The University of the State of New York

The State Education Department
State Review Officer
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No. 23-276

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Brian J. Reimels, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to find an appropriate nonpublic school for the student. The appeal must be sustained.

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

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here.

Briefly, the CSE convened on June 24, 2021, determined that the student was eligible for special education as a student with autism, and developed an IEP for the student with a projected implementation date of June 14, 2021 (see generally Dist. Ex. 11 at pp. 1, 33). The June 2021 CSE recommended that the student attend a 12-month program in a 6:1+1 special class for eight periods per week in English language arts (ELA), eight periods per week in math, four periods per week in science, and four periods per week in social studies (id. at pp. 24, 26). The June 2021 CSE also recommended the student receive three 30-minue sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual speech-language therapy, the support of a full-time individual paraprofessional for health and feeding, an individual

behavior management/support plan, individual bus transportation-safety, assistive technology in the form of picture communication, and that the parent be provided with two 30-minute sessions of parent counseling and training per year (id. at pp. 24-25).

In a due process complaint notice, dated February 13, 2022, the parents requested an impartial hearing seeking a "proper learning environment" for the student (Dist. Ex. 1). The parents also indicated that they had concerns that the student's current school placement did not have the proper personnel to "contain" the student when he became agitated and "melt[ed] down" (id.). Additionally, the parents questioned the student's annual goals and stated that ,with regard to progress, the student was making little improvement in the district program (id.).

The parents and the district partially resolved the February 13, 2022 due process complaint notice by agreement dated March 3, 2022 executed by the parents on March 7, 2022 and the district on March 8, 2022 (see SRO Ex. 1).[1] The resolution agreement provided that, within 30 days, the district would conduct the following evaluations/assessments: a neuropsychological evaluation; a classroom observation; a social history; a speech and language evaluation; an OT evaluation; and a functional behavioral assessment (FBA) (id. at p. 1). The resolution agreement also provided that once the evaluations/assessments were completed, the district would conduct a CSE meeting "[t]o consider the full extent of the Special Education Continuum, inclusive of a Deferment to the CBST" (id.).[2]

The parties met for twelve status conferences beginning March 16, 2022 and concluding on June 27, 2023 (Tr. pp. 1-87).[3] During the status conference on December 13, 2022, the parents indicated that the district had not yet provided a neuropsychological evaluation pursuant to the March 2022 partial settlement agreement (Tr. pp. 53-54). At that time, the district representative agreed to district funding of an independent neuropsychological evaluation conducted at a cost of up to $5,000 dollars (Tr. pp. 54-55). On January 3, 2023, the IHO issued an interim decision directing the district to reimburse the parents for a neuropsychological evaluation not to exceed $5,000 dollars (Interim IHO Decision at p. 1). The student underwent a neuropsychological evaluation over the course of two days on February 9, 2023 and February 16, 2023, which the examining clinical psychologist reduced into a written report (see Dist. Ex. 3).

Prior to the impartial hearing convening, the CSE met on May 9, 2023 for the student's annual review and to create an IEP for the 2023-24 school year (see generally Dist. Ex. 10). The May 2023 CSE continued to recommend a 12-month program consisting of a 6:1+1 special class placement for eight periods per week in ELA, eight periods per week in math, four periods per

[1] The district provided a copy of the March 2022 partial resolution agreement with its filing of the hearing record. For purposes of this decision the three-page March 2022 partial resolution agreement shall be cited as SRO Exhibit 1.

[2] CBST refers to the district's central based support team, which seeks nonpublic school placements for students who are referred for them on an IEP (Tr. pp. 99-100).

[3] Neither party was present for the status conference on April 27, 2022 (Tr. pp. 12-15). The pro se parents did not appear at the June 17, 2022, the July 7, 2022, or the June 6, 2023 status conferences (Tr. pp. 23-32, 77-81). The representative from the district did not appear at the October 11, 20222 status conference (Tr. pp. 33-39).

week in science, and four periods per week in social studies, but recommended that the program be implemented in a day program at a State -approved nonpublic school (id. at pp. 24-25, 31). The May 2023 CSE also continued to recommend the student receive three 30-minue sessions per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and full-time individual paraprofessional services; however, the paraprofessional services were recommended for behavior support instead of health and feeding (compare Dist. Ex. 10 at p. 25, with Dist. Ex. 11 at p. 25). The May 2023 continued to recommend assistive technology, identifying a static display speech generating device (SGD), communication book with picture symbols, and quick talk (Dist. Ex. 10 at p. 26). Additionally, the CSE continued to indicate that the student needed a behavioral intervention plan (BIP) (id. at p. 10).

At the June 6, 2023 status conference, the district representative indicated that the student's case had been referred to the CBST for a nonpublic school placement and that the CBST was "actively looking for a program" (Tr. p. 78). The district representative also stated that the student's "packet" was sent to nineteen programs, the CBST was waiting on responses as to which programs wanted to interview the family, and once a program was selected, the parents' February 2022 due process complaint notice would be satisfied (Tr. pp. 78-79).

At the June 27, 2023 status conference, the parents indicated that they received a list of nonpublic school placements from the CBST, but that they were not "really happy with any of those selections," and had "a few" placements in mind that they preferred (Tr. p. 84). The district representative indicated she was prepared to move to an impartial hearing to present a case proving the district offered the student a free appropriate public education (FAPE) and an impartial hearing was scheduled (Tr. pp. 84-86).

An impartial hearing convened on July 26, 2023 and concluded on the same day (Tr. pp. 88-112). The parents did not introduce any documentary evidence but did testify during the impartial hearing (Tr. pp. 109-10). Neither party made a closing statement (see Tr. pp. 110-11). In a three-page decision dated October 23, 2023, the IHO determined, since the district failed to locate a placement for the student, the May 2023 IEP was not designed to meet the student's needs and denied him a FAPE (IHO Decision at p. 2). Turning to relief, since the parents wanted the district to consider nonpublic schools that were not State-approved, the IHO ordered the district to find an appropriate nonpublic school for the student "immediately, irrespective of whether the school [wa]s approved or non-approved" (id. at pp. 2-3). The IHO also noted he did not have the authority "to issue an order allowing parents to pick any school that they like and then get funding from the state, irrespective of any inquiry into the appropriateness of the parental placement" and then determined that, because the parents were unrepresented and unaware of their need to identify a specific placement and prove the placement was appropriate for the student, the parents could refile their claim after locating a proposed school for the student (id. at p. 3). Thus the IHO dismissed the parents' other claims without prejudice (id.).

IV. Appeal for State-Level Review

The district appeals. The parties' familiarity with the particular issues for review on appeal in the district's request for review is presumed and, therefore, the allegations and arguments will not be recited here in detail. The parents did not interpose an answer to the district's request for review. The gravamen of the district's appeal is whether the IHO erred by ordering it to find an

appropriate private school for the student immediately, irrespective of whether the school was State-approved or not.[4, 5]

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. 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. 386, 399 [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

[4] On November 20, 2023 and December 4, 2023, the district sent letters to the Office of State Review to obtain permission from an SRO for service by alternate means to serve the notice of intention to seek review and request for review on the parents. The district's requests were granted. The parents did not file an answer in this matter challenging the district's method of service. The district presented affidavits of service showing compliance with the alternate service directives (see 8 NYCRR 279.4[c]).

[5] In its request for review, the district only appeals from the ordered relief. Accordingly, the IHO's determination that the district denied the student a FAPE by failing to locate a placement for the student is final and binding on the parties and will not be further discussed (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]).

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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[6]

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.

[6] 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., 580 U.S. at 402).

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

Turning to the substance of this appeal, the district argues that the IHO did not have the authority to order the district to locate a nonpublic school for the student, irrespective of whether or not it had been approved by the Commissioner of Education.

Prospective injunctive relief, in the form of an order directing a district to pay for a student's tuition at a nonpublic school, is an available form of equitable relief where it has been determined that the district's placement is inappropriate (or, as in this instance, not effectuated) and "that a private placement desired by the parents was proper under the Act" (Burlington, 471 U.S. at 369-70; Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422 [S.D.N.Y. 2011]). However, in this instance, the parents have not identified any specific nonpublic school for the student (Tr. p. 84). The IHO acknowledged this and acknowledged that directing the district to fund any nonpublic school located by the parents without assessing its appropriateness would be outside of his authority; however, in this instance, the IHO ordered the district to find a school placement for the student regardless of whether it was approved by the Commissioner of Education or not.[7]

The Supreme Court has noted that the IDEA contemplates that districts may not be able to address the needs of every student in public placements and may need to place some students in private placements at public expense in order to provide such students with a FAPE (Burlington, 471 U.S. at 369-70). However, the IDEA does not endow state or local educational agencies with regulatory authority over nonpublic schools, but instead requires state and local educational agencies to ensure that students placed in nonpublic schools by the educational agency receive a FAPE (Responsibility of SEA, 71 Fed. Reg. 46598-99 [Aug. 14, 2006]). A state educational agency must ensure that each student placed in a private facility by a public agency be provided special education and related services in conformity with an IEP, at no cost to the parents, and that meets the state's educational standards, and must also ensure that each such student is provided with all of the rights of a student who is served by a public agency (34 CFR 300.2[c][1]; 300.146).

[7] The IHO's ordered relief is not specific and can be interpreted to mean that the CSE can either locate a placement for the student in a nonapproved nonpublic school or a State-approved nonpublic school (see IHO Decision at p. 3). Therefore, the IHO's decision could be interpreted as allowing the CBST to complete its process of locating an appropriate State-approved nonpublic school placement for the student.

The IDEA also requires that special education and related services meet the standards of the state educational agency for a student to receive a FAPE (20 U.S.C. §1401[9][B]; 34 CFR 300.17[b]).[8]

Considering the State's obligations involving students placed in private facilities by public agencies, it is not surprising that, in providing special education to students with disabilities, districts are only authorized to contract with nonpublic schools which have been approved by the Commissioner of Education (Educ. Law § 4402[2][b][1], [2]; see Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2nd Cir. 1988] [noting that pursuant to the IDEA a district can only place a student in a nonpublic school that meets State educational standards, including the requirement for approval by the Commissioner of Education], abrogated in part by Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]).

Upon review, under the circumstances presented in this matter, the specific relief awarded by the IHO—directing the district to locate an appropriate nonpublic school placement, irrespective of whether the school was approved or not by the Commissioner of Education—was improper. In a similar circumstance, where an IHO ordered a district to refer a student to the CBST and consider all options for placement of the student, including nonapproved nonpublic schools, at least one district court has determined that such a directive was outside of the IHO's authority (Z.H. v. New York City Dept. of Educ., 107 F. Supp. 3d 369, 375 [S.D.N.Y. 2015]). Additionally, as noted by the district court in Z.H., "The Second Circuit has concluded that when a district places a student in a private school, the school must satisfy state approval requirements, and has rejected relief directing placement in an unapproved school" (107 F. Supp. 3d at 375, citing Antkowiak, 838 F.2d at 638).

In this matter, the district does not dispute that the student requires a nonpublic school placement. As correctly identified by the district in its request for review, the State has developed a process that must be followed by districts in locating an appropriate placement, and the district has not yet exhausted the process of locating a State-approved nonpublic school to address the student's needs.[9] Although the hearing record indicates that the CBST sent applications to at least nineteen State-approved nonpublic schools, the hearing record does not establish that the CBST exhausted all approved placements that might be appropriate to address the student's needs (Tr. pp. 82-112).[10] In addition, as the parents have not identified a unilateral placement for the student,

[8] State law defines "Special education" as "specially designed instruction which includes special services or programs . . . provided at no cost to the parents to meet the unique needs of a child with a disability" (Educ. Law § 4401[1]; see 8 NYCRR 200.1[ww]). In addition, while in-State and out-of-State "non-residential schools which have been approved by the commissioner" are included as part of the State's definition of special services or programs, nonpublic schools that have not been approved by the commissioner are not included (Educ. Law § 4401[2][e], [f]).

[9] Normally, deficiencies in a student's educational program or its implementation does not, in and of itself, demonstrate that the student cannot be provided with an appropriate education within the public school system (see Suffield Bd. of Educ. v. L.Y., 2014 WL 104967, at *12 [D. Conn. Jan. 7, 2014]). However, in this instance the district is not arguing that it can appropriately address the student's needs in a district placement but is arguing only that it does not have the authority to place the student in a school that has not been approved by the Commissioner (Req. for Rev. ¶¶ 11-15).

[10] Parents are expected to cooperate with the intake process and are not entitled to exercise a veto over the district's

the IHO was unable to make a specific finding regarding the appropriateness of any specific placement (IHO Decision at p. 3). As described above, the IHO directed the district to place the student in a nonapproved private school, despite the hearing record indicating that the district was attempting to secure the student's placement in State-approved nonpublic schools, but the intake process was not yet completed (Tr. pp. 82-112). The process for finding a nonpublic school placement should be completed. In the event that the district cannot find an appropriate program within the State to meet the student's needs, State law expressly directs the district to notify the Commissioner of Education (Educ. Law § 4402[2][b][3]; see Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1180 [S.D.N.Y. 1992] [indicating that in the event there are no appropriate State-approved nonpublic schools, a court may direct the State to expand the list of approved schools or provide conditional approval for an appropriate placement]; cf. L. v. North Haven Bd. of Educ., 624 F. Supp. 2d 163, 184 [D. Conn. 2009] [upholding an IHO's order that a district consider a State-approved private school and noting that the IHO had directed the district "to proceed as it would have in the absence of the parents' challenge" to the recommended program]). In certain limited circumstances an award directing a district to prospectively place a student in an appropriate but unapproved school may be proper (Connors v. Mills, 34 F. Supp. 2d 795, 802-06 [N.D.N.Y. 1998]). In Connors, the court reasoned that immediate prospective funding is available when the parent and district agree that the district could not provide the student with a FAPE and that placement in a specific unapproved private school was appropriate (Connors, 34 F. Supp. 2d at 805-06).

Accordingly, while the IHO's order directing the district to consider placing the student in an unapproved school was not an appropriate delegation of the IHO's authority to award appropriate relief, in the event that the district does not identify an appropriate placement for the student the parents are not left without options. If the parents are not happy with the selected nonpublic school placement by the CBST and believes it is not appropriate to meet the student's needs, they may file a new due process complaint notice to assert such claims. Also, the parents may select an appropriate unapproved school and initiate a due process complaint proceeding requesting prospective equitable relief from an administrative hearing officer; however, in such a proceeding the parents would be responsible to establish with specific objective evidence before the IHO that such a unilateral placement, chosen by the parent without the consent of district officials, is an appropriate placement under the IDEA.

VII. Conclusion

Based on the facts presented in this matter, the IHO's direction that the district consider placing the student in a school that has not been approved by the Commissioner of Education was beyond the scope of his authority and must be overturned (Carter, 510 U.S. at 13-14; Antkowiak, 838 F.2d at 640-41; Connors, 34 F. Supp. 2d at 805-06). Further, for the reasons set forth above, it is necessary to order the CBST to finish its process of locating an approved nonpublic school for the student

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proposals to provide the student with an appropriate school placement (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12 [S.D.N.Y. Dec. 16, 2011]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 675-76 [S.D.N.Y. 2011]; see also J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 675-76 [S.D.N.Y. 2011]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated October 23, 2023 is modified, by reversing the portion directing the district to locate an appropriate nonpublic school irrespective of whether the schools were "approved" or "non-approved" nonpublic schools; and

IT IS FURTHER ORDERED that the district shall, if it has not done so already, complete its process of locating a State-approved nonpublic school for the student, inform the parents immediately upon receipt of any letter of acceptance, and thereafter convene the CSE to consider the State-approved nonpublic school.

Dated: **Albany, New York**
January 5, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER