The University of the State of New York

The State Education Department
State Review Officer
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No. 23-278

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

Appearances:
Law Offices of Adam Dayan, PLLC, attorneys for petitioner, by Kelly Bronner, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Siobhan O'Brien, 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 her request to be reimbursed for her son's tuition costs at the Cooke School and Institute (Cooke) for the 2023-24 school year. 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. The student has received diagnoses of a mild intellectual disability and autism spectrum disorder (autism) "with accompanying mild intellectual impairment and accompanying language impairment with expressive and receptive language skills" (Parent Ex. H at p. 15). The CSE convened on October 3, 2022, and, finding that the student was eligible for special education as a student with autism, formulated the student's IEP with an implementation date of October 17, 2022 (see generally Dist.

Ex. 2).[1] The October 2022 CSE recommended a 12-month program consisting of a 12:1+1 special class placement at a district specialized school and adapted physical education together with related services of one 45-minute session per week of individual counseling; one 45-minute session per week of group counseling; two 45-minute sessions per week of individual occupational therapy (OT); two 45-minute sessions per week of individual speech-language therapy; and one 45-minute session per week of group speech-language therapy, as well as one 60-minute session per month of parent counseling and training (Dist. Ex. 2 at pp. 18-19, 24). In November 2022, the student underwent a neuropsychological and educational evaluation conducted as part of a resolution regarding a prior proceeding (Parent Exs. H; U at p. 5).

In April 2023, the parent entered into a contract for the student's enrollment at Cooke for the 2023-24 12-month school year (Parent Ex. I).

The parent sent a copy of the neuropsychological and educational evaluation report to the district in May 2023 (see Parent Ex. H).

The parent disagreed with the recommendations contained in the October 2022 IEP, as well as with the particular public-school site to which the district assigned the student to attend for the 2023-24 school year and, as a result, on June 20, 2023 notified the district of her intent to unilaterally place the student at Cooke and seek district funding for the cost of that program (see Parent Ex. B).

In a due process complaint notice, dated July 17, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Dist. Ex. 1). In particular, the parent alleged that the recommendation for a 12:1+1 special class was not appropriate as it would not offer the student "the level of support he nee[ed] to make progress" (Dist. Ex. 1 at p. 5). Further, among other concerns, the parent alleged that the CSE failed to include a "community" setting as a location for the student's services, the annual goals were not measurable, and the parent was denied meaningful participation in the development of the October 2022 IEP (id. at pp. 5-7). In addition, the parent asserted that she had requested a delay in holding the October 2022 CSE meeting so that the then in progress neuropsychological evaluation could be completed, that she disclosed a copy of the neuropsychological evaluation report to the CSE and requested a reconvene of the CSE, but the CSE had not yet reconvened and due to the failure to reconvene the parent had no choice but to enroll the student at Cooke (id. at pp. 5, 7). As relief, the parent sought a finding that Cooke was an appropriate unilateral placement and that equitable considerations favored an award of tuition reimbursement/direct funding of the student's tuition at Cooke for the 2023-24 school year (id. at p. 9).[2] The district submitted a response to the due process complaint notice generally denying the allegations contained therein and admitting that it recommended a 12:1+1 special class in a district specialized school with related services.

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

[2] The Commissioner of Education has not approved Cooke as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

After a prehearing conference on August 18, 2023, and a status conference on September 7, 2023, an impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on October 17, 2023 (Tr. pp. 1-82).[3] In a decision dated October 27, 2023, the IHO determined that the district offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 11-14). More specifically, the IHO found that it was a procedural violation for the district not to reconvene after receiving the neuropsychological evaluation but held that this procedural violation did not rise to the level of a denial of FAPE because the IHO found that the student's scores on testing administered as part of the 2022 neuropsychological evaluation were similar to the student's scores from a 2019 psychoeducational evaluation relied on by the CSE and that, therefore, review of the 2022 neuropsychological evaluation would not have resulted in different educational programming for the student (id. at p. 11).[4] In addition, the IHO found that substantively, the October 2022 IEP addressed the student's areas of need with respect to the annual goals and recommended related services (id. at p. 14). Although the IHO found that the district offered the student a FAPE, the IHO also found that Cooke was an appropriate unilateral placement for the student for the 2023-24 school year and that equitable considerations favored the parent and an award of direct funding of the costs of the student's tuition at Cooke (id. at pp. 14-15). Having found that the district offered a FAPE to the student for the 2023-24 school year, the IHO denied the parent's request for tuition reimbursement/direct funding at Cooke (id. at p. 15).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The main issue presented by the parent is whether the IHO erroneously found that the district offered the student a FAPE for the 2023-24 school year based on four arguments, namely; whether the IHO erred in finding that the CSE's failure to postpone the October 2022 CSE meeting and reconvene after receipt of the neuropsychological evaluation was not a denial of FAPE; whether the IHO erred in finding that the CSE would not have modified its IEP recommendations upon consideration of the neuropsychological evaluation; whether the IHO erred in finding that the October 2022 annual goals were appropriate and measurable; and whether the IHO erred in finding the assigned school was appropriate. In addition, the parent seeks the introduction of additional evidence into the hearing record.[5]

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[3] A Conference Summary and Order was issued by the IHO on September 7, 2023.

[4] The IHO noted that "the relevant analysis in this case is not whether the [s]tudent had been timely evaluated: this matter was settled via the resolution agreement in 2022, in which [the district] agreed to pay for an independent educational evaluation. The salient question is whether not waiting for, and ultimately not considering the neuropsychological evaluation represented a fatal procedural violation of the IDEA" (IHO Decision at p. 10).

[5] The parent submits an affidavit with the request for review as additional evidence without any explanation or discussion about the reasons for the submission of the affidavit. In its answer, the district did not respond to the consideration of the parent's affidavit. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application

In an answer, the district generally denies the material allegations contained in the request for review. The district argues that it offered the student a FAPE for the 2023-24 school year and the IHO correctly found that the October 2022 IEP annual goals were measurable, the CSE did not need to reconvene to consider the neuropsychological evaluation, and any claims pertaining to the assigned school were speculative.

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 student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR

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of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; 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 SRO is unable to render a decision]). Here, the information contained in the additional evidence proffered by the parent was available at the time of the impartial hearing, and it also is not necessary to consider the additional evidence with respect to the issues raised on appeal.

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. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-

[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).

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. Preliminary Matter – Scope of Review

Although the IHO found that the district offered the student a FAPE for the 2023-24 school year, the IHO made alternative findings to the effect that the parent's unilateral placement at Cooke was appropriate for the student and that equitable considerations favored the parent (IHO Decision at pp. 14-15). The district has not appealed either determination. As such, these finding have become 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]; 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]). Therefore, the only issue left to be resolved is whether the IHO erred in finding that the district offered the student a FAPE for the 2023-24 school year.

In addition to the parent raising the issue of the CSE's failure to reconvene after receipt of the neuropsychological evaluation, the parent asserts that the IHO erred in finding that the October 2022 IEP annual goals were appropriate and that the assigned school placement was appropriate for the student (Req. for Rev. at pp. 7-10). Although certainly the substantive issues of annual goals and assigned school are relevant in determining whether the district offered the student a FAPE for the 2023-24 school year, the parent's procedural violation claim for failing to reconvene the CSE is the sole issue that will be addressed herein because the evidence in the hearing record is sufficient to find that the CSE's failure to reconvene rose to the level of a denial of FAPE.

B. 2023-24 School Year – CSE Reconvene Request

In determining whether the district offered the student a FAPE for the 2023-24 school year, it is necessary to take into consideration the parent's request that the district reconvene to consider a neuropsychological and educational evaluation report.

The parent asserts that the IHO erred in determining that the district's failure to convene a CSE meeting after receipt of the parent's request to reconvene, with the neuropsychological and educational evaluation report attached, did not deprive the student a FAPE. The IHO found that the CSE's failure to postpone the October 2022 CSE meeting and failure to reconvene after receipt of the neuropsychological evaluation "did not rise to a denial of FAPE" (IHO Decision at p. 11). In rendering this finding, the IHO compared the results of the February 2019 psychosocial evaluation and psychological evaluation with the 2022 neuropsychological evaluation, and found the test results in cognitive functioning, adaptive functioning, socialization, and daily living skills as well as diagnoses were "quite similar" (id.). The IHO then further speculated that the results of

the 2022 neuropsychological evaluation would not have changed the recommendations contained in the October 2022 IEP (id.). Therefore, the IHO found the CSE's failure to reconvene was a procedural violation but not a "fatal" error that denied the student a FAPE (id.). The district claims that the failure of the CSE to reconvene after receipt of the neuropsychological evaluation did not impede the student's right to a FAPE or impede the parent's opportunity to participate in the decision-making process and therefore, was not a denial of FAPE to the student (Answer ¶¶ 15-16).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["[a] professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["[m]eaningful participation does not require deferral to parent choice"]).

In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). A district's failure to comply with the procedural requirements related to a parent's request to reconvene may constitute a denial of FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [finding that the district violated the IDEA by failing to either reconvene the CSE in response to the parents' request or respond with a written notice stating the reasons why the district did not believe a reconvene was necessary and such violation contributed to a denial of FAPE]; see also Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; 34 CFR 300.503; 8 NYCRR 200.5[a]; Application of a Student with a Disability, Appeal No. 13-172; Application of the Dep't of Educ., Appeal No. 12-128.) However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the

parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In a prior due process complaint notice, dated July 18, 2022, involving the 2022-23 school year, the parties reached a partial resolution agreement (August 9, 2022) wherein the district agreed to fund an independent neuropsychological evaluation (Parent Ex. U at p. 5). The resolution agreement stated that a CSE meeting would be held "[u]pon [r]eceipt of [e]valuation [r]eports" (id.).

The district then scheduled a CSE meeting for October 3, 2022 (Parent Ex. D at p. 3). Upon receipt of notice of the meeting, the parent informed the district that she was working to select an evaluator pursuant to the resolution agreement and wanted to reschedule the CSE meeting after the neuropsychological evaluation was completed so it could be reviewed by the CSE (Parent Exs. D at p. 1; Q ¶ 7). In a response email dated September 28, 2022, the school psychologist informed the parent of the CSE meeting date and stated that once "new evaluations [were] completed, the [CSE] w[ould] meet again to discuss the findings" (Parent Ex. D at p. 1). Thereafter, the CSE convened on October 3, 2022 for an annual review (see Dist. Ex. 2). The parent testified that since the district had not evaluated her son "in years" and she was still in the process of scheduling the evaluation she wanted to postpone the October 2022 CSE meeting; however, the meeting continued to proceed as scheduled (Parent Ex. Q ¶ 9).[7] The October 2022 IEP noted that the "school" stated that the student was "in the process of being evaluated and would need that evaluation to determine a recommendation" (Dist. Ex. 2 at p. 27).[8, 9] The parent disagreed with the October 2022 IEP recommendations because the CSE "did not have recent data " (Parent Ex. Q ¶ 12; Dist. Ex. 2 at p. 27).

According to the neuropsychological and educational evaluation report, the evaluator conducted testing with the student on November 2, 7, and 10, 2022 (Parent Ex. H at p. 4; see generally Parent Ex. S).[10] On May 3, 2023, the parent emailed the evaluation report to the district (Parent Exs. H at p. 47; Q ¶ 15). In a May 2023 letter accompanying the evaluation report, the parent expressed her disagreement with the October 2022 IEP recommendations including disagreement with the assigned school (Parent Ex. H at pp. 1-2). In requesting a reconvene of the CSE, the parent noted areas raised by the evaluator, which the parent wanted the CSE to consider,

[7] A February 7, 2019 psychosocial evaluation and psychological evaluation were both conducted when the student was 15 years of age (now 20 years of age) and in the seventh grade (see generally Dist. Ex. 3). The stated purpose of the November 2022 evaluation was on "planning for his continued education and transition into adulthood" (Parent Ex. S ¶ 4).

[8] However, the school psychologist testified that she did not recall anyone at the October 2022 CSE meeting discussing updated evaluations for the student (Tr. pp. 48-49). She was further unable to recall whether the independent neuropsychological evaluation was being conducted at the time of the CSE meeting (Tr. p. 49).

[9] Although this comment was recorded under "[p]arent [c]oncerns" it is unclear if "school" refers to Cooke or the district (Dist. Ex. 2 at p. 27). The IHO wrote in the decision that "school" was referencing Cooke and this appears to be correct; however, this was not discussed during the impartial hearing (Tr. pp. 1-82; IHO Decision at p. 6).

[10] Of note, the neuropsychological and educational evaluation report was not dated (see Parent Ex. H at pp. 4-46).

specifically referencing life experience and vocational skills, as well as practical experiences (Parent Ex. H at pp. 2-3). Consistent with her concerns as expressed in the letter, in her affidavit testimony, the parent expressed concerns for the student's safety as he transitioned into "adulthood" (Parent Ex. Q ¶ 5). The parent also stated in her letter that she was requesting that the CSE reconvene and consider the neuropsychological and educational evaluation report and develop an IEP to meet the student's needs (Parent Ex. H at p. 3). In her direct affidavit testimony, the parent stated that the CSE "never responded" to her May 3, 2023 request to reconvene the CSE meeting (Parent Ex. Q ¶ 16).

Here, the district's failure to reconvene the CSE at the parent's request or otherwise respond to the parent's request to reconvene was a procedural violation that rises to the level of a denial of FAPE for the 2023-24 school year because it significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). After agreeing to meet after receipt of the evaluation report, the CSE ignored the parent's request to reconvene the CSE (see Parent Exs. D at p. 1; U at p. 5). This blatant disregard for the parent's ability to participate in the CSE process cannot be condoned given the longstanding federal guidance that the district is required to respond to a parent's request for a reconvene in writing, as well as the State and federal regulatory framework supporting the right of a parent to have new evaluative information considered by the CSE, to participate actively in the development of the student's IEP and to receive prior written notice of the CSE's determinations and recommendations, to the extent required, throughout the CSE process. By failing to reconvene, or to explain to the parent their failure to do so, the CSE deprived the parent of her right to share new information with the CSE, participate in the IEP planning and development process, and significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student.

Moreover, unlike in situations where a reconvene of the CSE is unlikely to yield any new information or any information that has the potential to impact the CSE's recommendations (see Application of a Student with a Disability, Appeal No. 14-158 [finding that because information forming the basis for a parent's request to reconvene did not reflect a change in the student's needs and abilities to such an extent that the placement recommended by CSE became inappropriate as a result, "based on the unique circumstances" of the matter, the parents' participation was not impeded based on the CSE's failure to reconvene the CSE]), here, the new information obtained by the parent included a diagnosis of borderline intellectual functioning, which was in addition to the student's previous diagnoses of mild intellectual disability and autism (Parent Ex. H at pp. 15). The reason for the referral for the independent neuropsychological evaluation was due to "concerns regarding overall independent functioning and personal safety, as well as to obtain a better understanding of [the student's] difficulties and the appropriate supports that should be implemented that will overall assist with educational and vocational planning" (id. at pp. 4, 13). The evaluation results demonstrated that the student's cognitive skills were "slightly stronger" and more developed, but he had challenges with his working memory which was found to be in the "extremely low range" (id. at p. 14). The neuropsychologist concluded that the student's cognitive abilities were "moderately less mature or developed than most individuals his age" (id.). In terms of strengths, the student was found to have "stronger problem-solving abilities" and was able to self-regulate well (id.). The student was noted to have good "foundational" academic skills and strengths in socialization and coping skills (id.). The neuropsychologist noted a "moderate

impairment" in the student's oral language skills which reflected his challenges with "functional communication" (id.). The student was also noted to have adaptive difficulties with personal care and "skills for functioning within the community" (id. at p. 15). Further, the neuropsychologist observed that the student had no difficulties with emotional regulation or behaviors but had challenges with interpersonal relationships, social communication, self-advocacy, and safety (Parent Exs. H at p. 15; S ¶ 10). The neuropsychologist stated in her direct affidavit testimony that since the student was "lower functioning" he "require[d] instruction until the age of 21 to gain functional independent skills as he transition[ed] into adulthood" (Parent Ex. S ¶ 12). In order for the student to gain independent living and vocational skills, the neuropsychologist stated that the student needed to "independently understand[] verbal language, improv[e] function[al] reading comprehension and basic math skills, travel training, vocational skills and independently complet[e] [activities of daily living] ADLs (i.e., nutrition, dressing, cleaning, etc.)" (id. ¶ 12). Lastly, the evaluator recommended a program to focus on the student's "post-high school transition years" to "help him gain more life experience and vocational skills needed for future success and independence" (Parent Ex. H at p. 16). Accordingly, I find that this updated information pertaining to the student's "independent functioning and personal safety" as he transitioned into adulthood was the information the parent was attempting to discuss with the CSE in order to determine if it would have impacted the CSE's recommendations (see Parent Ex. H at pp. 4, 13).

Furthermore, to the extent that the district erred in failing to reconvene the CSE, especially after it was agreed that the CSE would reconvene after the neuropsychological evaluation report became available, or to provide the parents with prior written notice stating the reasons why the district did not believe it was necessary to reconvene the CSE, the parent's participation was impeded as she was not able to discuss the information in the neuropsychological evaluation which reflected a new focus on independent living and vocational skills for adulthood for the student.[11] Therefore, the evidence in the hearing record does not support the IHO's finding that the district's failure to reconvene the CSE was a procedural violation that did not rise to the level of a denial of FAPE, and I find that the district deprived the student of a FAPE for the 2023-24 school year.

VII. Conclusion

Having determined that there are sufficient reasons to overturn the IHO's finding that the district offered the student a FAPE for the 2023-24 school year, and, as the district failed to cross-appeal the IHO's findings with respect to the appropriateness of Cooke or equitable considerations, the parent is entitled to direct funding of the student's tuition at Cooke for the 2023-24 school year.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

[11] The district is cautioned to comply with federal and State requirements that it provide the parents with prior written notice on the form prescribed by the Commissioner (34 CFR 300.503; 8 NYCRR 200.5[a]).

IT IS ORDERED that the IHO's decision, dated October 27, 2023, is modified reversing that portion of the decision that found the district offered the student a FAPE for the 2023-24 school year; and

IT IS FURTHER ORDERED that the IHO's decision, dated October 27, 2023, is modified by directing the district to directly fund the cost of tuition for the student's attendance at Cooke for the 2023-24 school year.

Dated: **Albany, New York**
January 25, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER