The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 15-051

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 Office of Anton G. Cohen, PC, attorneys for petitioner, Anton G. Cohen, 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 Judge Rotenberg Center (JRC) for the 2014-15 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

During the 2013-14 school year, the student attended ninth grade at a district public school and received integrated co-teaching (ICT) services, counseling, and the services of a full-time, 1:1 crisis management paraprofessional (see Dist. Ex. 8 at pp. 1, 5-6, 10). On February 12, 2014, the student was admitted to a hospital for a psychiatric evaluation (see IHO Ex. III at pp. 1, 3). In February 2014, the parent filed a persons in need of supervision (PINS) petition because she "needed help for [the student]" due to the student's "[b]ehavior" and "emotional problems" (see Tr. pp. 63-64, 97-100). As a result, the Administration for Children's Services (ACS) obtained "legal custody" of the student "sometime in March of 2014" (IHO Ex. II at p. 6; see Tr. pp. 100-02; see also Tr. pp. 50-52).

On March 7, 2014, the CSE reconvened pursuant to the parent's request (see IHO Ex. II at pp. 4-5; Dist. Exs. 3 at pp. 1, 9; 8 at pp. 1, 9). Finding that the student remained eligible to receive special education and related services as a student with an emotional disturbance, the March 2014 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a State-approved nonpublic residential school with the related service of counseling (see Dist. Ex. 3 at pp. 1, 6, 8-10). At that time, the CSE deferred the matter to the Central Based Support Team (CBST) (id. at pp. 6, 9-10).

On March 24, 2014, the hospital discharged the student (see IHO Ex. III at pp. 2-3). At that time, ACS assigned the student to facility operated by ACS (see Tr. pp. 100-02; see also Tr. pp. 50-52; Parent Ex. W at p. 3).

In a letter dated August 1, 2014, JRC notified the parent of the student's admission into the JRC's "residential program" (Parent Ex. G).[1] According to the letter, JRC indicated that the student "would be appropriate for immediate enrollment" (id.).

In a due process complaint notice dated August 11, 2014 (August 2014 due process complaint notice), the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 and 2014-15 school years (see IHO Ex. II at pp. 3).[2] The parent asserted that the district failed to provide the student with a "residential placement recommendation," and based upon the parent's own research, JRC was an appropriate "residential facility" (id. at p. 6). As a remedy, the parent requested an order directing the student's placement at JRC at district expense, and more specifically, requested that the IHO (IHO 1) order the district to issue the parent a "P-1 or Nickerson" letter to allow the parent to place the student at "any" State-approved nonpublic school (id. at pp. 6-8).[3]

On December 10, 2014—as the impartial hearing continued and while the student remained in the custody of ACS—the student was arrested in connection with the commission of conduct which, if tried as an adult, would constitute a Class B felony offense (see Parent Ex. X at p. 1; IHO Ex. II at p. 1). On December 19, 2014, ACS returned custody of the student back to the parent

[1] At the impartial hearing, the parent testified that while the student was in ACS's custody in February or March 2014, ACS suggested that she "look into" JRC (see Tr. pp. 72-73). The parent testified that she researched JRC "online" and by "asking other . . . individuals" about it (Tr. p. 73). The parent also testified that she eventually called JRC, and then visited JRC with her son (id.).

[2] The parent's August 2014 due process complaint notice was not entered as evidence into the hearing record (see Tr. pp. 1-229; Dist. Exs. 1-8; Parent Exs. A-Y; IHO Exs. I-III).

[3] A "P-1 letter," also called a "Nickerson letter," is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

(see Parent Ex. Y; IHO Ex. II at p. 6).[4] On December 22, 2014, JRC transported the student from her home to JRC (see Tr. pp. 83-91; IHO Ex. II at p. 6; see generally Parent Ex. Q).

On January 14, 2015, an IHO 1 issued a decision with regard to the parent's August 2014 due process complaint notice (see IHO Ex. II at pp. 3-9). Initially, IHO 1 found that he lacked jurisdiction to grant the parent's request for a Nickerson letter and further declined to order a "P-1" letter since the district did not concede that it was "unable" to provide the student with an appropriate "public placement" (id. at pp. 6-7). Next, IHO 1 found that the district did not fail to offer the student a FAPE and further, that the district "bore no responsibility . . . to locate an appropriate facility for the implementation" of the March 2014 IEP because the student remained in the custody of ACS between March 2014 and December 19, 2014 (id. at pp. 7-8). Accordingly, IHO 1 concluded that the district was not required to place the student at JRC "for the balance of the 2014-15 school year" at district expense and dismissed the parent's August 2014 due process complaint notice (id. at p. 9).[5]

In a letter dated January 20, 2015, the parent advised a district CBST case manager that ACS "closed" the student's case on December 19, 2014, and "returned" custody of the student back to the parent (Parent Ex. W at p. 3). In addition, the parent notified the district in the absence of "any other appropriate and secure placement," she enrolled the student at JRC (id.). The parent also indicated that she remained willing to "cooperate with all reasonable requests form the CBST to consider other residential programs" that were "appropriate" for the student (id.).

On February 11, 2015—after "many months of negotiations"—the student entered into a plea agreement and pled guilty to the criminal offense that took place on December 10, 2014 (Parent Ex. X at p. 1). According to the terms of the plea agreement, the student was allowed to remain "at liberty" and was given the "opportunity to earn a designation of a Youthful Offender" (id.). The "conditions" of the student's release required that she "remain enrolled in a structured therapeutic residential school at . . . [JRC] and complete her educational program there" (id.). If the student complied with the terms of the plea agreement, she would obtain "Youthful Offender status and also avoid a jail sentence" (id.). If, however, the student violated the conditions of the plea agreement—through rearrest or leaving JRC without permission or failing to comply with the program requirements at JRC—the student would face a "minimum jail sentence of 5 years up to a maximum jail sentence of 25 years, with an additional 5 years of post-release supervision" (id. at pp. 1-2 [emphasis in original]).[6]

---

[4] At the impartial hearing, the parent testified that when ACS returned custody of the student back to the parent, several individuals accompanied her to that court date, including a representative from JRC, other "counselors," and an "ACS support team" (Tr. pp. 82-88).

[5] Neither party appealed IHO 1's determinations set forth in the January 14, 2015 decision; as such, IHO 1's findings in that decision are final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). In addition, the time within which to appeal the January 14, 2015 decision has expired (see 8 NYCRR 279.2[b], [c]).

[6] The attorney who represented the student in this criminal matter revealed the terms and conditions of the student's plea agreement in a letter to the district CBST case manager dated March 31, 2015 (see Parent Ex. X at p. 1). In the March 31, 2015 letter, the attorney urged the district to allow the student to "attend" JRC for the 2014-15 school year, noting that she would "hate" for the student to leave a "less structured program and return to an environment that could jeopardize her chances at meeting her current court mandate" (id. at p. 2)

A. Due Process Complaint Notice

By due process complaint notice dated February 12, 2015 (February 2015 due process complaint notice), the parent alleged that the district failed to offer the student a FAPE for the 2014-15 school year (see Parent Ex. A at pp. 1-3). Specifically, the parent alleged that "[a]s of the date of this impartial hearing request, the CBST/CSE" failed to make a "placement recommendation" for the student (id. at p. 2). In addition, the parent alleged that the district failed to prepare for the student's "transition from the ACS placement and to provide the student with an appropriate residential placement at the time of [the student's] return to the parent's home" (id.). The parent also asserted that she unilaterally placed the student at JRC on December 22, 2014 (id. at p. 3). In light of the foregoing, the parent requested that an IHO find that the district failed to offer the student a FAPE for the 2014-15 school year and that JRC, as the student's least restrictive environment (LRE), was an appropriate placement (id.). The parent also requested that an IHO order the district to issue a "P-1 or Nickerson" letter to allow her to place the student at "any" State-approved school of the "parent's choice for one year" at district expense, as well as an order directing the district to place the student at JRC for the "remainder" of the 2014-15 school year, to amend the student's IEP to "reflect the recommended placement" at JRC, and to pay the costs of the student's tuition at JRC for the 2014-15 school year (id.).

B. Impartial Hearing Officer Decision

On April 1, 2015, the parties conducted an impartial hearing related to the parent's February 2015 due process complaint notice (see Tr. pp. 1-229).[7] In a decision dated April 9, 2015, IHO 2 found that the district failed to offer the student a FAPE, that JRC was not an appropriate unilateral placement, and that equitable considerations did not weigh in favor of the parent's requested relief (see IHO Decision at pp. 5-7). With respect to the appropriateness of JRC, the IHO 2 initially found that given the student's "history of psychiatric illness," the hearing record did not contain sufficient evidence to demonstrate how JRC addressed these psychiatric needs (id. at pp. 5-6). In addition, IHO 2 found that the hearing record also failed to contain sufficient evidence demonstrating how JRC met the student's academic needs (id. at p. 6). IHO 2 also concluded that equitable considerations did not support the parent's requested relief because the parent did not cooperate with State-approved nonpublic schools during the intake process; the parent failed to provide evaluative information and hospital records to the district; and finally, when ACS transferred custody of the student back to the parent on December 19, 2014, the parent did not provide the district with that information until January 20, 2015 (id.).

In light of these findings, IHO 2 found no basis upon which to issue a Nickerson letter, and—similar to IHO 1—IHO 2 concluded that she lacked jurisdiction to order the district to issue a Nickerson letter and dismissed the parent's request (see IHO Decision at pp. 6-7). However, IHO 2 ordered the parent to make the student "available for a psychiatric evaluation, psychoeducational evaluation and any other necessary testing" within 30 days of the date of the decision (id. at p. 8). Also, IHO 2 ordered the parent to provide the district with a copy of a 2014 psychiatric evaluation

[7] A different IHO (IHO 2) presided over the impartial hearing related to the parent's February 2015 due process complaint notice (compare Tr. p. 1, with IHO Ex. II at p. 1).

of the student, as well as "all records from JRC" (id.). Finally, IHO 2 ordered the district to convene a CSE meeting within 45 days from the date of the decision (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that IHO 2 erred in finding that JRC was not an appropriate unilateral placement and that equitable considerations did not weigh in favor of her request for relief.[8] With respect to the appropriateness of the student's unilateral placement at JRC, the parent contends that, contrary to IHO 2's conclusion, JRC addressed the student's academic and psychiatric needs. The parent also argues that the evidence in the hearing record did not support IHO 2's findings upon which she concluded that equitable considerations did not weigh in the parent's favor. Also, the parent contends that even if an IHO and an SRO lack jurisdiction to direct the issuance of a Nickerson letter, both an IHO and an SRO may order the issuance of a Nickerson letter based upon equitable powers. Finally, in a footnote the parent asserts that IHO 2 failed to conduct the impartial hearing in a fair and impartial manner and demonstrated bias against the parent. As relief, the parent seeks to overturn IHO 2's decision and to receive the "relief requested in the [parent's] due process complaint [notice]."

In an answer, the district responds to the parent's allegations, and generally argues to uphold IHO 2's decision in its entirety.[9] The district objects, however, to the parent's request to consider the additional documentary evidence submitted with the petition.

In a reply, the parent contends that the district's objections to the consideration of additional documentary evidence—asserted only in a footnote in the answer—was "insufficient to preserve an argument for review on appeal." Therefore, the parent argues that the district's objections should be deemed waived. Alternatively, the parent argues that the additional documentary evidence was not available at the time of the impartial hearing and it is now necessary to consider in rendering a decision.[10]

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]).

---

[8] The parent submits additional documentary evidence for an SRO's consideration on appeal to establish that "no appropriate public or private facilities" existed in the State to provide instruction to the student "at this time" (Pet. ¶ 43; see Pet. Ex. A).

[9] The district does not appeal IHO 2's determination that it failed to offer the student a FAPE for the 2014-15 school year; accordingly, IHO 2's determination is final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[10] The parent's reply was not verified in accordance with State regulations (see 8 NYCRR 279.7). Counsel for the parent is reminded to comply with the requirements governing practice before the Office of State Review.

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 board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Conduct of the Impartial Hearing and IHO Bias

Generally, the parent contends that IHO 2 failed to issue a decision based on the hearing record, IHO 2 abused her discretion in conducting the impartial hearing, and demonstrated bias in evidentiary rulings at the impartial hearing. More specifically, the parent asserts that IHO 2 demonstrated bias against the parent when IHO 2 "learned of the ACS involvement" in the case and questioned the parent about ACS gaining custody of the student. In addition, the parent argues that IHO 2 exceeded the bounds of properly developing the hearing record when IHO 2 questioned the student's primary treating clinician at JRC (JRC clinician) at the impartial hearing.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants

and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021). In addition, State regulations authorize an IHO to "ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3][vii]).

Overall, a review of the evidence in the hearing record does not support the parent's contentions. Rather, the hearing record reveals that IHO 2 did not demonstrate bias against the parent and that IHO 2 observed the procedures of due process throughout this proceeding. Upon review of IHO 2's questions to the parent about ACS's involvement and the transfer of the student's custody to ACS, it appears that IHO 2 asked these questions in order to either clarify or further the development of an adequate hearing record (see Tr. p. 60). Also, IHO 2's questions to the parent on these topics did not, contrary to the parent's conclusory allegation, demonstrate IHO 2's bias against the parent. With regard to IHO 2's questioning of the JRC clinician, a review of this testimony also reveals that IHO 2 acted within the scope of her authority to ask questions of the witness in order to clarify or ensure adequate development of the hearing record (see Tr. pp. 140-68, 178-80). Therefore, the hearing record does not contain evidence that IHO 2 demonstrated bias against the parent.

2. Jurisdiction/Res Judicata

Under the facts and circumstances of this case, it is unlikely that an SRO could afford the parent any meaningful relief given the disposition of the criminal proceedings against the student and the terms and conditions of the student's plea agreement. As discussed above, the evidence in the hearing record reflects that when the student engaged in certain conduct on December 10, 2014 which gave rise to the plea agreement, the student remained in the custody of ACS and ACS did not return the student's custody back to the parent until December 19, 2014 (see Parent Exs. X at p. 1; Y; IHO Ex. II at pp. 4-6, 8). Therefore, as the student's plea agreement relates back to the criminal charges alleged regarding the student's activity on December 10, 2014 when the student remained in ACS's custody and neither party has offered any evidence to suggest that even if an SRO reviewed and reversed IHO 2's finding that JRC was not an appropriate unilateral placement for the student that such determination would in any way impact or alter the terms and conditions of the student's plea agreement, which requires the student to remain enrolled at JRC to complete her educational program as a condition for the student to receive "Youthful Offender" status and to avoid a jail sentence (see Parent Ex. X at pp. 1-2). As such, the parent's appeal must be dismissed.[11]

[11] In light of this determination, it is unnecessary to resolve whether the additional documentary evidence submitted with the parent's petition should be considered on appeal (see generally Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Ne. 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

Next, even if an SRO's determination regarding the appropriateness of JRC could afford the parent any meaningful relief, the parent's request for a Nickerson letter as relief is otherwise barred by the doctrine of res judicata, which "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.B., 2012 WL 234392, at *5; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).

Here, the evidence in the hearing record supports an application of res judicata to the parent's request for a Nickerson letter as relief. Specifically, in a final decision on the merits dated January 14, 2015, IHO 1 denied the parent's request for a Nickerson letter as relief for the district's alleged failure to offer the student a FAPE for the 2014-15 school year because he lacked jurisdiction to order such relief (see IHO Ex. II at pp. 5-9). At the prior impartial hearing, the parties litigated the issue of a Nickerson letter as relief, and the prior impartial hearing involved the same parties as in the instant impartial hearing. Accordingly, the parent is precluded from relitigating the issue of whether she is entitled to a Nickerson letter as relief for the district's failure to offer the student a FAPE for the 2014-15 school year.

Finally, even assuming for sake of argument that res judicata did not bar the parent's requested relief in the form of a Nickerson letter—and as both IHO 1 and IHO 2 correctly concluded—jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) 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, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]). Neither the IDEA nor the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal. Consequently, neither an IHO, nor an SRO, has jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Aug. 5, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd sub nom. R.E., 694 F.3d at 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, at 289-90 n.15 [S.D.N.Y. 2010]; see F.L. v. New York City Dep't of Educ., 2012

SRO is unable to render a decision]).

WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012]; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]; Levine v. Greece Cent. School Dist., 2009 WL 261470, *7-*9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has consistently distinguished systemic violations such as those in Handberry v. Thompson, 436 F.3d 52 [2d Cir. 2006] and Jose P. to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators]; Application of a Student with a Disability, Appeal No. 10-115; see also E.Z-L., 763 F. Supp. 2d at 594; Dean v. Sch. Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]).

Nonetheless, in an abundance of caution, the merits of the parent's appeal regarding the appropriateness of JRC will be addressed.

VII. Unilateral Placement—Applicable Standards

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]. A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

A. Appropriateness of JRC

As explained more fully below, the hearing record lacks sufficient evidence to establish that JRC offered the student specially designed instruction to address her needs.

1. The Student's Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof facilitates a determination regarding whether the parent's unilateral placement of the student at JRC was appropriate.

Overall, the evidence in the hearing record indicates that the student presented with academic, social/emotional, and behavioral needs (Parent Exs. C at pp. 1-11; E at pp. 1-4; F at pp. 1-2; see Tr. pp. 27-31). As part of a July 2013 psychoeducational evaluation, an administration of the Wechsler Abbreviated Scale of Intelligence—Second Edition to the student yielded an abbreviated full-scale IQ of 63 (extremely low range), and noted a discrepancy between the student's "verbal performance and perceptual reasoning performance" (Parent Ex. E at pp. 2-3). According to the evaluator, the student's "low performance on the perceptual reasoning subtest" resulted in a "lower" full-scale IQ score (id. at p. 2). An administration of the Wechsler Individual Achievement Test, Third Edition to the student revealed that she performed in the "average range" in reading comprehension; the "below average range" in the areas of pseudoword decoding, mathematics problem solving, numerical operations, and spelling; and the "low range" for word reading (id. at pp. 2-4). With regard to reading, the evaluator noted that the student performed better on tasks that "assessed her ability to read sentences and paragraphs and answer questions about what was read" compared to tasks that "required [the student] to correctly read a series of printed words" (id. at p. 2). The student demonstrated difficulty with mathematical problem solving related to basic skills, such as counting and identifying shapes, as well as with

mathematical problems involving fractions, pattern completion, and time (id. at p. 3). During the 2013-14 school year, the student repeated ninth grade, and she received failing grades in seven out of eight subjects in the second marking period (see Parent Exs. E at pp. 1, 4; F at p. 1).[12]

Regarding the student's social/emotional and behavioral needs, a July 2013 social history update reported that the student failed to submit classwork, she was "often combative" and would engage in "verbal altercations with cursing" and "yelling at adults," and she had been removed from class for "uncontrollable outbursts" (Parent Ex. F at p. 1). In addition, behavior logs from the student's high school during the 2012-13 school year indicated that the student frequently skipped or arrived late to classes, she refused to complete work, she was "disruptive" during class, she would leave the classroom without permission, she disrespected teachers and caused conflicts with peers, and she broke school rules (see Parent Ex. C at pp. 1-8).[13]

2. Specially Designed Instruction

The parent argues that contrary to IHO 2's findings, the hearing record contains sufficient evidence describing how JRC addressed the student's special education needs. In support of her contention, the parent asserts that JRC completed a functional behavioral assessment (FBA) of the student and developed a behavioral intervention plan (BIP). In addition, the parent notes that JRC assessed the student's academic skills and conducted a vocational assessment of the student. The parent also asserts that the student received instruction in several academic subject areas within a small class setting and made progress. Next, the parent argues that JRC employed a "state of the art behavior modification treatment program, implemented a reward system with the student, and provided the student with a secure environment. The parent further asserts that JRC provided the student with counseling and behavioral counseling services. Additionally, the parent contends that JRC employed a staff psychiatrist who could address the student's needs if necessary. Upon review, the evidence in the hearing record does not support the parent's contentions, and thus, there is no reason to disturb IHO 2's conclusion.

Concerning the student's academic needs, the JRC clinician testified that the student attended a class with 10 students, 1 teacher, 1 teaching assistant, and a classroom aide (see Tr. pp. 108-101, 125). The JRC clinician further testified that the student functioned at a "ninth grade level" and indicated that JRC assessed the student in the areas of reading comprehension, problem solving, mathematics computation, reading, and decoding skills when she started at JRC (see Tr. pp. 151-52). The evidence in the hearing record demonstrates that the student received instruction in several classes at JRC, including English, social studies, Spanish, health, gym, mathematics,

[12] In addition, the May 2014 IEP indicated that the student exhibited difficulty staying on task; she often required redirection and refocusing; the student required study strategies, such as flash cards and study guides; she could "learn in small groups or when provided with one to one attention;" and based upon a questionnaire, the student was a "visual and a tactile learner" (Parent Ex. 3 at pp. 1-2).

[13] With regard to social development, the May 2014 IEP reflected the student's difficulty maintaining good relationships with peers "usually result[ed] in altercations," and further the IEP described the student as "verbally abusive to adults" and "unable to form positive relationships" (Dist. Ex. 3 at p. 2). In addition, the May 2014 IEP indicated that the student "disregard[ed] classroom and building rules," and she presented with "poor impulse control" that required "constant monitoring" (id.). The May 2014 IEP also noted that the student benefited from "[s]ocial skills training, incentives, verbal praise and encouragement" (id.).

science, and library, as well as vocational courses (see Parent Ex. S). An undated informational sheet described the "[b]ehaviorally-based instruction" used at JRC, noting further that "[m]uch of the instructional program at JRC [was] carried out through self-instructional materials . . . presented by means of networked computers" (Parent Ex. H at pp. 1-2). The JRC clinician testified that "teachers" at JRC used a grading system, prepared quarterly reports, and administered weekly tests (Tr. pp. 166-167). The JRC clinician further testified that based upon viewing some of the student's quizzes in English, she thought the student did "really well on them" (Tr. p. 167). The JRC clinician also testified that the student was "motivated on her tasks" and completed her work (see Tr. pp. 130-31).

Aside from the information described above—which confirms that the student attended classes at JRC and did "really well" on English quizzes—the hearing record contains little, if any, evidence regarding how JRC provided the student with specially designed instruction to address her academic needs. For example, the hearing record contains no evidence regarding the assessments administered to the student when she first enrolled at JRC, the results of the assessments, or any evidence pertaining to the student's grades, quarterly reports, or tests described by the JRC clinician (see Tr. pp. 166-67; see generally Tr. pp. 1-219; Dist. Exs. 1-8; Parent Exs. A-Y; IHO Exs. I-III). Thus, consistent with IHO 2's finding, the hearing record fails to contain sufficient evidence to establish that JRC met the student's academic needs.

Turning to the student's behavioral and social/emotional needs, the JRC clinician testified that she designed the student's BIP, prepared clinical notes, and provided behavioral counseling services to the student "approximately two or three" times per week (Tr. pp. 111, 117). According to the JRC clinician, the behavioral counseling services entailed discussions about the "benefits of [the student's] decisions and the consequences of . . . certain choices," as well as "working with other group members and her peers" (Tr. pp. 118-19). The JRC clinician also testified that a licensed clinical social worker provided the student with individual and group counseling services for one hour per week (Tr. pp. 117-18).

With respect to the student's behavioral needs, the JRC clinician testified that the student made "multiple verbal threats" when she first arrived at JRC, which "often led to physical aggression" and "destructive behavior both in the classroom and [in] her residence" (see Tr. p. 114). The evidence in the hearing record reveals that the JRC clinician conducted an FBA and developed a BIP for the student (see Parent Ex. O at pp. 1, 10). Based upon the FBA, the JRC clinician identified the student's aggressive and destructive behaviors and indicated that the student's behaviors served the functions of escaping demands and receiving attention (id. at pp. 1-10). The FBA included consequences for behavior, such as a computer generated academic fine, loss of privileges, removal from the classroom, physical redirection, and emergency restraint (id. at pp. 2-3). In addition, dangerous or potentially dangerous behaviors could also, according to the FBA, result in the student's assignment to an alternative learning classroom or "alternative learning environment" (id.). With regard to the BIP, it included intervention strategies such as reminding the student of the contingencies in her program, the criteria needed for level advancement, the availability of reinforcers for appropriate behavior, and opportunities to move to a less restrictive residence (id. at pp. 1, 4-6). The BIP also included strategies to teach alternative behavior, including instructing the student to appropriately express her concerns by verbalizing them or drafting "student business letters" that detailed the problem and the proposed solution (id. at pp. 1-4, 6-9). Additionally, JRC staff developed behavioral contracts for the student, which provided

for rewards such as going into the community, shopping, and "getting [the student's] eyebrows done" (Parent Ex. R at pp. 1-3; see Tr. pp. 129-30).

Here, while the evidence in the hearing record indicates that JRC provided the student with counseling services, the hearing record fails to contain sufficient evidence regarding what the counseling services entailed (see generally Tr. pp. 1-219; Dist. Exs. 1-8; Parent Exs. A-Y; IHO Exs. I-III). Without sufficient evidence, a determination cannot be made regarding whether the counseling services the student received at JRC addressed the student's needs (see generally . v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011], aff'd sub nom, 471 Fed. App'x 77, 2012 WL 2218712 [2d Cir. 2012] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"]).[14] Moreover, even though the evidence in the hearing record establishes that the JRC clinician completed an FBA of the student and developed a BIP for the student, this evidence, alone, is not sufficient to conclude that JRC provided services addressed to meet the student's social/emotional or behavioral needs.

Finally, although the parent argues that the student demonstrated progress related to her social/emotional needs and behavioral needs at JRC, a review of the evidence in the hearing record belies this argument. Notably, the JRC clinician's notes from December 31, 2014 to March 24, 2015 demonstrate that the total number of the student's inappropriate behaviors increased during this time period (see Parent Ex. Q at p. 1). Further, the same notes detail a high frequency of dangerous and disruptive behaviors, the use of physical restraints, the student's assignment to an alternative learning classroom, a "programmatic level drop from 4 to 2," and the student's reassignment to a different residence due to "instigating her peers in riot like behaviors" (id.; see Parent Ex. R at pp. 1-3). According to the JRC clinician, JRC staff physically restrained the student a total of "four or five" times over the course of three months at JRC (Tr. pp. 122-24). In addition, the JRC clinician provided two examples of the student's conduct that precipitated the use of physical restraints: "attack[ing] another student," and interrupting "another student's physical restraint" (Tr. pp. 119-20). The JRC clinician's notes further indicated that the student's inappropriate behaviors increased during four out of the five reporting periods from December 22, 2014 to March 24, 2015 (Parent Ex. Q at p. 1). A March 2015 Treatment Summary detailed particular concerns with the student's specific behaviors, including "[v]erbal threats to harm self (including threats to kill herself and references to dying), leaving supervised areas, [and] attempts to runaway [sic];" attempted or actual self-harm by the student to actually harm herself; and acts of physical aggression, aggressive posturing, and possession or use of potential weapons (Parent Ex. R at p. 1).

[14] Similarly, while the parent argues that a psychiatrist who served "on staff" at JRC could meet the student's psychiatric needs if necessary, merely noting the availability of a psychiatrist to address the student's needs does not constitute sufficient evidence to support a finding that JRC was appropriate to meet the student's needs.

In light of the foregoing, although the student's enrollment at JRC may provide the parent with solace by knowing the student's whereabouts because she remained in the care and custody of a residential school and was being monitored at all times, the evidence in the hearing record demonstrates that this may be the only need addressed by JRC or the only benefit ascribed to the student's enrollment at JRC.[15] While it may satisfy the conditions of the student's plea agreement to resolve the criminal proceeding, that alone is not a sufficient basis for finding that JRC was an "appropriate" unilateral placement that meets the educational requirements of the IDEA and State law (Gagliardo, 489 F.3d at 112).[16]

VII. Conclusion

In summary, having determined, among other things, that the evidence in the hearing record demonstrates that the parent failed to sustain her burden to establish the appropriateness of the student's unilateral placement at JRC for the 2014-15 school year, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations supported the parent's requested relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

IT IS ORDERED that, to the extent it has not already done so, the district shall convene a CSE meeting within 10 days of the date of this decision

Dated: **Albany, New York**
July 13, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER

[15] The evidence in the hearing record reveals that the student had a history of elopement, both from her home and from the ACS facility (see Parent Ex. W at p. 3; IHO Ex. 2 at p. 4; see also Tr. pp. 49-51, 64-65, 67-70).

[16] Although unclear, it appears that the parent appealed IHO 2's order that directed the CSE to reconvene (Pet. ¶ 13). Given the date of the student's most recent CSE meeting in March 2014, it appears that the district was obligated to conduct the student's annual review on or about March 2015 as the IDEA and State law require a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Therefore, unless a CSE has already convened to conduct an annual review to develop an IEP for the student for the 2015-16 school year, IHO 2's order to reconvene a CSE meeting will be upheld.