavioral interventions), that the April 2013 CSE ignored evaluative data indicating the student had previously failed to make progress through the use of positive behavioral interventions alone, and that the decision to remove the aversive behavioral interventions was not supported by the information in front of the April 2013 CSE or by a functional behavioral assessment (FBA) or BIP (id. at pp. 2-5). In addition, the parent asserted that the BIP developed by the April 2013 CSE did not meet the student's needs and did not "provide for the least restrictive means of reducing her . . . behaviors" (id. at p. 3). The parent also asserted that she was denied an opportunity to participate in the development of the student's program

² The term mental retardation has been replaced in State regulations with the term intellectual disability (8 NYCRR 200.1[zz][7]).

because she was not provided with a copy of the April 2013 IEP (id.). As relief, the parent requested, among other things, residential placement at JRC with "supplemental aversive behavioral interventions," nullification of the April 2013 IEP to the extent that it omitted "aversive behavioral interventions," and a new IEP/BIP that included "supplemental aversive behavioral interventions" recommended by JRC staff and requested by the parent (id. at pp. 4-5). In addition, the parent sought a declaration that the district violated a preliminary injunction issued in "Alleyne et al. v NYSED et al., 1:06-cv-00994-GLS" and, as alternative relief, requested that the April 2013 IEP be nullified because "the CSE violated" 8 NYCRR 200.22(f) by not following procedures for obtaining a "child-specific exception" (id. at p. 5). Also, and despite earlier representations that the "program and placement recommendation" was not in dispute, the parent sought an order that the student was denied a free appropriate public education (FAPE) because the April 2013 IEP "did not make a recommendation for a specific placement, but only deferred to CBST" (id. at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 11, 2013 and concluded on November 22, 2013, after two days of proceedings (Tr. pp. 16-138).³ In a decision dated January 8, 2014, the IHO noted that the district agreed to fund the student's placement at JRC for the 2013-14 school year, and that the only issue before him was whether the removal of aversive behavioral interventions from the student's IEP was appropriate (IHO Decision at p. 7). In that regard, the IHO determined that the district offered the student a FAPE for the 2013-14 school year and dismissed the parent's due process complaint (id. at pp. 8-9).

Specifically, the IHO found that the April 2013 CSE's decision not to recommend aversive behavioral interventions did not deny the student a FAPE for the 2013-14 school year (IHO Decision at p. 8). In this regard the IHO made a number of findings, including that the April 2013 CSE reviewed documentation and reports from JRC, as well as conducted an FBA and developed a BIP, before deciding to "discontinue" the use of the GED (id.). In addition, the IHO noted that the April 2013 CSE believed that the addition of a 1:1 paraprofessional would help to implement the BIP, as well as help the student manage her targeted behaviors (id.). Further, the IHO found that the decision to "eliminate" the GED was not predetermined, and that there was sufficient evidence in the hearing record to determine that the use of the GED was unnecessary "in light of the fact that the Student made progress in addressing her aggressive and self-injurious behaviors without the GED" (id.).

Finally, and with respect to the parent's claim that the district's actions violated court orders, the IHO found that the "Alleyne Injunctions" did not prohibit the district from "removing" the GED from the student's IEP (IHO Decision at 8). In addition, the IHO found that while there was

³ In addition to these hearing dates, a prehearing conference took place on August 12, 2013 during which the parties discussed the student's pendency (stay-put) placement (Tr. pp. 1-6). As a result, the IHO issued an interim decision on pendency, dated August 15, 2013, awarding services according to the student's April 2010 IEP during the pendency of this matter, retroactive to the filing of the parent's due process complaint notice (Interim IHO Decision at p. 2). In addition, a second prehearing conference took place on September 19, 2013, during which the parties acknowledged that the district had agreed to fund the student's placement at JRC for the 2013-2014 school year, narrowing the issues before the IHO to those relating to the CSE's decision to remove aversive behavioral interventions from the BIP developed during the April 2013 CSE meeting (Tr. pp. 7-15).

no evidence "to support [the district's] assertion that a child specific exception application was submitted to the Commissioner of Education," he questioned whether the district was required to submit one since there was "no evidence that the [student] was receiving the GED program prior to October 1, 2006" (*id.* at pp. 8-9).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in a number of respects, including in finding that the April 2013 CSE was not required to submit a child-specific exception application to the Commissioner of Education. The parent also maintains that the IHO erred in finding that the April 2013 CSE's determination was supported by information that it had before it, and contends both that the FBA conducted by the district was flawed, and that the BIP it developed "ignored the undisputed evidence in the record" that JRC had "exhausted" the positive behavioral strategies being recommended. In addition, the parent asserts that the April 2013 CSE's determination to "remove" the GED from the Student's IEP was "impermissibly predetermined," that the CSE "had no evaluative data to conclude that the Student could make reasonable behavioral progress without supplemental use of the GED," and that the IHO erred in finding that the use of a 1:1 paraprofessional would be beneficial since, among other things, the student's IEP did not recommend a 1:1 paraprofessional. The parent further maintains that the student was denied a "substantive FAPE" by issuance of an IEP that did not include the GED, and suggests that the district "committed a major procedural violation" by "ignoring" the preliminary injunctions in effect. Finally, and while the parent expressly asserts in her petition that the "only dispute between the Parent and the [district] in this case is whether the Student's IEP developed on April 9, 2013 for the 2013-2014 school year should include aversive behavioral intervention in the form of the GED treatment to address one category of the Student's aggressive behavior," she asserts in a footnote that since "to date" she had not received a Final Notice of Recommendation identifying a specific school to which the student was assigned, that this "is an alternative ground to find a denial of FAPE for the 2013-2014 school year."

The district answers, denying the substance of the parent's allegations and contending, among other things, that "the recommendations of the April 9, 2013 CSE complied with the . . . child-specific exception regulations," and that the April 2013 CSE produced an appropriate IEP for the student. In support of these contentions, the district submits additional evidence for my consideration consisting of (a) a copy of a "Child Specific Exception Application," dated July 31, 2013, (b) a document entitled "Child-Specific Panel Determination to CSE and Commissioner of Education," (c) a letter, dated September 24, 2013, advising the district of the "Panel's determination" and enclosing a copy of its determination, and (d) a copy of a document entitled "Meeting Notice Committee on Special Education (CSE)," dated March 4, 2014 indicating that a CSE would be meeting on March 26, 2014 "to discuss [the student's] educational needs" (Answer Exs. 1-4). In addition, the district also contends that neither I nor the IHO have jurisdiction to address the "Alleyne" injunctions.

The parent replies, objecting to the district's inclusion of additional evidence and contending that the district's assertions regarding the "Alleyne" injunctions are not properly raised in this appeal.

V. Applicable Standards

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

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][iii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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. Preliminary Matters

1. Scope of Review (Formal Recommendation of JRC)

As an initial matter, the IHO determined that the only issue in front of him was whether the removal of aversive behavioral interventions from the student's IEP was appropriate because the district had agreed to fund the student's placement at JRC for the 2013-14 school year during the hearing (IHO Decision at p. 7). The IHO's decision to narrow the issues is not surprising as the hearing record reflects that the parent's attorney agreed with the IHO during a prehearing conference that the issue regarding funding of JRC was "no longer live" (Tr. p. 11). This is in

agreement with State regulations which provide that one of the purposes of having a prehearing conference is for "simplifying or clarifying the issues" (8 NYCRR 200.5[j][3][xi][a]).

Nevertheless, and as noted above, the parent asserts in a footnote in her petition that the district's failure to finalize the April 2012 IEP and formally recommend JRC as a placement for the student is "an alternative ground to find a denial of FAPE for the 2013-2014 school year" (Pet. ¶ 63 n.5). Such an assertion is not only contrary to the parent's waiver of this issue during the prehearing conference, but is also contrary to assertions made in her post hearing brief that the student's continued placement at JRC was not in dispute (Parent Post-Hr'g Br. at p. 2). This assertion is further contrary to other statements expressly made in her petition that "[t]he Student's classification of Autism and her placement at JRC are not contested in this case," and that "[t]he only issue in this case is whether the CSE denied the Student a FAPE by removing the GED treatment from her IEP/BIP" (Pet. ¶ 11 [emphasis in original]). Accordingly, and considering that the parent expressed an agreement to accept a publically funded placement of the student at JRC for the 2013-14 school year and that this argument is raised only in a footnote, the issue of whether the district formally recommended JRC must be considered waived at this stage of the proceedings (see, e.g., United States v. Quinones, 317 F.3d 86, 90 [2d Cir. 2003] [arguments raised only in footnotes are insufficient to preserve an argument for review on appeal], quoting United States v. Restrepo, 986 F.2d 1462, 1463 [2d Cir. 1993]).

2. District Court Injunctions

In addition, the parent submitted three injunctive orders into evidence which she asserted enjoin the district from applying certain portions of Section 200.22 of the Commissioner's regulations (Parent Exs. U; V; W).⁴ While the district, in its post hearing brief, indicated that the injunctions prevented the district from applying the student-specific exception procedure set forth in 8 NYCRR 200.22(e) (Dist. Post-Hr'g Br. at p. 1), on appeal the district asserts that the IHO and SRO do not have jurisdiction to address any allegations relating to the district court injunctions (Answer ¶¶ 59-60). The district's argument on appeal is correct, as jurisdiction over preliminary injunctions issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services, 364 F.3d 925 [8th Cir. 2004]). No provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to resolve disputes over injunctions issued by a judicial tribunal. Consequently, neither the IHO nor an SRO have the jurisdiction to resolve the parties' disputes regarding the extent to which the district may be bound by or may have violated injunctions issued by a district court. Accordingly, irrespective of what the district may have argued to the IHO, since this is a jurisdictional issue, any arguments related to the district court injunctions, raised by either party, will not be addressed or considered herein.

⁴ The parent asserts that the injunctions prevent the district from applying 8 NYCRR 200.22(f)(2)(vi) to the student, which limits the use of aversive interventions to "those self-injurious or aggressive behaviors identified for such interventions on the student's IEP." However, on appeal the district does not assert that the student's behavior that is being targeted for aversive interventions is not "aggressive" or "self-injurious," and refers to it in the petition as an "aggressive behavior" (Petition ¶ 37); therefore, whether or not the district is enjoined from applying this part of the regulations does not affect the outcome of this matter.

3. Additional Evidence

Finally, and as noted above, the district submits four supplemental documents with its answer for review and consideration (Answer Exs. 1-4). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, three of the four documents that the district submits for consideration relate to a child-specific exception application that district apparently submitted on or about July 31, 2013 (Answer Exs. 1-3). The district does not explain in its answer why it did not submit these documents as evidence during the hearing, and each of these documents was clearly available to it at the time of the hearing (see Tr. pp. 40-42, 54-55; see also Parent Post-Hr'g Br. at p. 4).⁵ Since these documents could have been offered at the time of hearing but were not, I decline to accept them at this juncture.

Further, and perhaps more importantly, all of the documents that the district submits for my consideration (Answer Exs. 1-4) post-date the actions of the April 2013 CSE. In fact, it appears that the purpose of these documents is to show that, irrespective of what the April 2013 CSE should have done, any errors "did not rise to the deprivation of a FAPE to the student" (Answer ¶42). However, the actions being appealed in this matter are those of the April 2013 CSE, and the IEP that was developed by that CSE must be reviewed "prospectively as of the time of its drafting" (R.E., 694 F.3d at 186). In that regard, none of the additional documents submitted by the district could have been considered by the April 2013 CSE and, thus, they are not necessary to a determination in this matter. Accordingly, while I have reviewed these documents, I decline to accept them into the record for consideration.

B. Aversive Interventions and the Child-Specific Exception

Generally, the use of "aversive interventions" on students by schools located in, or approved by, New York State is prohibited (see 8 NYCRR 19.5[b][1]; see also 8 NYCRR 200.7[b][8], 200.22[b][3]).⁶ However, regulations promulgated by the Commissioner of Education allow a "child-specific exception" to this rule for, among other things, "school-aged students" whose IEP included the use of aversive interventions as of June 30, 2009 (see 8 NYCRR 200.22[e]). For students who qualify for this exception, the Commissioner's regulations require that, prior to determining whether to allow such an exception, a CSE submit an application seeking a recommendation from a State-level panel of experts (8 NYCRR 200.22[e][3]-[6]). This panel must then notify the school district and the Commissioner of its recommendation, and "[t]he CSE

⁵ The decision to not introduce these documents into evidence at the hearing may be due to the district's decision to change its stance on appeal. Specifically, at the time of the hearing the district asserted that it did not have to apply for a child-specific exception because a district court injunction prevented the district from applying the child-specific exception procedure to the student; however, on appeal the district asserts that it complied with the child-specific exception procedures and applied for a child-specific exception (compare Answer ¶32, with District Post-Hr'g Br. at p. 2). However, such a reason, if in fact true, would not compel a different outcome with respect to these documents from that discussed above.

⁶ The term "aversive interventions" is defined at 8 NYCRR 19.5(b)(2).

shall determine, based on its consideration of the recommendation of the panel, whether the student's IEP shall include a child-specific exception allowing the use of aversive interventions" (8 NYCRR 200.22[e][7]-[8]).

In this instance, the IHO determined that, with respect to the district's obligation to submit an application seeking a "child-specific exception," the April 2013 CSE was not required to submit such an application because there was no evidence the student was receiving aversive interventions prior to October 1, 2006 (IHO Decision at p. 9). However, as noted by the parent, the October 1, 2006 date, which was the day that districts were originally required to submit child-specific exception applications in 2006 (see, e.g., Application of a Child with a Disability, Appeal No. 07-130), is not relevant here. Rather the question is whether the student's IEP included "the use of aversive interventions as of June 30, 2009" (8 NYCRR 200.22[e]). In this instance, the record reflects that the student was receiving aversive interventions prior to the June 30, 2009 cutoff date (Parent Ex. K at pp. 8-9), and therefore the student was eligible to have an application submitted for a child-specific exception. Accordingly, the IHO's decision must be reversed on this point, and the question becomes whether the April 2013 CSE should have submitted a child-specific exception application for review.

On appeal, the district appears to argue that the April 2013 CSE was not required to submit a child-specific exception application because the CSE ultimately decided not to recommend aversive interventions on the student's April 2013 IEP (Answer ¶¶ 36-38). However, this argument is similar to one that was made (and rejected) in Application of a Child with a Disability (Appeal No. 07-130), wherein the district argued that if the CSE in that matter were "seriously" considering the use of aversive behavioral interventions, then it would have applied for a child-specific exception. In that case, as here, the CSE was divided over whether the child should receive aversive behavioral interventions, with the parent and staff at the student's school advocating in favor of such interventions and district staff asserting that such interventions should be discontinued. Significantly, the SRO noted in that case that, under the facts presented, "consideration of the strategies raised by [the parent and staff at the student's school] would require [the district] to submit an application for a recommendation for a child specific exception" (*id.*). Thus, and as explained in a subsequent case, "whenever individual members of a CSE, be it the parent, the district or other providers, are considering whether a child-specific exception is warranted for a student . . . , the school district shall submit a written application to the Commissioner of Education [for a recommendation regarding whether a child-specific exception is warranted] (Application of a Student with a Disability, Appeal No. 08-015, citing 8 NYCRR 200.22[e][3]-[6]; see 8 NYCRR 200.1[r]). As the hearing record indicates the parent and the student's providers at JRC (as members of the CSE) were all recommending the continuing use of aversive interventions at the April 2013 CSE meeting (Tr. pp. 40-41),⁷ the CSE was "considering" the inclusion of aversive interventions and, as such, was required to submit an application for a child-specific exception (and to consider the recommendation of the State-level panel before making a decision) (8 NYCRR 200.22[e][8]). By failing to do so, the April 2013 CSE did not

⁷ The district school psychologist's testimony and the minutes from the April 2013 CSE meeting indicate that the CSE discussed the aversive interventions that were being used with the student and that the CSE decided not to include them in the student's April 2013 IEP (Tr. pp. 36-37, 64-65; Dist. Ex. 7 at p. 3). The hearing record also indicates that the parent disagreed with the CSE's decision not to include aversive interventions, requested aversive interventions to address one of the student's behaviors, and explained why she believed that specific behavior warranted the use of aversive interventions (Tr. pp. 37, 47, 67, 129-31).

properly consider the parent's request for the use of aversive behavioral interventions and, as a result, significantly impeded her opportunity to participate in the decision-making process regarding the provision of FAPE to the student.

The district, however, also argues that it complied with the child-specific exception application procedures. In this regard, the district school psychologist testified that a child-specific exception application was submitted "over the summer," and that the district received a State-level panel recommendation in September 2013 (Tr. pp. 40-41). However, since this application was made (and the recommendation was received) after the development of the April 2013 IEP (which is the IEP being challenged on appeal), such actions and recommendation could not have been known by the April 2013 CSE, and thus could not have been considered as part of the April 2013 IEP's development. As noted above, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision" (R.E., 694 F.3d at 187). Therefore, in reviewing the program offered to the student, the focus of the inquiry is on the information that was available to the April 2013 CSE at the time the April 2013 IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605 at * 11 [S.D.N.Y. Sept. 27, 2013]; D.A.B. v New York City Dept. of Educ., 2013 WL 5178267, at *12 [S.D.N.Y. Sept. 16, 2013]). Accordingly, that a child-specific exception application may have been made subsequent to the development of the April 2013 IEP is irrelevant, and the district cannot rely on this to correct the procedurally inappropriate April 2013 IEP.

Finally, the district suggests that since a child-specific exemption application was subsequently made, and that a State-level panel determined that the use of aversive behavioral interventions was not warranted, the April 2013 CSE's failure to make such an application "did not rise to the deprivation of FAPE to the Student" (Answer at ¶¶ 38-42). However, and putting aside that this argument is raised in the district's answer for the first time in this matter, this argument assumes that the child-specific exception application that was made was sufficient, which is not something that I can find on the record before me.⁸ Furthermore, this suggestion fundamentally ignores the significant impediment that the April 2013 CSE placed on the parent's ability participate in the development of the April 2013 IEP by not applying for a child-specific exception at that time, which alone is a basis for the finding of a denial of a FAPE (see, e.g., Davis v. Wappingers Central School Dist., 431 Fed. App'x 12, 15 [2d Cir. 2011] [holding that procedural violations that significantly affect a parent's ability to participate in developing an IEP constitute

⁸ This would be the case even if I were to accept the additional documents submitted by the district with its answer for consideration. For example, in submitting an application for a child-specific exemption, a district is required to submit certain information regarding the student, including his or her IEP; the student's diagnosis(es); the student's FBA; any proposed, current and/or prior BIP (including documentation of the implementation and progress monitoring of the effectiveness of such plans); and other relevant individual evaluations and medical information that allow for an assessment of the student's cognitive and adaptive abilities and general health status, including any information provided by the parent (see 8 NYCRR 200.22[e][5]). However, it is not clear from the documents that the district submitted that all of this data was provided to the State-level panel or that whatever data was submitted was sufficient. In fact, I note that the State-level panel's decision itself indicates that an FBA that was submitted did not contain essential information and was inadequate (Answer Ex. 2 at p. 5), and that the panel needed "to see a current behavior intervention plan in order to make an informed decision about the use of a GED" (id. at p. 4).

a denial of FAPE irrespective of the "substantive merits of the IEP"]; see also Doug C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1047 [9th Cir. 2013] [holding that significantly impeding a parent's ability to participate in the development of an IEP is "reason alone to conclude that [the student] was denied a FAPE"]; Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892, 895 [9th Cir. 2001] [holding that "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA[, as a]n IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed," and declining to address the substantive adequacy of the IEP]). Accordingly, even if I were to assume the sufficiency of the district's application, I would not be able to find that the April 2013 CSE's failure to submit an application was harmless. This is especially true since there is no indication in the record that a subsequent IEP was ever developed for the student.⁹

VII. Conclusion

Based on the forgoing, the appeal must be sustained, in part. Accordingly, I need not consider the parent's remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

IT IS ORDERED that the IHO's decision dated January 8, 2014 is modified, by reversing that portion which found that the district did not violate the child-specific exception application procedure set forth in State regulations; and

IT IS FURTHER ORDERED that, unless the parties agree otherwise, the CSE shall reconvene within 30 days of this decision and determine the extent to which it may require any additional data regarding the student, as well as whether any child-specific exception applications submitted on behalf of the student for the 2013-14 school year were complete and allowed for the sufficient evaluation of the student's needs by the State-level panel; and

IT IS FURTHER ORDERED that if the CSE determines that any child-specific exception applications submitted on behalf of the student for the 2013-14 school year were inadequate, the district shall submit an application for a child-specific exception along with sufficient documentation to allow the State-level panel to make an informed recommendation; and

IT IS FURTHER ORDERED that, to the extent that it has not already done so, the CSE shall consider the recommendation of the State-level panel it receives after submission of a complete child-specific exception application, and shall develop an IEP for the student for the 2013-14 school year; and

⁹ Although I realize that the district sent a notice to reconvene the CSE dated March 4, 2014, there is no indication in the hearing record, or in the pleadings on appeal, as to whether or not the CSE has met to formulate a new IEP for the 2013-14 school year (Answer Ex. 4).

IT IS FURTHER ORDERED that until the CSE develops such an IEP after consideration of the recommendation of the State-level panel and provides the parent with prior written notice explaining the basis for the recommendations in that IEP, the district shall maintain the student's current placement according to her last agreed upon IEP, provided that nothing herein shall be construed as requiring the district to provide the student with special education and related services beyond the period of her eligibility.

Dated: **Albany, New York**
 May 14, 2014

HOWARD BEYER
STATE REVIEW OFFICER