The University of the State of New York

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

No. 23-288

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:
The Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Christina Golkin, 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 for direct funding of her son's tuition costs at the Big N Little: Or Hatorah Program (Big N Little) for the 2021-22 school year. Respondent (the district) cross-appeals from the IHO's determination that the student was entitled to a free appropriate public education (FAPE). The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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) (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 facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, for the 2020-21 school year the student attended seventh grade at Or Hatorah, a religious nonpublic school, at the parent's expense (Dist. Exs. 1 at pp. 3, 12; 3 at p. 1). A CSE convened on February 25, 2021 and developed an IESP with a projected implementation date of March 12, 2021 (see generally Dist. Ex. 1). The February 2021 CSE recommended that the student receive five periods per week of direct group special education teacher support services (SETSS) and one 40-minute session per week of individual counseling services (id. at p. 9).[1]

By letter to the district dated November 2, 2021, the parent stated that she previously requested in September 2020 that the district evaluate the student and provide a special education classroom, that the IESP created for the student "[t]owards the end of the 20[20]-21 school year" was insufficient to meet the student's needs, and that the student had "been sitting at home for the last two weeks, due to his inability to function in a classroom with insufficient support" (Dist. Ex. 2 at p. 2). The parent requested the district to provide the student with an IEP and place him in a full-time special education classroom (id.). The parent further stated that, if the district did not offer the student a timely and appropriate placement, she intended to unilaterally place the student at Big N Little and commence due process to seek tuition funding from the district (id.).[2]

In an amended due process complaint notice, dated July 7, 2023, the parent alleged that the district failed to offer the student a FAPE for the 2021-22 school year (Amended Due Process Compl. Not. at pp. 1-2).[3, 4] Generally, the parent contended that she did not agree with the February 2021 CSE's recommendations, that the district failed to provide an appropriate IEP and placement for the student for the 2021-22 school year, and that such inaction by the district forced her to privately enroll the student in a special education class at Big N Little (id.). More specifically, the parent argued that the student required a full-time 12:1+1 special class "that offered individualized support, modified and simplified instruction and direction, repetition, review, modeling, prompting, social skills instruction, and the development and implementation of a behavioral plan [for the student] to make meaningful academic and functional progress for the full-time 2021-2022 school year" (id. at pp. 1-2). The parent also referenced her November 2, 2021 letter to the district in which she had requested that the district provide the student with an IEP and place him in a full-time special education classroom (id. at p. 2). The parent further

[1] The February 2021 IESP did not specify the length of the SETSS sessions (Dist. Ex. 1 at p. 9).

[2] Big N Little is a special education program housed in Or Hatorah, the same nonpublic school that the student attended for the 2020-21 school year (see Tr. pp. 43-44). Big N Little 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).

[3] The original due process complaint notice was dated June 26, 2023 (see Due Process Compl. Not. at p. 3).

[4] Although the original and amended due process complaint notices were not marked or entered into evidence during the impartial hearing, the district included them as part of the hearing record on appeal as required by State regulations (8 NYCRR 200.5[j][5][vi][a]; 279.9[a]).

alleged that the program at Big N Little was appropriate for the student and that she was seeking direct funding for the full amount of tuition (id.). As relief, the parent requested that an IHO order the student to remain in his 12:1+1 Big N Little program for the 2021-22 school year, and that the district directly fund or reimburse the student's tuition costs at Big N Little (id.).[5]

The parties convened for a prehearing conference on August 7, 2023 before the Office of Administrative Trials and Hearings (OATH) and then proceeded to an impartial hearing, which convened on September 18, 2023 and concluded on October 25, 2023, after three days of proceedings (Tr. pp. 1-157). Leading up to and during the September 18, 2023 impartial hearing date, the IHO rejected the parent's requests for an adjournment; the parent did not offer any documentary evidence at the September 18, 2023 or September 26, 2023 hearing dates and did not disclose documents to the district leading up to either date (see Tr. pp. 21-157). The parent proceeded by presenting her case in the form of live witness testimony (see Tr. pp. 38-136). The district did not produce any witness testimony as part of its case and instead only presented documentary evidence (see Tr. p. 34; Dist. Exs. 1-4). The IHO denied the parent's request to admit documentary evidence leading up to the final date of the impartial hearing slated for the presentation of closing arguments (Tr. pp. 131-34; IHO Ex. III).

In a decision dated December 15, 2023, the IHO determined that the district failed to meet its burden to prove that the February 2021 IESP was appropriate for the student for the 2021-22 school year, that Big N Little was an appropriate unilateral placement, but that equitable considerations did not weigh in favor of the parent's request for an award of direct tuition payment (IHO Decision at pp. 2, 5-17). Due to the IHO's findings, she denied the parent's requested relief (id. at p. 17).

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer with cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited here.[6] The following issues presented on appeal must be resolved in order to render a decision in this case:

1. whether the district challenges the IHO's determination that it failed to meet its burden to prove that it offered the student appropriate services for the 2021-22 school year;

2. whether the IHO erred in denying the parent's request for an adjournment of the scheduled hearing dates or to permit the parent additional time to disclose evidence in accordance with the five-day rule; and

[5] At the time the parent filed her July 2023 amended due process complaint notice, the 2021-22 school year was over. During the prehearing conference on August 7, 2023, the parent through her attorney indicated that the only relief she sought was funding for the student's tuition during the 2021-22 school year (see Tr. pp. 5-8).

[6] The parent did not submit an answer to the district's cross-appeal.

3. whether the IHO erred in determining that equitable considerations did not favor the parent's claim for tuition reimbursement or direct payment.

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 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]).[7]

While a board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]), the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, but such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for

[7] 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).

services is made (Educ. Law § 3602-c[2]).[8] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[9] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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).

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[8] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[9] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–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. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

VI. Discussion

A. Scope of Review

The IHO did not directly address the parent's claim from the amended due process complaint notice that the district failed to develop an IEP for the student for the 2021-22 school year (see Amended Due Process Compl. Not. at pp. 1-2; see generally IHO Decision). Instead, in finding that the district failed to meet its burden, the IHO determined that it was unclear from the hearing record what the February 2021 CSE relied upon in making its recommendations and that, therefore, it was "not possible to determine, based solely on the [district]'s exhibits, that at the time the CSE made its recommendations, the recommendations were reasonably calculated to enable Student to make progress appropriate in light of his circumstances" (IHO Decision at p. 9). In its cross-appeal, the district argues that the IHO improperly applied a FAPE analysis to this matter and that there was no evidence that the parent was seeking a FAPE for the student during the 2021-22 school year. The parent did not submit an answer to the district's cross-appeal. However, regardless of whether the parent was actually seeking an IESP or an IEP, the district does not cross-appeal the IHO's finding that it failed to meet its burden to prove that the recommendations in the February 2021 IESP were appropriate for the student for the 2021-22 school year or argue that the IHO exceeded the scope of the impartial hearing in reaching such a determination (see IHO Decision at p. 9).[10] In addition, the district does not appeal the IHO's finding that Big N Little was an appropriate unilateral placement (see id. at p. 13). Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CRF 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]).

B. Conduct of the Impartial Hearing

The parent argues that the IHO should have granted her adjournment requests to allow her additional time to disclose evidence pursuant to the five-day rule. More specifically, the parent argues that the IHO's conduct in declining to grant her requests for adjournments denied her the opportunity to a fair and impartial hearing, was prejudicial, and further, that she was not in the position to withdraw the matter because it involved a prior school year and her claims would have been barred by the statute of limitations. The parent also argues that the district would not have

[10] The IHO set forth the FAPE standard in the decision but examined the appropriateness of the February 2022 IESP (see IHO Decision at pp. 7-9). To the extent the district's cross-appeal could be deemed to challenge the IHO's application of the FAPE standard, the district has not explained how examination of the February 2022 CSE's recommendations as equitable services under the State's dual enrollment statute would have resulted in a different outcome. The dual enrollment statute has been routinely treated by the New York Court of Appeals as providing eligible students with an individual right to special education services that must be tailored to the student's particular needs by the CSE as well as the right to seek redress through the due process hearing system called for by the IDEA (see Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289 [2010] [reviewing due process hearing determinations and noting that the pertinent question is what the educational needs of the particular student require]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 188 [1988] [noting that services under the dual enrollment statute must take into account the individual educational needs of the student in the least restrictive environment]). Under the present circumstances, the application of the equitable services standard would not have made a difference given the IHO's finding that the hearing record was insufficiently developed to determine if the IESP met the student's needs (IHO Decision at p. 9).

been prejudiced if the IHO permitted her additional time to submit disclosures because the request was made almost a week in advance of the September 18, 2023 impartial hearing, the district did not intend to call any witnesses, and the district would have had time to review the evidence, examine the parent's witnesses, and present any rebuttal witness if necessary.

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Among other due process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). If a party fails to disclose all completed evaluations, the prohibition against introduction of evaluations is discretionary insofar as an IHO "may" bar a party from introducing an evaluation (34 CFR 300.512[b][2]; 8 NYCRR 200.5[j][3][xii][a]). Courts have not enforced absolute adherence to the five-day rule for disclosure, but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. Apr. 9, 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

In this matter, the parties convened for a prehearing conference on August 7, 2023 to select dates for the impartial hearing (Tr. pp. 1-20). The IHO suggested a few dates in the beginning of September to which the district representative indicated that she would prefer a later date due to witness availability (Tr. pp. 10-11). The IHO then suggested September 11, 2023 as a potential impartial hearing date, but the parent's attorney represented she would not be available and also inquired as to how many hours the impartial hearing would be scheduled for (Tr. p. 11). The IHO answered that she liked to set aside two hours for each party and was looking for a four-hour block (id.). The parent's attorney then interposed whether a date in October would be possible due to her availability (id.). The district representative suggested that the parties schedule two impartial hearing dates, one date for each party to present their case (Tr. pp. 11-12). The parties agreed to have the district present its case on September 18, 2023 from 10:00 a.m. to 12:00 p.m., followed

by the parent's case either that same day or on September 26, 2023 from 2:00 p.m. to 4:00 p.m. (Tr. pp. 14-16). The parent requested an extension of IHO's decision timeline "to allow additional time for the hearing," which the district joined, and the IHO granted (see Tr. p. 17; Aug. 7, 2023 Order of Extension). In an email to the parties dated August 7, 2023, the IHO confirmed the hearing dates that the parties had agreed upon (IHO Ex. I at p. 1).

Regarding the parties' disclosure of evidence, the IHO stated during the August 7, 2023 prehearing conference that, "in terms of the disclosures, the five-day document exchanges," would be addressed between the parties, but the IHO requested "a copy of any documents [the parties were] going to use at hearing . . . by close of business the day before the hearing" (Tr. p. 18). Regarding affidavits in lieu of direct testimony, the IHO stated such affidavits does not have to comply with the five-day disclosure rule but should be sent to the other party "so they have long enough to look it over to formulate any cross-exam questions" (Tr. p. 19).

On September 12, 2023, the parent through her attorney, requested an adjournment via email stating "additional time [wa]s needed to prepare for the hearing" which the IHO denied stating "[b]oth parties agreed to the hearing dates on August 7, [2023,] which left adequate time to prepare" (IHO Ex. II). At the September 18, 2023 impartial hearing, the parent through her attorney again requested an adjournment to which the district objected and stated "[t]he fact that we have not been provided with any disclosures from the [p]arent will put us at a distinct disadvantage if we are to proceed today" (Tr. pp. 25-27). The district also stated that it was not in a position to agree to an extension (Tr. p. 26). The IHO again denied the parent's adjournment request, citing the same reason as before—that the parties agreed on August 7, 2023 to the impartial hearing dates and there was sufficient time to prepare (Tr. p. 27). At the close of the September 18, 2023 hearing date, the IHO indicated that the parent could present her case on September 26, 2023 and that, on that date, the district would be "free to raise any objections to the Parent's disclosure or lack of again at that time" (Tr. p. 35). There is no indication in the hearing record that between September 18, 2023 and September 26, 2023 that the parent disclosed her documentary evidence to the district.

During the September 26, 2023 impartial hearing, after both parties closed their cases and agreed on an additional hearing date to present their closing arguments, the parent's attorney requested that she be permitted to disclose to the district the documents the parent wanted to submit into evidence (Tr. pp. 131-32). The district objected, stating that the parent closed her case and that if the IHO allowed the parent to submit documents at the end of the hearing process it would be unfair to the district (Tr. pp. 132-33). The IHO responded "I think it's late to bring in more evidence" and determined that it was not a particular instance where documentary evidence should be allowed after both parties have concluded their cases (Tr. pp. 133-34). The IHO then went on to explain that the district could request to present rebuttal witnesses at the final hearing date and that, if the district requested to present such a witness, the IHO would then consider whether such witness would be prejudicial "given [her] position on the [p]arent's case" (Tr. p. 134). The IHO further stated that the rebuttal witnesses would be limited to "whatever they're rebutting, which is already in the record" and that the district had until September 29, 2023, to make such a request (Tr. pp. 133-34). The district did not make a request to present a rebuttal witness.

On October 12, 2023, the parent through her attorney, emailed the district and the IHO a disclosure list of documents and requested that the IHO admit the documents into the record "so as not to prejudice the [p]arent" (IHO Ex. III). The IHO denied the parent's request (id.).

Initially, based on the foregoing, the IHO did not abuse her discretion in denying the parent's request to reschedule the impartial hearing. The parent's attorney did not specify in her September 12, 2023 adjournment request that such request was being made to be able to timely disclose the documents to the district's representative five days prior to the hearing date (see IHO Ex. II). Moreover, the parent's attorney did not articulate with specificity as to why an adjournment was needed other than for "additional time" to prepare for the impartial hearing (id.). When repeating the request for an adjournment during the September 18, 2023 hearing date, the parent mentioned the need for time to send the disclosure, indicating she could "try to send it out" that day," but the parent did not otherwise articulate a reason for the request to reschedule the hearing or explain why there was such a delay in providing disclosures to the district (see Tr. p. 25). Further, the IHO had already granted an extension to the decision timeline and allowed the parties to choose hearing dates convenient to their schedules (Tr. pp. 10-17; Aug. 7, 2023 Order of Extension).

In addition, the parent's statement that she was denied "a fair and impartial hearing in this matter" as she was "not permitted to submit disclosure in the case" (Req. for Rev. ¶ 14) is not supported by the hearing record. The parent had almost seven weeks between the prehearing conference on August 7, 2023 and the second impartial hearing date on September 26, 2023 to prepare and disclose her documentary evidence and has not offered any explanation on appeal as to why this was insufficient time. It was not until the end of the September 26, 2023 impartial hearing, after the district had rested and the parent had presented testimonial evidence, that the parent's attorney represented that the disclosure list was complete and ready to send, as the parent's attorney stated "I'd like to make a request to be permitted to send in Parent's disclosure. I apologize for not having been able to send sooner, but I would like to make that request" (Tr. p. 132). The parent's attorney did not indicate why she was not able to provide the disclosure at an earlier date (see Tr. pp. 132-34). Thus, even if the IHO had discretion to admit evidence into the hearing record that had been untimely disclosed leading up to one of the impartial hearing dates scheduled for the presentation of evidence, as the parent argues (see Req. for Rev. ¶ 16), the parent did not even attempt to disclose the documents until after the close of both parties' cases. Instead, the parent disclosed the documents only leading up to the last hearing date, which was set solely for the presentation of closing arguments. Further, the parent has not attempted to submit any additional evidence to be considered on appeal (see generally Req. for Rev.).

Moreover, upon my independent review of the hearing record, I find that the IHO conducted the impartial hearing in a manner consistent with due process. In fact, review of the hearing transcript shows that both parties were treated fairly, with courtesy, and with respect by the IHO during the impartial hearing (Tr. pp. 1-157). The IHO correctly requested and offered clarification of issues in dispute, questioned witnesses, and made efforts to maintain the decorum of the proceedings while ensuring that each party had the right to be heard in an orderly manner (see, e.g., Tr. pp. 52, 82, 88-90, 95-100, 107, 109-10, 113-14, 120, 121-22, 125, 132-34). Overall, I find no merit to the parent's allegation that the IHO abused her discretion in declining to adjourn the scheduled hearing dates or in declining to allow the parent's introduction of the documentary evidence when it was untimely disclosed on October 12, 2022.

C. Equitable Considerations and Relief

Under the federal standard, 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. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014], [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

With regard to fashioning equitable relief under the IDEA for private school tuition, the Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington– Carter framework" (E.M., 758 F.3d at 453; see also Mr. and Mrs. A, 769 F. Supp. 2d at 430 [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). In Burlington, the Court stated that

"[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (Burlington, 471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

For the reasons set forth below, I decline to disturb the IHO's findings that equitable considerations did not weigh in favor of an award of tuition funding and that the parent did not demonstrate her legal obligation to pay for the student's tuition at Big N Little. The IHO conducted a well-reasoned analysis of the relevant evidence and did not abuse her discretion in denying the parent's requested relief on equitable grounds (E.M., 758 F.3d at 461; Bd. of Educ. of Wappingers Cent. School Dist. v. M.N., 2017 WL 4641219, at *10 [S.D.N.Y. Oct. 13, 2017]).

Initially, the IHO discussed the relevant statutes, State and federal regulations, and caselaw concerning an award of tuition funding, including a discussion of the law with respect to equitable considerations consistent with that set forth above (IHO Decision at pp. 13-17). Next, the IHO set forth a thorough written summary of the evidence and testimony, including the instances in the hearing record where contradictory or confusing facts and testimony existed (id.).

With respect to the parent's request for direct payment, the IHO's decision set forth in detail the facts and reasoning upon which she based her determinations (IHO Decision at pp. 14-17). The IHO determined that the parent was not entitled to direct payment because there was no evidence of an enrollment contract or other agreement between the parent and Big N Little that established the parent's financial obligation to pay for the special education program provided by Big N Little for the 2021-22 school year (id. at p. 15). The IHO noted that the Big N Little supervisor testified as to the monthly cost of the student's tuition, that the parent had not made any payments toward the cost, and further noted that the Big N Little supervisor did not testify to any agreement between Big N Little and the parent (id.; see Tr. pp. 73-74). The IHO also noted that the parent testified regarding her income but did not testify to whether she had an obligation to pay for the student's special education program provided by Big N Little (IHO Decision at p. 15; see Tr. p. 106).

The parent argues that she was not permitted to introduce the enrollment contract and that the testimony from the Big N Little supervisor should be sufficient to show that the parent had an obligation to pay; however, there is no indication in the hearing record that the parent attempted to offer an enrollment contract into evidence, and, as indicated above, I decline to disturb the IHO's decision denying the parent's attempt to offer unidentified documentary evidence after the close of testimony. In addition, the parent could have introduced affidavits or additional testimonial evidence to support her argument that she had an obligation to pay for the student's 2021-22 program provided by Big N Little, but she did not do so. In her request for review, the parent states the "testimony clearly delineates an obligation to pay the tuition" but she does not point to

any specific testimony other than the Big N Little supervisor's testimony regarding the price of the program per month (see Req. for Rev. ¶ 24). Moreover, the parent did not attempt to submit any additional evidence for consideration on appeal.

The IHO also made determinations in the alternative regarding equitable considerations that would warrant a reduction of relief if such relief was going to be awarded. Regarding the parent's 10-day notice letter, the IHO determined that the 2021-22 school year started on September 13, 2021 and that the parent's 10-day notice letter dated November 2, 2021 was almost two months late (IHO Decision at p. 16). The IHO also noted that the parent's 10-day notice indicated her concerns with the 2021 IESP and requested an IEP, but on January 28, 2021 the parent gave conflicting information to the CSE in which she indicated that she did not want a "FAPE" but rather an "IESP with services" (id.; see Dist. Exs. 2; 4 at p. 2).[11] The IHO determined that if she was awarded relief in this matter, the late 10-day notice warranted an equitable adjustment of one-fifth of the total tuition cost (IHO Decision at p. 17).

The parent argues that, once it was established that a district did not provide a FAPE, the district could not then argue that the equities were in its favor (Req. for Rev ¶ 19; citing N.R. v. Dep't of Educ. of City Sch. Dist. of City of New York, 2009 WL 874061 [S.D.N.Y. Mar. 31, 2009]). However, this argument has been soundly rejected by the courts that have found that "[t]here would be no need for a third prong—the equities—if it were the case that a finding of a denial of FAPE and an appropriate unilateral placement (the first two prongs) precluded denial or reduction of reimbursement costs for families" Donohue v. New York City Dep't of Educ., 2021 WL 4481344, at *10 n.4 [S.D.N.Y. Sept. 30, 2021]; see Melendez v. Porter, 2023 WL 4362557, at *9 [E.D.N.Y. July 6, 2023]). Further, I do not find that this is an instance where the district would be precluded from arguing that equitable considerations favored it rather than the parent (see N.R., 2009 WL 874061, at *7 [finding that the district's "abdication of its responsibility" was so clear that equitable considerations weighed in the parents' favor]; see, e.g., Application of the Dep't of Educ., Appeal No. 13-072).

Overall, the IHO relied upon the evidence in the hearing record as well as assessments about the witnesses' credibility to concluded that equitable considerations did not support an award of tuition funding. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at

[11] The IHO also noted that during the impartial hearing, the parent denied that she had requested an IESP rather than an IEP (IHO Decision at p. 16; see Tr. pp. 106-110). However, the IHO determined that the parent lacked credibility regarding her communications with the district and the CSE and regarding her income because she avoided answering some questions, appeared to be confused, failed to give details when asked to clarify, and repeated generalized answers rather than responding to the question (IHO Decision at p. 7). The parent did not appeal the IHO's credibility findings and, as noted below, I defer to the IHO's credibility findings. Had the IHO found a denial of a FAPE based on the district's failure to develop an IEP, evidence of the parent's communications to the district regarding the desire for an IESP versus an IEP may have been an additional equitable factor supporting a reduction or denial of tuition funding (see E.T. v. Bd. of Educ. of Pine Bush Cent. Sch Dist., 2012 WL 5936537, at *14-*16 [S.D.N.Y. Nov. 26, 2012] [noting 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"] [internal quotations omitted]).

*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, neither non-testimonial evidence in the hearing record nor the hearing record read in its entirety compels a contrary conclusion with regard to the credibility of the witnesses.

As such, there is ample basis in the hearing record to support the IHO's credibility findings as well as her weighing of the evidence in the hearing record and her ultimate determination to deny direct funding on equitable grounds and given the lack of evidence of the parent's obligation to pay for the student's tuition.

In light of the totality of circumstances in this matter and a full, independent review of the impartial hearing record, I find no abuse of discretion in the IHO's determination to deny direct funding in full.

VII. Conclusion

I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 29, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER