The University of the State of New York

The State Education Department
State Review Officer
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Nos. 23-156 & 23-160

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

Appearances:
Law Offices of Martin Marks, attorneys for petitioners, by Martin Marks, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

These proceedings arise under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. With respect to Appeal No. 23-156, petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be fully reimbursed for their daughter's tuition costs at the Mill Basin Yeshiva Academy Prep Program (MBYA Prep) for the 2021-22 school year. In Appeal No. 23-156, respondent (the district) cross-appeals seeking to limit the district's obligation to fund the cost of the student's tuition at MBYA Prep for the 2021-22 school year. With respect to Appeal No. 23-160, the parents appeal from the decision of an IHO that reduced the tuition award for MBYA Prep for the 2022-23 school year. In Appeal No. 23-160, the district cross-appeals from the IHO's determination that it failed to offer the student an appropriate educational program for part of the 2022-23 school year. As Appeals Nos. 23-156 and 23-160 involve the same student, the same IEP, and overlapping issues, they will be decided together. Regarding Appeal No. 23-156, the appeal must be sustained in part and the cross-appeal must be sustained in part. Regarding Appeal No. 23-160, the appeal must be dismissed, and the cross-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 these matters is presumed and, therefore, the detailed facts and procedural history of the cases and the IHO's decisions will not be fully recited here.

A CSE convened on October 29, 2019 and found the student eligible for special education services as a student with a learning disability and developed an individualized education services program (IESP) for the student recommending five periods per week of direct, group special education teacher support services (SETSS) (see SRO Ex. A).[1, 2] The student attended a general education program in a nonpublic school until November 1, 2021 when the parents unilaterally placed the student at MBYA Prep (23-156 Parent Ex. G ¶ 12).[3] On November 1, 2021, the parents entered into an enrollment contract with MBYA Prep for the 2021-22 school year (see 23-156 Parent Ex. B).[4]

On November 2, 2021, the parents requested in writing that the CSE develop an IEP and recommend a "public school placement" for the student (Dist. Ex. 4). The district conducted a psychoeducational evaluation (December 10, 2021) and Level I vocational interview (December 10, 2021) of the student (Dist. Exs. 2-3). The CSE convened on January 4, 2022 and found the student eligible for special education services as a student with a learning disability and developed an IEP for the student, recommending integrated coteaching (ICT) services for English language arts (ELA), eight periods per week; math, eight periods per week; social studies, four periods per week; and science, four periods per week, together with individual counseling services for one 30-minute session per week (23-160 Parent Ex. J at pp. 1, 13, 19). A prior written notice of the January 2022 recommendation and a school location letter were sent to the parents on March 9, 2022 and a new prior written notice and school location letter were sent on July 21, 2022 (23-160 Parent Exs. K-L; see Dist. Ex. 8). On August 16, 2022, the parents entered into an enrollment contract with MBYA Prep for the student's attendance for the 2022-23 school year (23-160 Parent Ex. C). On August 23, 2022, the parents disagreed with the recommendations contained in the

[1] When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] The hearing record in Appeal No. 23-156 includes a transcript of the impartial hearing and documents marked and entered as parent exhibits A through G, district exhibits 1 through 9, and IHO exhibits I through III; the hearing record in Appeal No. 23-160 includes a transcript of the impartial hearing and documents marked and entered as parent exhibits A through L, and IHO exhibits I through X, accordingly, all citations to transcripts and parent exhibits will be preceded by the associated appeal number, i.e., 23-156 or 23-160.

[4] MBYA Prep has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

January 2022 IEP and alleged that the assigned public high school was not appropriate for the student, and, as a result, notified the district of their intent to unilaterally place the student at MBYA Prep for the 2022-23 school year (see 23-160 Parent Ex. B).

A. July 21, 2022 Due Process Complaint Notice (Appeal No. 23-156)

In a due process complaint notice, dated July 21, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see 23-156 Parent Ex. A). The parents asserted that the student transitioned to high school for the 2021-22 school year without any current assessments or an IEP, that the parents requested a reevaluation, that they submitted a written request for an IEP in November 2021, and that after the January 2022 CSE convened and the parents received the school location letter, they observed the assigned public high school and found that the placement was not appropriate for the student at that time (23-156 Parent Ex. A at pp. 2-3). As relief, the parents requested direct payment/reimbursement for the cost of the student's tuition and related services at MBYA Prep for the 2021-22 school year (id. at p. 4).

B. September 21, 2022 Due Process Complaint Notice (Appeal No. 23-160)

In a due process complaint notice, dated September 21, 2022, the parents alleged that the district failed to offer the student a FAPE for the 2022-23 school year (see 23-160 Parent Ex. A). The September 2022 due process complaint notice repeated the allegations contained in the July 2022 due process complaint notice asserting that they observed the assigned public high school and found that the placement was not appropriate for the student (23-160 Parent Ex. A at p. 3). The parents further asserted that the district did not offer any other placement for the 2022-23 school year (id.). As a result of the lack of an updated IEP, the parents determined that MBYA Prep was appropriate for the student and requested direct payment/reimbursement of the tuition and related services at MBYA Prep for the 2022-23 school year (id. at pp. 3-4).

C. June 20, 2023 Impartial Hearing Officer Decision (Appeal No. 23-156)

On August 30, 2022, a prehearing conference was held (23-156 Tr. pp. 1-18), and six additional conferences were held on September 30, 2022, October 25, 2022, November 28, 2022, January 5, 2023, February 1, 2023, and March 2, 2023 (23-156 Tr. pp. 19-60). An impartial hearing was held on March 28, 2023 and concluded on April 20, 2023 after two days of proceedings (23-156 Tr. pp. 61-185). In a decision dated June 20, 2023, the IHO found that the district failed to offer the student a FAPE for the 2021-22 school year, that the unilateral placement was appropriate, and that equities partially favored the parents (23-156 IHO Decision at pp. 13-16, 21-22).[5]

In particular, the IHO rejected the district's assertion that it was not required to develop an IEP or implement an education program for the student for the 2021-22 school year, and further found that the district's failure to offer the student special education until March 9, 2022 impeded the student's right to a FAPE, impeded the parents' opportunity to participate in the "decision-making process," and caused a "deprivation of educational benefits" to the student (23-156 IHO

[5] The same IHO resided over the hearings in both proceedings at issue.

Decision at p. 13). In connection with the parents' unilateral placement of the student at MBYA Prep, the IHO found that MBYA Prep was "specifically designed to meet [the student's] unique special education needs," and the student made progress while at the school (id. at pp. 15-16). Next, the IHO discussed equitable considerations and found there was no evidence in the hearing record that the parents provided the requisite ten-day notice to the district (id. at pp. 17-21). The IHO further found that the district first became aware of the parents' disagreement with the recommended program in the November 29, 2019 IESP when the parents sent a letter dated November 2, 2021 requesting that the CSE develop an IEP for the student, and thereby found that a reduction in tuition for two months (September and October) prior to the parents' November 2, 2021 letter was an appropriate remedy (id. at p. 21). The IHO then discussed that the district should not be held responsible for the tuition at MBYA Prep for 60 school days following the parent's November 2, 2021 letter, giving the district time to implement an IEP after the parents' request (id.). Accordingly, the IHO held that the district was responsible for tuition from February 9, 2022 through June 30, 2022 (id. at pp. 21-22). Additionally, the IHO addressed the fact that the student attended religious instruction at MBYA Prep and reduced the tuition by an amount calculated by the IHO to be nonsecular classes (id. at pp. 22-23). Ultimately, the IHO found that the parents were entitled to reimbursement for the cost of the student's tuition in the amount of $5,000 and direct funding of the rest of the awarded tuition costs for the 2021-22 school year in the amount of $27,070 to MBYA Prep (id. at pp. 24-25).

D. June 28, 2023 Impartial Hearing Officer Decision (Appeal No. 23-160)

On February 8, 2023 a prehearing conference was held (23-160 Tr. pp. 5-11), and two status conferences were held on March 8, 2023 and April 3, 2023 (23-160 Tr. pp. 12-21).[6] An impartial hearing convened on April 24, 2023 and concluded on May 2, 2023 after two days of hearings (23-160 Tr. pp. 22-143). In a decision dated June 28, 2023, the IHO determined that the district offered the student a FAPE from September 2022 through January 3, 2023, but failed to offer the student a FAPE from January 4, 2023 through June 30, 2023, that MBYA Prep was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement/direct funding (23-160 IHO Decision at pp. 11-14, 18).[7] As relief, the IHO ordered the district to reimburse the parents for the cost of the tuition at MBYA Prep in the amount of $10,000 and to directly fund the remaining tuition awarded to MBYA Prep in the amount of $49,231 for the 2022-23 school year (id. at pp. 18-21).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review in both appeals in the parents' requests for review and the district's answers thereto, and cross-appeals, is also presumed and, therefore, the allegations and arguments will not be fully recited here.

[6] An impartial hearing was scheduled for February 6, 2023 but adjourned at the request of the parents (23-160 Tr. pp. 1-4).

[7] Similar as to the IHO's decision being appealed in Appeal No. 23-156, in the IHO's decision being appealed in Appeal No. 23-160, the IHO reduced a portion of the student's tuition based on the time the student received what the IHO found to be religious instruction at MBYA Prep (IHO Decision at pp. 18-19).

Briefly, in Appeal No. 23-156, the parents' appeal is limited to the IHO's findings with respect to equitable considerations and the reduction of the awarded tuition costs. More specifically, the parents argue that they are entitled to tuition reimbursement/direct funding of the MBYA Prep tuition for the entire 2021-22 school year, as this was not an initial referral for special education services and the student had been receiving special education services from the district for several years. Further, the parents request that additional evidence of an October 29, 2019 IESP be accepted into evidence for the completeness of the hearing record (SRO Ex. A). The district filed an answer denying the material allegations contained in the due process complaint notice. In addition, the district cross-appeals, asserting that the district's obligation to offer the student a FAPE began on February 9, 2022, 60 school days after the parent's November 2, 2021 letter referring the student for an IEP and therefore, its obligation to fund tuition began on said date and continued through to the end of the school year (23-156 Answer ¶¶ 7-10).[8] Further, the district argues that the award of tuition should be reduced based on the parents' failure to submit a ten-day notice of the unilateral placement (id. ¶¶ 12, 15). The district also submits a copy of its school calendar for the 2021-22 school year to show that February 9, 2022 was 60 school days after the November 2, 2021 letter. The parents submitted an answer to the district's cross-appeal denying the material allegations contained therein.

In Appeal No. 23-160, the main issues presented on appeal by the parents are that the IHO erred in finding that the January 4, 2022 IEP offered the student a FAPE for part of the 2022-23 school year and the parents request full tuition reimbursement/direct funding of the tuition at MBYA Prep for the entire 2022-23 school year as relief. The district submitted an answer denying the material allegations contained in the parents' request for review. The district also cross-appeals from the IHO's finding that it failed to offer the student a FAPE from January 5, 2023 through the end of the 2022-23 school year and that the parents met their burden to demonstrate that MBYA Prep was an appropriate unilateral placement for the student. In an answer to the cross-appeal, the parents deny the material allegations contained therein and assert that the district denied the student a FAPE for the entire 2022-23 school year and they met their burden that MBYA Prep was an appropriate unilateral placement for the student.

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

[8] The district does not cross-appeal the IHO's finding that MBYA Prep was an appropriate unilateral placement for the student for the 2021-22 school year, and accordingly, that finding has 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]).

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 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]).[9]

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. Preliminary Matters

1. Consolidation of Matters

On October 26, 2022, the IHO denied the consolidation of the July 21, 2022 due process complaint notice and the September 21, 2022 due process complaint notice based on the "potential settlement" regarding the July 21, 2022 due process complaint notice (see generally Interim IHO Decision). Although the IHO did not consolidate the matters underlying Appeal No. 23-156 and Appeal No. 23-160, both matters concern the student's January 2022 IEP.

State regulations concerning the conduct of impartial hearings provide that when a subsequent due process complaint notice is filed while a due process complaint is pending before

[9] 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).

an IHO involving the same parties and student with a disability, the IHO with the pending due process complaint notice "shall be appointed" to the subsequent due process complaint notice involving the same parties and student with a disability, unless that IHO is unavailable (see 8 NYCRR 200.5[j][3][ii][a]). The IHO may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately before the same IHO (8 NYCRR 200.5[j][3][ii][a][2]). When considering whether to consolidate multiple due process complaint notices, the impartial hearing officer is required to consider relevant factors including: (1) the potential negative effects on the child's educational interests or well-being; (2) any adverse financial or other detrimental consequences; and (3) whether consolidation would impede a party's right to participate in the resolution process, prevent a party from receiving a reasonable opportunity to present its case, or prevent the impartial hearing officer from timely rendering a decision (see 8 NYCRR 200.5[j][3][ii][a][4][i-iii]). In declining to consolidate the two matters under consideration herein, the IHO indicated that since the parties had requested impartial hearings with different procedural postures and the parties opposed consolidation together with the potential of settlement of one of the matters, it was simpler to maintain separate hearings (see Interim IHO Decision). I find that the IHO did not abuse his discretion by denying the consolidation of the two matters. Nevertheless, upon notice and an opportunity for the parties to be heard, and because both appeals arise from essentially the same set of facts and involve similar underlying issues, I shall exercise my discretion to decide the appeals together and both matters are addressed in this decision.

2. Additional Evidence

In Appeal No. 23-156, the parents seek the introduction of an October 29, 2019 IESP (SRO Ex. A) as additional evidence (23-156 Req. for Rev. ¶¶ 39-40). The parents contend that the October 2019 IESP was referenced during the impartial hearing (id. ¶ 39). The parents admit that it was available at the time of the impartial hearing but should now be made a part of the hearing record "for a complete understanding of the underlying arguments in this case" (id. ¶ 40). The district contends that the October 2019 IESP is irrelevant to the proceedings and is not necessary for the undersigned to render a decision (23-156 Answer ¶ 9). Additionally, in Appeal No. 23-156, the district seeks inclusion of the district school calendar for the 2021-22 school year as additional evidence.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence

during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

In this instance, information regarding the October 2019 IESP came up during the hearing. For example, as part of its direct case, the district asked the school psychologist about a prior IESP, but she could not recall if she had reviewed it (23-156 Tr. p. 114). Additionally, the student receiving services pursuant to an IESP was central to the district's assertion that the CSE was not required to develop an IEP for the student as set forth in its opening statement (23-156 Tr. p. 75), as well as the parents' response to the district's opening statement (23-156 Tr. pp. 78-79). Additionally, the IHO decision references the October 2019 IESP leading up to the discussion of the district's responsibility for developing an IEP for the student for the 2021-22 school year (see 23-156 IHO Decision at pp. 12, 21).[10] Considering all of this, the October 2019 IESP is relevant to the discussion of whether the district had the obligation to offer the student a FAPE at the beginning of the 2021-22 school year, or later on November 2, 2021 when the parents requested an IEP and public-school placement (see 23-156 Parent Ex. A; see Dist. Ex. 4). Accordingly, I will exercise my discretion and accept the October 2019 IESP into the hearing record which shall be referenced as SRO Ex. A.

Turning to the district's school calendar for the 2021-22 school year, included with the district's answer and cross-appeal, the calendar is being submitted in support of the IHO's computation of February 9, 2022 as the date that was 60 school days from the parents' November 2, 2021 letter. On review, it is not necessary for a determination in this matter and will not be accepted as additional evidence for consideration on appeal.

B. 2021-22 School Year

The January 2022 IEP is relevant in this appeal because it spanned portions of both the 2021-22 and 2022-23 school years. The January 2022 IEP had a projected implementation date of February 18, 2022 and a projected annual review date of January 4, 2023 (Dist. Ex. 1 at p. 1). Prior thereto, the last document developed by the CSE was an October 2019 IESP (see SRO Ex. A).

[10] It should be noted that the IHO references a November 2019 IESP, which is in error most likely the result of the parents' assertion in their due process complaint notice that the student received SETSS through a November 29, 2019 IESP and the parents' use of the November date in their post-hearing brief (see 23-156 Parent Ex. A at p. 2; IHO Ex. II at p. 3). The district also makes the assertion, on appeal, that the IESP was dated November 29, 2019 (see 23-156 Answer ¶ 3).

The IHO focused his initial discussion on whether the district's obligation to offer a FAPE to the student began in September 2021 or later, upon receipt of the parents' November 2, 2021 letter as argued by the district (23-156 IHO Decision at p. 10). The IHO found it was "undisputed" that the student was a resident of the district, and the student's residency triggered the district's obligation to offer the student a FAPE (id. at p. 11). Then, the IHO found that the student was unilaterally placed by her parents in a nonpublic school for the 2019-20 and 2020-21 school years and during those school years received SETSS as recommended by an IESP (id. at p. 12). Next, the IHO found that because a CSE meeting was not held until January 4, 2022 and services were not offered until March 9, 2022, the district impeded the student's right to a FAPE and the parents' opportunity to participate in the CSE process, both of which deprived the student of educational benefits (id. at p. 13).[11] Accordingly, the IHO found the procedural violation, in failing to develop an educational program for the student within the applicable time frame, deprived the student of a FAPE for the 2021-22 school year (id. at p. 14).

In its cross-appeal, the district asserts that the IHO erred in finding that the district did not offer the student a FAPE for the 2021-22 school year. According to the district, the district's obligation to develop an IEP for the student was triggered by the parents' November 2, 2021 letter, not the student's residency in the district. The district further asserts that the fact that the student previously had IESPs had "no bearing on the [district's] FAPE obligation" because equitable participation is distinct from the requirement for a FAPE.[12] Furthermore, after the parents' November 2, 2021 letter, which the district describes as an initial referral, the district contends that

[11] The IDEA and State regulations require the CSE to meet "at least annually" to review and, if necessary, to revise a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). Further, the regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA's implementing regulations and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [finding that a district's failure to finalize an IEP until after start of school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

[12] Additionally, the district contends that the parents did not assert that the district should have developed an IESP for the student for the 2021-22 school year and that the student was not entitled to an IESP because the parents did not request one prior to June first preceding the school year at issue. Generally, the State's dual enrollment statute requires parents of a New York State resident student with a disability who was placed in a nonpublic school and who sought to obtain educational "services" for his or her child to file a request for such services in the district where the nonpublic school was located on or before the first day of June preceding the school year for which the request for services was made (Educ. Law § 3602-c[2]). However, although mentioned by the district, this is not a case that involves dual enrollment under Education Law § 3602-c. The parent was not seeking dual enrollment under an IESP, therefore its June 1 deadline defense is irrelevant to the 2021-22 school year claims asserted by the parent.

it was not obligated to implement an IEP until sixty school days later, asserting that State regulation provides the district with 60 school days from a referral for special education to implement an IEP.

The parents assert that the IHO correctly found that the district was obligated to offer the student a FAPE because the student was a resident of the district and neither the student's enrollment status nor the parents' intent was relevant to the district's obligation. According to the parents, the October 2019 IESP was the student's last educational program developed by the district and the district failed to convene a CSE to develop any educational program for the student prior to the start of the 2021-22 school year. Prior to the 2021-22 school year, the parents argue that the student was known to the district as a student with a disability as she had a prior IESP and had been receiving SETSS at a nonpublic school. The parents assert that the November 2, 2021 letter was not a request for an initial referral to the CSE, as argued by the district in its closing statement, but was merely notification that the previously recommended SETSS were not appropriate and a reminder of the district's obligation to develop an IEP for the student.

Courts have recognized that a district's duty to offer the student a FAPE is triggered by the student's residency in the district, not the student's enrollment status or the parent's intent (see E.T. v. Bd. of Educ., 2012 WL 5936537, at *14-*15 [S.D.N.Y. Nov. 26, 2012] [noting that "residency, rather than enrollment, triggers a district's FAPE obligations" and "the issue of parental intent vis-à[-]vis the child's enrollment is not dispositive of whether a school district has a FAPE obligation to a disabled child"] [internal quotations omitted]). Thus, a district of residence has an obligation to provide a FAPE to a resident student with a disability that does not end with the enrollment of the student in a school that is not a district school or (see Doe v. East Lyme Bd. of Educ.,790 F.3d 440, 450-51 [2nd Cir. 2015]; District of Columbia v. Vineyard, 901 F. Supp. 2d 77, 87-88 [D.D.C. 2012]; E.T., 2012 WL 5936537, at *14-*15; see also N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1209 [9th Cir. 2008] ["A school district cannot abdicate its affirmative duties under the IDEA"]).

In its Official Analysis to Comments in the Federal Register, the United States Department of Education noted that when a student is placed in a nonpublic school located outside of the district, a student's district of residence is responsible for providing FAPE, but further indicated that "[i]f the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child" (71 Fed. Reg. 46,593 [Aug. 14, 2006]). The United States Department of Education has maintained this position, in relatively recent guidance answering the following question:

If a parent makes clear his or her intention to keep the child with a disability enrolled in the private school, is the LEA where the child resides obligated to offer FAPE to the child and develop an individualized education program (IEP) for the following school year, and annually thereafter?

> Answer: No. Absent controlling case law in a jurisdiction, after the LEA where the child resides has made FAPE available to the child, and the parent makes clear his or her intention to not accept that offer and to keep the child in a private school, the LEA where the child resides is not obligated to contact the parent to develop an IEP

> for the child for the following year and annually thereafter. However, if the parent enrolls the child in public school in the LEA where the child resides, the LEA where the child resides must make FAPE available and be prepared to develop an IEP for the child.

("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c" Attachment 1 at p. 12 available at https://www.p12.nysed.gov/specialed/publications/policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf). Courts have grappled with the effect of a parent's intention to place a student at a nonpublic school on the district's obligation to provide the student with an IEP. On the one hand, it is clear that a district violates the IDEA by refusing to convene an IEP meeting when the parent of a student who is parentally placed in a private school is making inquiries about potentially enrolling a student in a public school for special education programming and an outdated IEP in that instance is not a permissible placeholder (Bellflower Unified Sch. Dist. V. Lua, 832 F. App'x 493, 496 [9th Cir. 2020]). In another instance, in E.T. v. Board of Education of Pine Bush Central School District, after concluding that the district retained an obligation to offer the student a FAPE, the court found that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (2012 WL 5936537, at *16 [S.D.N.Y. Nov. 26, 2012]). In contrast to the court's holding in E.T., at least two federal district courts have found that an objective manifestation of the parent's intention to place a student in a nonpublic school is a threshold issue regarding whether a district remained obligated to offer the student a FAPE (see Dist. of Columbia v. Vinyard, 971 F. Supp. 2d 103, 108-10 [D.D.C. 2013] [finding the court's explanation in E.T. "illogical"]; Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15-*20 [M.D. Pa. Sept. 28, 2017]).

Turning to the facts presented in this matter, an October 29, 2019 IESP was the last educational program developed for the student prior to the start of the 2021-22 school year (see SRO Ex. A). Additionally, the parents asserted that the district provided SETSS and related services to the student through an IESP prior to the 2021-22 school year, which the district has not disputed (23-156 Tr. pp. 75, 78, 80; 23-156 Parent Ex. A at p. 2; Dist. Ex. 4).[13] In September 2021, the student attended a general education classroom at the same nonpublic school she had attended since third grade and where she received SETSS (23-156 Tr. pp. 139, 150).[14] The parent testified that within the first month of the 2021-22 school year, school staff recommended that the parent look for an ICT program from the district (23-156 Tr. p. 141). The student then moved to

[13] Here, there is no evidence that the parents revoked consent for the district to provide the student with special education services after the development of the October 2019 IESP (see 8 NYCRR 200.5[b][5][i]-[iii]; see 34 C.F.R. 300.300[b][4]).

[14] The MBYA director of special education testified that the class the student was in at the start of the 2021-22 school year was the same class she remained in throughout the year, but that as of November 1, 2021 she began receiving additional support from the special education teacher who was already assigned to the class (23-156 Tr. pp. 160-61).

an inclusion program at MBYA Prep in November 2021 (23-156 Tr. pp. 147-50). The parents signed an enrollment contract with MBYA Prep on November 1, 2021 (Parent Ex. B). On November 2, 2021, the parents sent a letter to the district CSE chairperson requesting an IEP (Dist. Exs. 4; 7 at p. 1). In response thereto, on November 3, 2021, the district sent prior written notice to the parents treating the parents' November 2, 2021 letter as a request for a "reevaluation," indicating the parents were requesting a FAPE, and further noting that it was necessary to conduct a "reevaluation" of the student (Dist. Ex. 5 at p. 1).[15] The CSE convened on January 4, 2022 and developed an IEP for the student to be implemented on February 18, 2022 (see Dist. Exs. 1 at p. 19; 9 at p. 1). On March 9, 2022, a prior written notice of the January 2022 recommendations was sent to the parents noting the student's "[c]ontinued [e]ligibility for [s]pecial [e]ducation [s]ervices and [r]ecommended [s]pecial [e]ducation [s]ervices" (Dist. Ex. 8 at p. 1). Based on the foregoing, it is clear that the November 2, 2021 letter from the parents was not a referral of the student for an initial evaluation for special education services but a request for the CSE to develop an IEP which the district treated as a request for a reevaluation.

Although it is unclear why there is a gap in the hearing record as to communication between the parents and the district regarding the student's educational programming and receipt of educational services, it appears that the student nevertheless continued to receive SETSS in accordance with the October 2019 IESP during the 2019-20 and 2020-21 school years, as well as for a portion of the 2021-22 school year up until the student began attending MBYA Prep on November 1, 2021. Additionally, although the student was receiving services pursuant to an IESP, the district has not presented any evidence indicating that the parents manifested an intention to reject a district offer of a FAPE and keep the student in the nonpublic school. Therefore, it was incumbent on the district to convene a CSE to develop an IEP for the student prior to the start of the 2021-22 school year.

The evidence in the hearing record most strongly supports the inference that the district stopped convening the CSE for annual reviews after creating the 2019 IESP, and although the student remained eligible for special education services under IDEA, there is no evidence in the record that the CSE attempted to communicate with the parents or attempted to convene the CSE learn about the parents' concerns or their intentions regarding the student on at least an annual basis. Instead, the available evidence leads to the conclusion that district simply waited until hearing from the parents, and by that time it learned what was happening, the district had already failed in its obligations to convene the CSE and provide the student with an IEP. The district's assumption that the parents in this case wanted the student's special education services to continue unchanged as described in the 2019 IESP is not a valid defense. Ultimately, the district has not pointed to any authority to support its position that it was not obligated to convene the CSE and provide the student with a special education program and related services at the beginning of the 2021-22 school year. Accordingly, the IHO's finding that the district denied the student a FAPE for the entire 2021-22 school year is upheld.

[15] A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]).

Despite finding a denial of FAPE for the 2021-22 school year, the IHO made further findings in the equitable considerations context that must also be considered in this analysis.

The parents contend that the IHO erred in finding that the November 2, 2021 letter was the first notification to the district of their disagreement with services and this finding was "not supported by the evidence and a misapplication of the law regarding the balancing of the equities." Further, the parents argue that the IHO "adopted the [d]istrict's fallacious argument" that the November 2, 2021 letter was an initial referral to the CSE.[16] The parents contend that a reduction in the amount of relief would be "inequitable" and "reward" the district for its failure to comply with the requirements of the IDEA for over two years (October 29, 2019 through January 4, 2022). The parents request tuition costs for the entire 2021-22 school year with a reduction for religious classes as determined by the IHO.[17]

The district argues that the award of tuition reimbursement should be reduced because the parents failed to file a ten-day notice of the unilateral placement. The district asserts that the IHO's proration of tuition from November 2021 until the end of the school year, was an attempt to reduce the tuition for the parents' failure to file the ten-day notice. The district contends that a twenty percent reduction to the IHO's already prorated award for tuition would be appropriate under the circumstances.

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]). 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

[16] The IHO decision does not refer to the November 2021 letter as a referral for an initial evaluation; however, the IHO adopted the 60-school day calculation used in the district's post-hearing brief (see IHO Decision; IHO Ex. I). Review of the district's post-hearing brief shows that the district asserted that the letter constituted a request for an initial evaluation and that, because it was an initial evaluation, the district had 60 school days to offer the student a placement (IHO Ex. I at p. 1).

[17] Neither party is appealing the IHO's reduction of the award of tuition for religious instruction, which was based on a percentage of the school day in which the student attended nonsecular instruction and which the IHO computed as a 10.916667 percent reduction to the total award of tuition (23-156 IHO Decision at pp. 22-23).

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., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The Second Circuit recently emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the 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"]). During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171).

The IHO found no evidence in the hearing record that the parents provided ten-day notice of the unilateral placement of the student at MBYA Prep (23-156 IHO Decision at p. 20). The IHO references the parents' November 2, 2021 letter, which does not provide notification of the student's unilateral placement at MBYA Prep but did notify the district of the parents' disagreement with the last program offered to the student that included SETSS (id.). The IHO recognized that an IHO may excuse the parents' failure to provide a ten-day notice, i.e., parents failed to receive procedural safeguards notice; however, here there was no excuse alleged by the parents (id. at pp. 20-21). Next, the IHO found that because the district was not aware of the parents' disagreement with the prior recommended program of SETSS until November 2, 2021, the award of tuition should be reduced by the first two months of the 2021-22 school year – September and October – which is the period of time before the district received notice of the parents' disagreement (id. at p. 21). The IHO then went on to find that the district had 60 school days after the parents' November 2, 2021 letter to implement a special education program for the student—November 2, 2021 to February 9, 2022 (id.). Accordingly, the IHO determined that the district was not "liable

or responsible" for the cost of the student's tuition at MBYA Prep until February 9, 2022 when the initial 60 school day implementation period expired (id. at pp. 21-22).

The parents' November 2, 2021 letter to the CSE chairperson states that the parents were "writing to request that the CSE develop an IEP and recommend public school placement" and that the CSE "previously provided SETSS and related services through an IESP" (Dist. Ex. 4). The parents further expressed that the student required a "full time special education placement" (id.). This letter expresses no disagreement with any prior IEP or IESP and provides no notice of placement at MBYA Prep (id.). Moreover, the district treated the parents' letter as a request for a reevaluation (see Dist. Exs. 5; 8). Therefore, the November 2021 letter in no way constitutes the requisite statutory ten-day notice. Nevertheless, the letter also does not alleviate the district of its responsibility to develop an IEP for the student annually, and the district's assertion in its post-hearing brief that the letter constituted a request for an initial evaluation was equally off point. To this point, the IHO's findings were inconsistent with the legal requirements of the district to have an IEP in place for the student at the beginning of the 2021-22 school year, which was also cited by the IHO. The district, despite the student's unilateral placement at MBYA Prep, remained obligated to provide the student a FAPE for the entire 2021-22 school year and as noted above, the hearing record does not include any object manifestation of the parents' intent to keep the student out of the district public schools.

Considering the above, I will exercise my discretion to reduce the award for the cost of the student's tuition at MBYA Prep due to the parents' failure to comply with the statutory notice provision. I find that overall the parent should be awarded the cost of tuition at MBYA Prep less 20 percent, but that the percentage should be inclusive of the unappealed reduction by the IHO for religious instruction.

The enrollment contract with MBYA Prep for the 2021-22 school year began on November 1, 2021 and ended on June 21, 2022 with tuition set at $80,000 (see 23-156 Parent Ex. B). An administrator of MBYA Prep submitted testimony by affidavit stating that the parents paid $5,000 and owed the balance of $75,000 (23-156 Parent Ex. C). Accordingly, I shall uphold the IHO's finding that the parents are entitled to be reimbursed in the amount of $5,000 and order the district to directly fund MBYA Prep in the amount of $59,000, which together represent 80 percent of the costs for the 2021-22 school year.[18]

[18] To the extent that the district asserts the IHO erred in finding that the parents were entitled to direct funding of tuition, I note that recent cases have called into question whether proof of an inability to front the cost of a student's tuition is required before making a direct payment award (see Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4-*5 [S.D.N.Y. Sept. 26, 2023] [ruling that parents "are not required to establish financial hardship in order to seek direct retrospective payment"]; Ferreira v. New York City Dep't of Educ., 2023 WL 2499261, at *10 [S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]; see also Maysonet v. New York City Dep't of Educ., 2023 WL 2537851, at *5-*6 [S.D.N.Y. Mar. 16, 2023] [declining to reach the question of whether parents must show their inability to pay in order to receive an award of direct tuition funding but, instead, considering additional evidence proffered by the parents about their financial means to award direct tuition payment]). As the district did not address these cases in its cross-appeal, I find no basis to overturn the IHO's finding that the parents are entitled to direct funding to MBYA Prep.

C. 2022-23 School Year

As part of the parents' appeal in Appeal No. 23-160 the parents contend that the IHO erred in finding that the January 2022 IEP "accurately reflected the results of the evaluations," was appropriate, and offered the student a FAPE for part of the 2022-23 school year. The parents argue that the IHO's finding, that the January 2022 IEP was appropriate, was erroneous because the district failed to offer any testimonial or documentary evidence to sustain its burden of proving that the January 2022 IEP offered the student a FAPE. The parents also argue that the IHO decision failed to refer to evidence in the hearing record in support of the IHO's findings.

Expanding on the parents' arguments, they assert that the January 2022 CSE recommendation for an "ICT classroom" was too large and would not have enabled the student to make progress. The parents further contend that a "mid-year" IEP places an "unreasonable" "burden of uncertainty" on the parents when they have placed the student in a nonpublic school and may have to change the student's placement. The district on the other hand contends that it offered the student a FAPE for the entire 2022-23 school year, that the January 2022 IEP was appropriate, that the January 2022 IEP was the operative IEP, that the CSE had no obligation to convene on the projected review date of January 4, 2023, and that the IHO erred in finding that the district denied the student a FAPE from January 5, 2023 through the remainder of the 2022-23 school year.

In connection with the 2022-23 school year, the IHO initially discussed the period of time from September 1, 2022 to January 4, 2023 (23-160 IHO Decision at p. 12). The IHO recognized that the parents alleged in their due process complaint notice the assigned public high school was not appropriate; however, they failed to assert any allegations about the development of the IEP, i.e., "IEP [t]eam composition, functioning levels, goals, counseling services, etc." (id.). The IHO stated that the parents "opined" that the district's recommended "ICT class [] . . . was not appropriate because of the number of students in the class" but that the parents failed to substantiate this claim (id. at pp. 12-13).[19] The IHO concluded that the district established that the January 2022 IEP was appropriate and offered the student a FAPE from September 1, 2022 to January 4, 2023 (id. at p. 13).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent

[19] The parties appeared to agree that a general education classroom with supports for most of the student's school day was appropriate for the student to make progress (23-156 Tr. pp. 111-12, 141-42, 160-61; 23-156 Parent Ex. G ¶¶ 5, 13, 17-18, 21; 23-160 Parent Ex. A at p. 2). The parent testified that her concern about the district's classroom was the expected number of students in the class, up to 35, in comparison to the size of the class the student was in at MBYA Prep, 21 (23-156 Tr. p. 143).

must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

The September 21, 2022 due process complaint notice generally alleged that the CSE "failed to provide their daughter with a FAPE . . . for the 2022-2023 school year" (23-160 Parent Ex. A at p. 1). Turning to the parents' more specific allegations, the parents repeated the same allegations from the prior school year, asserting that they notified the district on November 2, 2021 that the student "had not received an appropriate IEP or IESP and had not received a placement recommendation from the school district" (id. at p. 3). The parents then alleged that after the January 2022 CSE meeting and upon receipt of the school location letter on March 9, 2022, they observed the recommended high school placement but "found the placement was not appropriate for the student to transition at that time" (id.). Beyond alleging that the placement was not appropriate, the parents' due process complaint notice cannot be reasonably read to include any other procedural or substantive allegations concerning the January 2022 CSE meeting process or the IEP itself (see generally 23-160 Parent Ex. A). Thus, even a broad reading of the due process complaint notice does not reflect that the parents identified any claims other than as to the assigned school, in particular the issue regarding the size of a district class with ICT services was not raised as an issue related to the development of the student's IEP; the parent never argued that the student required placement in a class with a specific number of students.

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

A careful review of the district's questioning shows that the district's line of cross-examination of both the mother of the student and MBYA Prep special education coordinator did not elicit testimony related to the appropriateness of the "ICT classroom" (23-160 Tr. pp. 89-109, 111-34). Therefore, the district did not open the door to these issues (see A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d at 282-84; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9). Accordingly, allegations related to the recommendation for ICT services was not raised in the due process complaint notice and was outside the scope of this impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

Upon an independent review of the record on appeal, I find that the September 21, 2022 due process complaint notice is insufficient to raise specific procedural or substantive allegations

about the January 2022 IEP. The September 21, 2022 due process complaint notice contains general allegations and conclusory statements that a FAPE was denied, without identifying the nature of the problem of the student relating to a proposed or refused initiation or change (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). It does not identify facts relating to anything that the district proposes to change or refuses to change pertaining to the student other than that the district did not provide a new school location after the parent was unsatisfied with the assigned public high school.[20] For example, it alleges the assigned public high school "was not appropriate for the student to transition at that time" (23-160 Parent Ex. A at p. 3). The September 21, 2022 due process complaint notice is also insufficient because it otherwise fails to allege a description of the nature of the problem of the student, including facts relating to the problem (see 23-160 Parent Ex. A). As a result, the September 21, 2022 due process complaint notice failed to provide an awareness and understanding of the issues forming the basis of the complaint (see S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]; see also Application of a Student with a Disability, Appeal No. 08-146; Application of a Student with a Disability, Appeal No. 08-135). Accordingly, the parents did not not present any viable claims related to the design of the January 2022 IEP or the district's recommended programming for the 2022-23 school year.

In connection with the remainder of the 2022-23 school year (January 5, 2023 through June 30, 2023), the IHO found that the CSE's failure to convene a meeting on or before January 4, 2023 "impeded the [s]tudent's right to a FAPE" and "significantly impeded the [p]arents' opportunity to participate in the decision-making process regarding the provision of a FAPE for the [s]tudent," and "caused a deprivation of educational benefits to the [s]tudent because the program and services offered to the [s]tudent pursuant to the expired IEP were potentially no longer based upon the Student's then current functioning levels, needs" (23-160 IHO Decision at p. 12). The IHO found that this resulted in a denial of FAPE for the student for the latter portion of the 2022-23 school year (id.).

The district appeals from the IHO's decision and argues that it offered the student a FAPE for the second part of the 2022-23 school year as the January 2022 IEP was "operative" when the parents unilaterally placed the student at MBYA Prep and further, if it was determined that not holding a CSE meeting by the projected annual review date (January 4, 2023) was a procedural violation it did not rise to the level of a denial of FAPE. The parents contend that the IHO correctly found that the district's failure to conduct an annual review on or before January 4, 2023 denied the student a FAPE for the remainder of the 2022-23 school year. The parents further argue that holding a mid-year meeting places an undue burden of uncertainty on them in placing the student in a nonpublic school for an entire school year when there is the potential that an adverse finding

[20] Although the parents' class size arguments could possibly be read as fitting within the parent's assertion that the assigned public school was not appropriate after the parent's visit, the parents' assertions during the hearing and on appeal related to the number of students within the proposed ICT class are not proper challenges to the district's assigned school (M.O. v. New York City Dept. of Educ., 793 F.3d 236, 245 [2d Cir. 2015] [claims regarding class size at an assigned school are not prospective challenges to the school's capacity to provide the services mandated by the IEP, instead, they are substantive attacks on the IEP "couched as challenges to the adequacy of [the assigned school]").

with respect to a mid-year IEP could result in the parents having to fund tuition at a nonpublic school.[21]

In this instance, although the parties raise arguments related to the latter half of the 2022-23 school year, based on the district's alleged failure to convene a CSE for an annual review of the student's educational program, the due process complaint notice for this matter was filed on September 21, 2022 (see 23-160 Parent Ex. A). The projected annual review date in the January 2022 IEP was January 4, 2023 (Dist. Ex. 1 at pp. 1, 19). At the time of the September 2022 due process complaint notice it was unknown whether the district would convene and develop an IEP on or before January 4, 2023. The allegations raised by the parties pertaining to the second half of the 2022-23 school year could not have been known in September 2022, and the parents' claims were speculative and premature. Accordingly, the IHO's finding of a denial of FAPE for the second part of the 2022-23 school year was outside the scope of the impartial hearing, and any claims by the parents arising out of facts from the later portion of the 2022-23 school year must be brought in a different proceeding.

Based upon the foregoing, the IHO's decision is hereby vacated for the second part of the 2022-23 school year and the parties may address any further unresolved issues in another proceeding relating to the time from January 5, 2023, through the end of the 2022-23 school year.

VII. Conclusion

Based on the foregoing, I find that the district denied the student a FAPE for the 2021-22 school year and therefore, the parents are entitled to tuition reimbursement/direct funding for the cost of the student's tuition at MBYA Prep for the 2021-22 school year. For the 2022-23 school year, I find that the parents did not raise any claims in their due process complaint notice with respect to the operative IEP for the beginning of the school year, that the parents' assertions as to the assigned school were speculative at the time it was filed, and that the IHO ruled on matters that outside the scope of the hearing with respect to the latter portion of the school year; therefore, the parents claims set forth in the September 2022 due process complaint notice must be dismissed.

[21] As noted above, the district denied the student a FAPE for the 2021-22 school year by failing to have an IEP in place at the start of the school year; at the time the parents made their decision to place the student at MBYA Prep for the 2022-23 school year, the January 2022 IEP was the student's operative program. The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]). As has been noted in prior SRO decisions, while it may be convenient to meet and revise a student's IEP during the spring for the following school year, a school district does not offend the IDEA's procedural requirements if the CSE meets at a different point during the school year so long as it conducts a review of a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). In a slightly different context involving the timing of when IEPs must be provided to teachers (and using a December meeting example), the United States Department of Education recently reemphasized that "[t]he statute and regulations also make clear that an IEP Team meeting may be convened at any time throughout the year" (Letter to Frumkin, 79 IDELR 233 [OSERS 2021]). Accordingly, there is no merit to the parents' assertion that the January 2022 meeting date impeded their ability to assess the appropriateness of the district's programming for the 2022-23 school year.

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

THE APPEAL IN 23-156 IS SUSTAINED TO THE EXTENT INDICATED.

THE APPEAL IN 23-160 IS DISMISSED.

THE CROSS-APPEAL IN 23-156 IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IN 23-160 IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated June 20, 2023, is modified such that the parents are entitled to be reimbursed in the amount of $5,000 and the district shall directly fund MBYA Prep in the amount of $59,000 for the 2021-22 school year; and

IT IS FURTHER ORDERED that the IHO's decision, dated June 28, 2023, is modified by vacating the IHO's finding of a denial of FAPE for the period of time from January 5, 2023 through June 30, 2023 and reverse the award of tuition reimbursement and direct funding at MBYA Prep for the 2022-23 school year.

Dated: **Albany, New York**
November 21, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER