The University of the State of New York

The State Education Department
State Review Officer
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No. 22-131

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
The Law Office of Natan Shmueli, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

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 the parent's request to be reimbursed for the student's tuition costs at the Big N Little: Stars of Israel Program (the NPS) for a portion of the 2021-22 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

At the time of the filing of the due process complaint notice in this matter, the student was ten years old and enrolled in a 6:1+1 special class as a fifth-grade student at the NPS, for the ten-month school year (see Tr. pp. 32-33; Parent Ex. G at p. 1).

On November 20, 2020, the CSE convened and, finding the student eligible for special education as a student with a learning disability, developed an IEP for the student for the 2020-21 school year, recommending a 12:1+1 special class placement for math (5 periods per week), English language arts (ELA) (10 periods per week), social studies (3 periods per week), and science (2 periods per week), along with related services of counseling one time per week for 30

minutes in a group of five and occupational therapy (OT) two times per week for 30 minutes in a group of two (District Ex. 10 at pp. 1, 14-15, 20).[1]

In September 2021, the district school psychologist "received numerous phone calls from the parent," during which the parent said she wanted a change in placement; the district school psychologist suggested an evaluation of the student and the parent indicated she would not give consent for any new evaluations (District Ex. 4 at p. 4). The parent then sent a letter to the school district, dated September 21, 2021, requesting that the student be moved from a 12:1+1 special class setting to a general education class with the support of integrated co-teaching (ICT) services and stating that she did not want the student to be evaluated (District Ex. 6).

On October 5, 2021, the district sent the parent a prior written notice indicating that the district received the parent's September 23, 2021 request for a reevaluation of the student and intended to conduct a psychoeducational assessment of the student (Dist. Ex. 7 at p. 1). At the same time, the district sent the parent a consent form for additional assessments (id. at p. 4).

The CSE convened on October 14, 2021 and, continuing to find the student eligible for special education as a student with a learning disability, it developed a new IEP for the student and recommended that the student receive ICT services for math (10 period per week), ELA (10 periods per week), social studies (3 periods per week), and science (2 periods per week), along with related services of counseling one time per week for 30 minutes in a group of three and OT two times per week for 30 minutes in a group of two (Parent Ex. B at pp. 1, 13, 18).

In addition to the program recommended for the student by the October, 2021 CSE, the district recommended that the student receive special education recovery services consisting of 20 hours of small group instruction, 10 hours of group OT, and 10 hours of counseling services, with a start date of January 31, 2022 (Dist. Ex. 8).

On January 20, 2022 the parent entered into an enrollment contract with the NPS for the student's attendance at the NPS from February 2022 through June 2022 (Parent Ex. C at pp. 1-3).

On February 9, 2022, the parent sent the district a letter requesting "the immediate placement of [the student] in a full-time 12:1+1 class" and that a behavioral intervention plan (BIP) be developed for the student because ICT services were not successful for the student and his "difficulties and challenges" did not allow him to learn in that environment (Parent Ex. H at p. 2). The letter further stated that if the issues with the student's program identified were not resolved, the parent would unilaterally place the student in a private special education program and seek tuition funding or reimbursement from the district (id.).

A. Due Process Complaint Notice

In a due process complaint notice, dated May 19, 2022, the parent alleged that the district failed to offer the student a FAPE for the 2021-22 school year (see Parent Ex. A).

[1] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The parent indicated that at the October 2021 CSE meeting the district recommended that the student receive ICT services for only 25 periods per week and that he remained in need of placement at the NPS in the full-time special education classroom to meet all of his academic, social, and behavioral needs and (Parent Ex. A at p. 1). The parent described the student's need for consistent prompting in order not to be distracted by classmates; noted the student's high energy level, which sometimes inhibited his ability to complete assignments; and highlighted his fluctuating mood that had an "extreme" impact on his behavior and ability to focus (id.). The parent reported that the student struggled to follow classroom and school rules, needed constant positive reinforcement, worked best in small groups, benefitted from directions read aloud multiple times during assessments and information broken down in a step-by-step process in all subject areas, and required visual support in all areas (id.). The parent indicated that the student was below grade level in reading and struggled to read many grade-level texts with proper intonation and also struggled to answer inferential questions (id.). In writing, the student struggled to write using "clear" grammar, proper spelling, and punctuation without prompting (id.). The parent reported that the student became apprehensive and oppositional when presented with a writing task (id. at pp. 1-2). With regard to mathematics, the parent reported that the student struggled to use multiple strategies to answer challenging math facts and word problems (id. at p. 2). The parent noted that the student had a need for attention that could be disruptive (id.). As a result of the above, the parent asserted that the student "required and requires" an educational program that placed him in a special education class that offered individualized support, modified and simplified instruction and direction, repetition, review, modeling, prompting, social skills instruction, a behavioral plan, occupational therapy, and counseling for the 2021-22 school year (id.). The parent further asserted that the student was in need of a full-time special education program of up to 12 students, one teacher, and one assistant and the development and implementation of a behavioral plan in order to make meaningful and functional progress for the 2021-22 school year (id.).

The parent recounted the details of her February 2022 letter to the district in which she requested that the district immediately place the student in a 12:1+1 special class and develop/implement a BIP for him; reported that the attempt to educate the student in a large class with ICT services had been unsuccessful, and stated that the district had not responded to her attempt to raise concerns regarding his program and placement (Parent Ex. A at p. 2).

The parent alleged that the district failed to provide the student with an appropriate placement and program which "forced" her to privately place the student in a 12:1+1 class at the NPS (id.). For relief, the parent requested funding for the cost of the student's tuition at the NPS for the 2021-22 school year, to begin in February 2022, when the student was unilaterally placed by the parent in the NPS.

B. Impartial Hearing Officer Decision

On July 13, 2022, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH), and, on that date, the IHO conducted a prehearing conference (Tr. pp. 1-11). The hearing then convened and concluded on August 30, 2022 (Tr. pp. 12-86).

In a decision dated September 2, 2022, the IHO found that the district conceded that it denied the student a FAPE for the 2021-22 school year and that the NPS was an appropriate

placement for the student, but because the IHO found that equitable considerations weighed in favor of the district, the IHO declined to award tuition reimbursement for the cost of the NPS for the 2021-22 school year to the parent (IHO Decision at p. 12).

Initially, the IHO found that the district conceded that it did not provide the student with a FAPE for the 2021-22 school year and did not object or contest the evidence submitted by the parent (IHO Decision at p. 6). The IHO found that the NPS performed a functional behavioral assessment (FBA), developed a behavioral intervention plan (BIP) for the student, and as documented by his grades, the student appeared to have progressed academically (id.). Thus, the IHO found that based on the uncontroverted evidence, the NPS was an appropriate placement for the student (id. at p. 9).

The IHO next found that the parent enrolled the student at the NPS in January 2022, prior to the parent sending the district the February 2022 ten-day notice (IHO Decision at pp. 9-10).

In regard to equitable considerations, the IHO determined that the district worked with the parent to accommodate the student even though the parent expressed a desire to remove the student from public school and place him at a private school (IHO Decision at p. 11). The IHO found that the district changed the student's program from a 12:1+1 special class to ICT services at the parent's request, and that, later, the parent requested the district change his program back to a 12:1+1 special class because ICT services were not working out for the student (id.). The IHO determined that the parent's requests for changes to the student's program were based on her conversations with staff at the NPS and their recommendations and not because she wanted to work with the school to maintain the student's enrollment in public school (id.). Considering this, the IHO found that the parent had "no intention of working with the District to keep the Student enrolled in the Public School" (id.).

The IHO also determined that the district requested to evaluate the student to reassess his needs; however, the parent refused in September 2021 and February 2022 (IHO Decision at p. 11).[2] The IHO found that the parent prevented the district from developing a proper and appropriate IEP because the parent refused to have the student evaluated despite her claim that the student needed a different placement (id.). In addition, the IHO did not credit the parent's claim that she gave the district an opportunity to resolve the matter and found that the parent did not provide the district with proper notice of her intent to remove the student from public school (id.).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision. The central issue presented on appeal is whether the IHO erred by determining that the equitable considerations weighed against awarding the parent reimbursement for the cost of tuition at the NPS.

[2] Although the IHO states that the parent refused evaluation of the student in February 2022, this appears to be in error as the hearing record does not contain any evidence that the district sought to evaluate the student in February 2022 or that the parent refused to have the student evaluated at that time.

The parent argues that the IHO was correct in finding that the district conceded a denial of FAPE for the student for the 2021-22 school year and that her unilateral placement of the student at the NPS was appropriate.[3]

The only matter at issue is the IHO's determination that equitable considerations did not favor the parent resulting in a full denial of tuition funding for the portion of the 2021-22 school year that the student attended the NPS. The parent claims that she testified the student attended public school through January 2022 but did not attend for the remainder of the school year because ICT services were not working for him and the school did not provide transportation although the student could not walk home alone. According to the parent, she notified the school about the problems the student was having with ICT services and that no changes were made. The parent also contends that the district failed to respond or take any action based on the ten-day notice she sent the district on February 9, 2022, alerting the district that the student would be unilaterally placed and that the parent would seek funding for the student's tuition. The parent asserts that it would be inequitable to require the parent to pay the cost of tuition for the NPS where the district did not provide a FAPE to the student, the NPS was found to be appropriate, and the district was on notice that the parent disagreed with the IEP, as presented in the ten-day notice. The parent further states that it is inequitable to "punish" the parent and reward the district when the district failed to provide a FAPE. The parent seeks a determination that the district denied the student a FAPE for the 2021-22 school year, that the student's placement at the private school was appropriate, and that the equitable considerations favor the parent and the parent is entitled to an award of direct funding of the cost of the student's tuition in the amount of $47,500 for the February through June portion of the 2021-22 school year.

In an answer, the district generally denies most of the allegations contained in the parent's request for review. The district asserts that the IHO properly found that equitable considerations do not favor the parent and, therefore, properly denied funding of tuition for the NPS for the student for the 2021-22 school year. The district contends that the parent's conduct was unreasonable and uncooperative, as the parent impeded the district's ability to provide the student with a FAPE by refusing to consent to an evaluation and enrolled the student at the NPS prior to sending the ten-day notice to the district.

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.

[3] Neither party has appealed from the IHO's determinations that the district denied the student a FAPE for the 2021-22 school year or that the NPS was an appropriate placement for the student; accordingly, these issues have become final and binding on both parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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]). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), 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]).[4]

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Equitable Considerations

The parent asserts that the IHO erred in finding that equitable considerations weighed against awarding the cost of the student's tuition at the NPS for the February through June portion of the 2021-22 school year.

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]).[5] With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

In reviewing the hearing record, the IHO noted multiple equitable factors weighing against the parent's request for relief (IHO Decision at p. 11). In particular, the IHO found that the parent prevented the district from developing an appropriate IEP by refusing to allow the district to evaluate the student (id.). In addition, the IHO determined that the parent was not working with the district in formulating the student's IEPs and that her requests for changes in the student's programming were made with the intention of placing the student in a nonpublic school (id.). Finally, the IHO did not credit the parent's claim that she gave the district an opportunity to resolve

[5] Here, the district does not assert that the costs of tuition at the NPS were excessive (see Carter, 510 U.S. at 16).

the matter, finding that the parent did not provide the district with proper notice of her intent to remove the student from public school and place him at the NPS (id.).

As an initial matter, although the parent appeals from the IHO's findings regarding equitable considerations and disputes the accuracy of the IHO's findings regarding the communications between the parent and district staff asserting that she notified the school of her concerns with the student's placement in a general education class, the parent does not make specific allegations of IHO error with regard to the IHO's factual findings—in particular, the parent does not address the IHO's finding that the parent did not consent to an evaluation of the student. As noted above, tuition reimbursement may be reduced or denied when a parent fails to make their child available for evaluation by the district (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]). Accordingly, the parent's failure to address the IHO's finding on this point requires a finding that equitable considerations weigh, at least to some extent, against an award of funding for the student's placement at the NPS. Nevertheless, a review of the hearing record is required to determine if the IHO was justified in finding that equitable considerations support a total bar of any relief to the parent.

Turning to the start of the parties' disputes, the November 2020 CSE recommended that the student be placed in a 12:1+1 special class with related services of counseling and OT (see District Ex. 10). At some point the parent became dissatisfied with the special education program and services the student was receiving at the public school, and according to a district SESIS events log entry, over the February 2021 spring break she informed the student's classroom teacher that she intended to disenroll the student from the public school and place him in a private school (District Ex. 3 at p. 1). The SESIS event log also indicated that in September 2021, the district school psychologist "received numerous phone calls from the parent," in which the parent said she wanted a change in placement, the district school psychologist suggested an evaluation of the student, and the parent indicated she would not give consent for any new evaluations (District Ex. 4 at p. 4). The parent sent a letter to the district, dated September 21, 2021, requesting that the student be moved from a 12:1+1 special class setting to a general education class with the support of ICT services; the parent also indicated that she did not consent to an evaluation of the student (District Ex. 6).

In response to the parent's September letter requesting a change in placement, the district sent the parent a prior written notice, dated October 5, 2021, requesting consent for a psychoeducational assessment and attached a consent for additional assessments form (District Ex. 7).[6] The hearing record does not include any evaluations or assessments of the student.

When the CSE convened in October 2021, the CSE recommended that the student be placed in a general education class with the support of ICT services; the IEP indicated that the parent "strongly fe[lt] that [the student] should be placed in a less restrictive environment" (Parent Ex. B at pp. 2, 13). The parent testified that, in October 2021, she had asked the district to change

[6] The district included the parent's response to the request for consent with its answer (Answer Ex. 1). Review of the parent's response to the request for consent is not necessary to my determination herein and it is not clear why it was not presented at the hearing; however, it adds additional support for finding that the parent did not consent to having the student evaluated by the district as it shows the parent returned the consent form with the box checked for "I do not give my consent to have my child evaluated" (id.).

the student's placement to a general education class because she wanted to place him in a general education private school (Tr. at pp. 59-62, 65, 69, 74).

The October 2021 IEP also noted that the parent had requested a reevaluation of the student but did not consent to testing (Parent Ex. B at p. 2). The parent testified that she did not want the student evaluated in the public school because she had already made the decision to place him in a private school (Tr. p. 62). However, the parent also testified that she wanted the student evaluated again for a 12:1+1, that it did not happen in the public school, and that is why she placed the student at the NPS (id.).

On cross examination, the program supervisor at the private school testified that at the end of January the parent reached out to the NPS stating that "it wasn't working out in the school program" (Tr. at p. 42). However, the parent testified that the student was transferred to the NPS in January 2022 (Tr. at p. 63). Moreover, according to the NPS attendance record provided by the parent, the student began attending the NPS as early as January 3, 2022 (Parent Ex. F). According to the district's SESIS events log, on January 3, 2022, the parent called and requested that additional copies of the student's last three IEPs be sent home, which were placed in the student's teacher's mailbox to be sent home with the student (District Ex. 4 at p. 1). Then, on January 18, 2022, copies of the student's last two IEPs and copies of his report card were given to the parent, as she stated that she was applying to multiple private schools (id.). On January 20, 2022, the parent executed a contract with the NPS for the student's enrollment from February 2022 through June 2022 (Parent Ex. C at p. 3). The NPS conducted an FBA of the student, dated January 25, 2022 showing that data was collected through observation of the student and from the student's teachers and providers (see Parent Ex. G at pp. 1-8). On February 1, 2022, the private school completed a BIP for the student (id. at pp. 9-13). The hearing record includes a February 8, 2022 treatment plan developed for the student at the NPS, which indicated that the student started at the NPS in February 2022, but also indicated that the student was making progress in some areas (id. at pp. 14-24).

In a letter dated, February 9, 2022, the parent requested that her son be placed back into a 12:1+1 special class and that a BIP be developed and implemented for him, and also asserted that attempting to educate the student in a large class with ICT services was unsuccessful because his challenges and difficulties did not allow him to learn in that environment (Parent Ex. H at p. 2). The parent further stated that she raised issues the student was having in the general education class with ICT services with the public school, but nothing was done (id.). Also, the parent advised the district that unless the issue was resolved, she intended to unilaterally place the student in a private special education program for which she would seek tuition funding from the district (id.).

Considering the above, the IHO may have placed too much emphasis on the parent's desire to remove the student from the public school program. Even if the evidence in the hearing record supported a finding that the parent had no intention of placing the student in any program the district may have recommended, it is well-settled that such an intention on the part of the parent would not be a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). However, the hearing record supports the IHO's findings that the parent did not give the district the opportunity to amend the student's

programming before removing the student from the public school in January 2022. Although the CSE could have reconvened after receipt of the 10-day notice, to do so would have been largely formalistic at that juncture because the student was already attending the parent's preferred program at the NPS when the 10-day notice was sent to the district. In addition, as noted above, the parent inhibited the district's ability to develop an appropriate program for the student for the 2021-22 school year by refusing to allow the district to evaluate the student. Accordingly, while I do not entirely agree with the reasoning underlying the IHO's decision, given that the evidence in the hearing record supports a finding that the parent did not demonstrate the requisite cooperation with the CSE process which would allow for the weighing of equitable considerations in her favor, I decline to disturb the IHO's decision not to award funding for the cost of the student's tuition at the NPS based on equitable considerations.

VII. Conclusion

As the sole issue presented is whether the IHO erred in denying the parent relief based on equitable considerations and I have determined that the hearing record supports the IHO's determination that equitable considerations weigh against granting relief, the necessary inquiry is at end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 6, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER