The University of the State of New York

The State Education Department
State Review Officer
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No. 24-080

Application of a STUDENT WITH A DISABILITY, by her 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 Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, Esq., and Brian J. Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) reimburse her for her daughter's tuition costs at Strivright Auditory Oral School of New York (Strivright) for the 2023-24 school year. The appeal must be sustained in part and the matter remanded to the IHO for further proceedings.

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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications

of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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 student "present[ed] with delays in social, cognitive, receptive and expressive language, in focus and attention as well as in processing skills, and most prominently in her speech

intelligibility" (Parent Ex. B at p. 2). Additionally, the student exhibited "severe auditory processing delay, as well as developmental, academic, linguistic, motor, and social/emotional delays" (Parent Ex. J ¶ 12). For the 2022-23 school year, the student attended a 12:1+2 preschool special class at Strivright (Parent Ex. H; Dist. Exs. 5 at p. 1; 8 at p. 1).[1]

In January 2023 and March 2023, the district conducted evaluations in preparation for the student's transition to school-age programming (see Dist. Exs. 5; 8). The CSE convened on March 14, 2023, and, finding the student was eligible for special education as a student with a speech or language impairment, developed the student's IEP to be implemented beginning September 2023 (see generally Dist. Ex. 5).[2] The March 2023 CSE recommended a 12:1+1 special class placement for math, English language arts (ELA), social studies, and science in a district non-specialized school with two 30-minute sessions per week of individual occupational therapy (OT), two 30-minutes sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (id. at pp. 12-13, 17).

On April 13, 2023, the Committee on Preschool Special Education (CPSE) convened, determined the student was eligible to receive special education as a preschool student with a disability, and recommended 12-month services for July and August 2023 (see Parent Ex. B). Specifically, the CPSE recommended a 12:1+2 special class placement at an approved special education program with two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group of two (id. at p. 1; 17; 20). The CPSE also recommended special transportation in the form of a minibus (id. at p. 20).

The parent entered into a contract on August 30, 2023 with Strivright for the student's attendance for the 2023-24 school year beginning September 2023 (Parent Ex. D). According to the contract, the parent agreed to pay for a classroom placement from September to June, a registration fee, and additional services consisting of parent counseling and training, OT, and speech-language therapy (id.).

In a letter to the district dated September 1, 2023, the parent indicated her disagreement with the recommendations contained in the March 2023 CSE IEP and notified the district that she did not receive a school location letter indicating the particular public school site to which the district assigned the student to attend for the 2023-24 school year, and, as a result, the parent notified the district of her intent to unilaterally place the student at Strivright and seek public funding for such placement (see Parent Ex. C).

A. Due Process Complaint Notice

In a due process complaint notice dated September 11, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year

[1] According to the student's IEP dated March 14, 2023, the student attended a "smaller sized preschool classroom [composed of] 13 students, with 1 teacher and 3 assistants" (Dist. Ex. 5 at p. 1).

[2] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

(see Parent Ex. A).[3] The parent indicated that she agreed with the April 2023 CPSE IEP developed for summer 2023, which mandated a 12:1+2 special class at an approved special education program with two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group of two (id. at pp. 1-2). However, the parent contended that March 2023 IEP created for the 10-month portion of the 2023-24 school year was not appropriate because the CSE inappropriately reduced the recommendations from a 12-month program in a 12:1+2 special class to a 10-month program in a 12:1+1 special class (id. at p. 3). Further, the parent asserted that she did not receive notice of an assigned public school site that would have been able to implement the IEP (id. at p. 4).

The parent also alleged that, because of the district's failures, she was "left with no choice but to continue to implement the 12-month 12:1:2 Special Class program at [Strivright] and seek reimbursement from the [district]" (Parent Ex. A at p. 5). The parent alleged that Strivright was appropriate because it provided instruction, support, methodologies, supervision, and services that were specifically designed to meet the student's unique needs (id.).

For relief, the parent requested reimbursement for the costs of the student's attendance at Strivright for the 2023-24 school year and an order that the recommendations in the April 2023 IEP continue for the 2023-24 school year (Parent Ex. A at pp. 5-6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 17, 2023 and concluded on January 4, 2024 after two days of proceedings (see Tr. pp. 1-77).[4] In a decision dated February 1, 2024, the IHO found that the district offered the student a FAPE for the 2023-24 school year and denied the parent's requested relief (IHO Decision at pp. 4-7). The IHO found that the April 2023 IEP with which the parent agreed was the operative IEP for purposes of examining the district's offer of a FAPE and, as the parent agreed with the recommendations set forth in the April 2023 IEP, the district did not deny the student a FAPE (id. at p. 7). Given this determination, the IHO found it unnecessary to address the appropriateness of the unilateral placement or equitable considerations but did note that the timing of the contract with Strivright and the parent's 10-day notice to the district were equitable factors that would have weighed against an award of tuition reimbursement (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in determining the district offered the student a FAPE for the 2023-24 school year given that the district relied on documentary evidence alone, which did not address the "massive shift in program recommendation" or provide a rationale

[3] Both parties offered copies of the parent's September 11, 2023 due process complaint notice into evidence (compare Parent Ex. A, with Dist. Ex. 1). For purposes of this decision only the parent exhibit will be cited.

[4] On November 16, 2023, the district executed a pendency implementation form agreeing that the student's pendency placement was based on the April 2023 IEP and consisted of a 12:1+2 special class with related services of speech-language therapy and OT, in addition to special transportation (Pendency Implementation Form).

as to how such a program shift was appropriate. The parent asserts that the IHO erred in finding the April 2023 CPSE IEP was the operative IEP. The parent also argues that the lack of a timely school location letter denied her meaningful participation in the placement process. The parent further argues that the IHO erred in determining that equitable considerations did not weigh in favor of the parent's request for relief because of the timing of her entering an enrollment contract with Strivright and her letter to the district providing notice of her intent to unilaterally place the student.[5]

Additionally, the parent claims that the IHO's decision contains several significant errors and omissions where there appears to be text missing; the parent argues this warrants a remand to allow the IHO to complete the decision.

For relief, the parent requests that the IHO's finding that the district offered the student a FAPE for the 2023-24 school year be reserved and that the district be directed to fund the student's program at Strivright, or in the alternative, that the matter be remanded for further consideration.

In an answer, the district concedes that it did not defend its offer of a FAPE to the student during the impartial hearing, noting that the documentary evidence it offered during the impartial hearing was meant to challenge the parent's unilateral placement and equitable considerations. Nevertheless, the district asserts that the IHO decision to deny the parent's request relief should not be disturbed since the parent has not properly appealed the IHO's lack of determination regarding the appropriateness of the program provided by Strivright. The district further argues that the parent's request for review should be dismissed for failure to comply with practice regulations governing appeals before the Office of State Review.

In a reply to the district's answer, the parent argues, among other things, that she complied with practice regulations governing appeals and did not need to extensively address the IHO's lack of determination regarding the appropriateness of Strivright because there was no genuine question regarding the appropriateness of the unilateral placement.

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]).

[5] The parent submits additional evidence with her request for review to corroborate her arguments on appeal (see Req. for Rev. at pp. 1-2; SRO Ex. A). However, given the ultimate determination herein remanding the matter, there is no need to address the parent's request to submit additional evidence for consideration on appeal. It is left to the IHO's sound discretion on remand to determine whether additional evidence is necessary to complete the hearing record.

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]).[6]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [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 – Compliance with Practice Regulations

As a threshold matter, it must be determined whether or not the parent's appeal should be dismissed for failing to comply with State regulations governing appeals before the Office of State Review.

The district argues that the parent's appeal papers failed to contain a notice of request for review and an affidavit of verification. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a notice of request for review, a verified request for review, and other supporting documents upon a respondent (8 NYCRR 279.4[a], [g]). State regulation

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

provides that all pleadings shall be verified by a party and that "[a]ll oaths required by this Part may be taken before any person authorized to administer oaths by the State of New York" (8 NYCRR 279.7[b]). Additionally, each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3; 279.4[a]).

On March 8, 2024, the parent filed with the Office of State Review: a notice of request for review dated March 8, 2024; a request for review dated March 5, 2024; an affidavit of verification notarized on March 6, 2024; and an affidavit of service notarized March 8, 2024. According to the affidavit of service, the district was served "the attached Request for Review" on March 8, 2024 (Parent Aff. of Service). This statement does not clearly identify if any documents other than the request for review, such as the notice of request for review or affidavit of verification, were actually served upon the district on March 8, 2024.

Here, while it is unclear from the parent's affidavit of service which documents were actually served upon the district on March 8, 2024, the district does not allege that its ability to timely prepare, serve, or file an answer was compromised or prejudiced in any way due to the lack of a verification or a notice of request for review. Moreover, the parent's attorney in the reply indicates that, to the extent that the verification and the notice of request for review was not originally served on the district with the request for review, such an omission was a clerical error and that a copy of each was provided once the attorney for the parents realized the district did not receive such documents (Reply at p. 1).[7] Accordingly, I decline to exercise my discretion and dismiss the parent's request for review for these alleged failures.

B. IHO's Decision and Remand

The IHO erred in relying on the April 2023 CPSE IEP to examine the district's offer of a FAPE to the student for the 10-month portion of the 2023-24 school year (see IHO Decision at p. 7). The March 2023 IEP had a projected implementation date of September 7, 2023 and a projected date of annual review of March 14, 2024 (Dist. Ex. 5 at pp. 1, 12-13). As a preschool student with a disability, the student was entitled to continue to receive special education and related services under the CPSE through summer 2023 (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]). Thus, the CPSE developed the April 2023 preschool IEP to be implemented through summer 2023 only (Parent Ex. B). Accordingly, although the April 2023 preschool IEP was developed after the March 2023 IEP, it did not supersede it, and the IHO erred in relying on the April 2023 preschool IEP to assess the district's offer of a FAPE for the 10-month portion of the 2023-24 school year (compare Dist. Ex. 5, with Parent Ex. B).

Given the IHO's error in this regard, the IHO did not make a determination regarding whether the March 2023 IEP, the operative IEP for the 10-month portion of the 2023-24 school

[7] As correctly identified by the district, the parent's attorney has been previously cautioned about his carelessness undertaken in his appeal filings (see Application of a Student with a Disability, Appeal No. 22-169, at p. 9; Application of a Student with a Disability, Appeal No. 22-162, at pp. 9-11). Nevertheless, for the reasons set forth above, I decline to exercise my discretion to reject the parent's appeal on the basis of the nonconformities that occurred in this matter.

year, offered the student a FAPE. It is, however, unnecessary to examine the parent's claims regarding the March 2023 IEP or the notice of the assigned public school site because, in its answer, the district concedes that it did not defend its offer of a FAPE to the student and, therefore, essentially concedes it denied the student a FAPE for the 2023-24 school year despite that the IHO's decision was rendered in its favor (see Answer ¶ 7; see also IHO Decision at pp. 5-7).

As the district has conceded it failed to offer the student a FAPE, the next inquiries relate to the appropriateness of the unilateral placement and equitable considerations. Because the IHO determined that the district offered the student a FAPE for the 2023-24 school year, he declined to address the appropriateness of Strivright as a unilateral placement or equitable considerations (IHO Decision at p. 7). However, "as a point of emphasis," the IHO indicated that, if he had reached the question, he would have found that equitable considerations did not favor the parent given the timing of the parent's contract with Strivright and the letter providing notice of the unilateral placement relative to the beginning of the school year (id.).

With respect to equitable considerations, the IDEA 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 or CPSE 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]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]).

Here, it is unclear from the IHO's decision how he weighed the timing of the contract and the parent's 10-day notice letter and whether, in his view, the equitable considerations warranted a

full or partial reduction of the relief sought by the parent. As noted above, the parent executed the contract on August 30, 2023 and provided the district notice of her intent to unilaterally place the student at public expense on September 1, 2023 (Parent Exs. C; D). The parent indicated that the student would start at Strivright on September 5, 2023 (Parent Ex. I ¶ 9). The projected implementation date of the March 2023 IEP was September 7, 2023 (Dist. Ex. 5 at p. 1). Accordingly, the parent's notice was not provided 10 days prior to the parent unilaterally removing the student from the public program (Parent Ex. D). It is unclear whether the IHO viewed this delay as a complete bar to an award of tuition reimbursement. With respect to the contract, it is unclear from the IHO's decision if he found the timing, in conjunction with the 10-day notice letter, too close to the beginning of the school year or, as the parent interprets it, too early, thus demonstrating that the parent did not have an open mind regarding the district's program offer. As to the latter, the Second Circuit has held that, even when parents have no intention of placing a student in the recommended program, it is not a basis to deny a request for tuition reimbursement absent a finding that the parents "obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA" (C.L., 744 F.3d at 840).

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

As the IHO did not address the appropriateness of the unilateral placement and as the IHO's determination regarding the equitable considerations was stated in the alternative and is unclear with respect to the impact on a potential award of tuition reimbursement, the determination regarding equitable considerations must be vacated and the matter remanded to the IHO for further consideration of the appropriateness of Strivright and a weighing of equitable considerations.[8]

The IHO upon remand should ensure that an adequate record is developed upon which to base the necessary findings of fact and of law relative to the parents' requested relief. I note that at this juncture the 2023-24 school year is much further along compared to when the impartial hearing took place between November 2023 and January 2024, and I will leave it to the IHO's sound discretion regarding adequate development of the hearing record on those topics and whether to provide the parents an opportunity to present additional evidence regarding the student's

[8] The district in its answer contends that parent did not properly raise on appeal the IHO's lack of determination regarding the appropriateness of Strivright and thus the undersigned should not address the issue further on appeal. Though the parent did not outright raise an issue with the lack of such determination in her request for review, the parent requests relief in the form of tuition funding for the student's unilateral placement at Strivright which cannot be awarded without addressing whether the program at Strivright was appropriate (see Carter, 510 U.S. at 14; Burlington, 471 U.S. at 369-70; Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020]). Further, given that the district essentially concedes on appeal that it did not provide a FAPE to the student during the 2023-24 school year and the IHO did not have the benefit of the district's position in this regard at the time of his decision, the more appropriate action at this juncture is to remand the matter to the IHO for further determinations as addressed above.

programming and progress at Strivright and a concomitant opportunity for the district to respond. Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues left to be resolved at the hearing (see 8 NYCRR 200.5[j][3][xi][a]).

VII. Conclusion

Given the district's concession that it did not offer the student a FAPE for the 2023-24 school year, the IHO's decision to the contrary must be reversed. Having determined that the IHO's decision regarding equitable considerations must be vacated, and, as the IHO did not address the appropriateness of the parent's unilateral placement, this matter is remanded to the IHO to make determinations on these issues.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated February 1, 2024, is vacated in its entirety; and

IT IS FURTHER ORDERED that, in light of the district's concession that it did not offer the student a FAPE for the 2023-24 school year, the matter is hereby remanded to the IHO to determine whether Strivright is an appropriate unilateral placement and whether equitable considerations weigh in favor of an award of tuition reimbursement for all or a portion of the student's tuition.

Dated: **Albany, New York**
May 16, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER