The University of the State of New York

The State Education Department
State Review Officer
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No. 24-286

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:
Law Office of Erika L. Hartley, attorneys for petitioner, by Erika L. Hartley, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Irene Dimoh, 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 reduced the award of reimbursement/direct funding of her daughter's tuition at the Winston Preparatory School (Winston Prep) for the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student has received a diagnosis of attention deficit hyperactivity disorder (ADHD) (Parent Ex. E at p. 1).[1]

[1] The hearing record contains multiple duplicative exhibits (compare Parent Exs. E-G, with Dist. Exs. 5-7). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit were identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]). In addition, although the IHO declined to admit into evidence several of the district's proposed exhibits and the district withdrew one exhibit during the impartial hearing, as part of the hearing record on appeal, the district filed all of its exhibits as

For the beginning of the 2023-24 school year, the student was eligible for special education as a student with a learning disability and attended a charter school where she received integrated co-teaching (ICT) services together with individual and group counseling, individual and group occupational therapy (OT), and individual and group speech-language therapy (Dist. Ex. 11 at p. 1).[2]

On September 19, 2023, the district conducted a psychoeducational reevaluation (see Dist. Ex. 11). A social history update was conducted with the parent on September 21, 2023 (see Dist. Ex. 12).

On October 24, 2023, a CSE convened; however, the parent did not attend (see generally Dist. Ex. 1). The October 2023 CSE found the student continued to be eligible for special education services as a student with a learning disability and recommended a 12:1+1 special class in a State-approved nonpublic day school together with the following related services: one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, one 30-minute session per week of group OT, one 30-minute session per week of individual OT, one 30-minute session per week of group speech-language therapy, and one 30-minute session per week of individual speech-language therapy (id. at pp. 1, 15-16, 22). Additionally, the October 2023 CSE recommended that the student have a computer, tablet, or laptop throughout the school day (id. at p. 16).

The parent disagreed with the recommendations contained in the October 2023 IEP and notified the district of her intent to place the student at Winston Prep for the remainder of the 2023-24 school year (see Parent Ex. A).[3] The parent executed an enrollment agreement with Winston Prep for the 2023-24 school year beginning on November 14, 2023 and ending in June 2024 (see Parent Ex. J).

A. Due Process Complaint Notice

In a due process complaint notice dated March 20, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year due to various procedural and substantive violations (see generally Parent Ex. B).

According to the parent, a prior impartial hearing was held and a decision was issued on July 25, 2023 in which the prior IHO found that the district failed to offer the student a FAPE and ordered the CSE to reconvene for placement of the student in a nonpublic school (Parent Ex. B at p. 2). The parent alleged that the district failed to provide her notice of a meeting to discuss the student's placement in a State-approved nonpublic school as ordered by the prior IHO and

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marked (see Tr. pp. 33-36, 48; Dist. Exs. 1-16). In reviewing the hearing record, I have not considered those district exhibits that were not entered into evidence (e.g., Dist. Exs. 2-4; 8-10).

[2] The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[3] The Commissioner of Education has not approved Winston Prep as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

thereafter held a CSE meeting on or about October 24, 2023 without parental participation (id.). The parent further alleged that the district failed to provide the parent a copy of the IEP and to locate an appropriate school for the student to attend prior to the start of the 2023-24 school year and that the recommendations contained in the October 2023 IEP were not appropriate (id. at pp. 3-4). In addition, the parent alleged that the district failed to implement compensatory related services and did not provide the student with a laptop as ordered in the prior IHO decision (id. at p. 4).

The parent sought findings that the student was denied a FAPE for the 2023-24 school year, that Winston Prep was appropriate for the student, and that equitable considerations weighed in favor of the parent for the 2023-24 school year (Parent Ex. B at p. 5). The parent also requested a laptop for the student with "appropriate software" (id.). As relief, the parent requested reimbursement/direct funding of the student's tuition costs at Winston Prep for the 2023-24 school year (id.).

B. Impartial Hearing Officer Decision

After a prehearing conference on April 17, 2024, an impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on May 17, 2024 (Tr. pp. 1-134).[4] In a decision dated May 31, 2024, the IHO found that, because the district failed to present any witnesses to provide an explanation for the recommendations in the October 2023 IEP, it failed to meet its burden to prove that it offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 4-5). Next, the IHO addressed whether Winston Prep was an appropriate unilateral placement and found that the school addressed the student's needs in an "individualized manner" and provided the student with appropriate services to make progress (id. at pp. 5-7).

Lastly, the IHO addressed equitable considerations and found that the parent's testimony lacked credibility and that the parent failed to consistently cooperate with the district (IHO Decision at pp. 7-9). As an example, the IHO referred to the parent's claim that the district conducted an evaluation of her daughter without her consent, finding that the district's events log showed communication with the parent about the evaluation (id. at p. 8). Additionally, the IHO found that the parent's claim that she was never contacted by the district for meetings was "not credible nor supported by the hearing record" and noted evidence indicating that the parent did not cooperate with the intake process with a potential nonpublic school for the student (id. at p. 9). Finally, the IHO found that, although the parent provided notice of her intent to unilaterally place the student at Winston Prep, the parent's notice was not timely (id. at pp. 9-10).[5] In balancing the equities, the IHO found that "equitable factors" did not weigh in the parent's favor, but the parent was "entitled to an award of pro-rated tuition funding and/or reimbursement" for Winston Prep for the 2023-24 school year (id. at p. 10). Thus, as relief, the IHO ordered the district to directly fund/reimburse the parent for the student's placement at Winston Prep for the 2023-24 school year

[4] The IHO provided the parties with a Hearing Guideline and Order dated April 17, 2024 (see IHO Ex. I).

[5] Weighing in the parent's favor, the IHO noted that the parent submitted proof of her obligation to pay the Winston Prep tuition (IHO Decision at p. 10).

in an amount not to exceed $45,860.98 (id. at p. 11).[6] The IHO also granted the parent's request for the district to provide the student with a laptop and appropriate software (id. at pp. 10-11).

IV. Appeal for State-Level Review

The parent appeals. The parent alleges that the IHO erred in not allowing the parent to submit into evidence a July 25, 2023 IHO decision from a prior matter and a neuropsychological evaluation of the student. Next, the parent asserts that the IHO incorrectly found that the district provided proper notice of the CSE meeting and erred in finding that the parent provided consent for the reevaluation of the student. Further, the parent claims that the IHO made incorrect legal findings with respect to equitable considerations and erred in reducing the Winston Prep tuition award.[7] The parent seeks an award of the full amount of the student's tuition at Winston Prep.

In an answer, the district generally denies the material allegations contained in the request for review. The district argues that the IHO properly excluded evidence not relevant to the 2023-24 school year, the IHO correctly found that the parent consented to the reevaluation, and that the parent had notice of the October 2023 CSE meeting. The district asserts that the parent's notice of unilateral placement notice was untimely and the IHO correctly determined that equitable considerations warranted a reduction of the award of tuition funding. The district requests that an SRO dismiss the parent's appeal.

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.

[6] The awarded tuition reflected a 20 percent deduction from the amount of the parent's contract with Winston Prep (see IHO Decision at p. 11, n.52; see also Parent Ex. J).

[7] State regulation provides that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents (8 NYCRR 279.8[a]-[b]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). Here, the parents' request for review was 11 pages long, in excess of the 10-page maximum set forth in State regulation (8 NYCRR 279.8[b]). While I decline to exercise my discretion to reject the parent's pleading due to this irregularity in this instance (see 8 NYCRR 279.8[a]), the parent's attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review, an SRO may be more inclined to do so after a party or an attorney's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

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]).[8]

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

At the outset, I must point out that the district did not cross-appeal the IHO's findings that it failed to offer the student a FAPE for the 2023-24 school year and that Winston Prep was an appropriate unilateral placement or the IHO's award of a laptop and appropriate software to the student. Therefore, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[8] 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).

A. Additional Evidence

The parent offers additional evidence consisting of a prior IHO decision dated July 25, 2023 and a July 2020 neuropsychological evaluation, both of which were offered by the parent during the impartial hearing but the IHO declined to enter the documents into evidence (Tr. pp. 43-48). In connection with the July 25, 2023 IHO decision, the parent asserts that the decision is relevant because the district's failure to implement the decision caused the parent to unilaterally place the student at Winston Prep.[9] With respect to the July 2020 neuropsychological evaluation, the parent asserts that it is relevant and the IHO "ignored the importance of this evaluation" (id.). The district contends that the IHO correctly excluded the evidence because they relate to prior school years not relevant to the 2023-24 school year and that a hearing officer lacks the authority to enforce prior IHO decisions.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Here, the IHO is reminded that she has broad discretion to determine the relevancy of evidence and should err on the side of including evidence that may bear some relevancy on the student's educational history and issues presented to be resolved at the hearing. Moreover, it is poor hearing practice to exclude the documentation of prior, recent litigation between the parties as it often contains useful history regarding the student or the reoccurrence of particular disputes between the parties. However, here, given that the IHO's findings that the district failed to offer a FAPE and that Winston Prep was an appropriate unilateral placement are final and binding on the parties because the district did not cross-appeal them, I find that the July 2020 neuropsychological evaluation and prior IHO decision dated July 25, 2023 are not necessary for me to consider in order to render a decision on equitable considerations.

B. Equitable Considerations

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

[9] Generally, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]).

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"]).

Turning to the equitable factors weighed by the IHO, the documentary evidence relating to the communications between the parties is as follows. The district's special education student information system (SESIS) events log reflects that an individual from the district contacted the parent on September 14, 2023 to discuss a prior IHO decision and informed the parent that an evaluation of the student would be required so the student's placement could be referred to the district's central based support team (CBST) to identify a nonpublic school (Dist. Ex. 14 at p. 3). According to the log, the parent responded that she did not want the student to change schools and that she wanted the student evaluations completed "at the school" (id.).[10] The event log reflected that a CSE meeting would be held once the evaluations were completed (id.). On September 19, 2023, the social history update interview was scheduled with the parent and was completed on September 21, 2023 (Dist. Exs. 12 at pp. 1-2; 14 at pp. 2-3). On September 19, 2023, the district conducted a psychoeducational reevaluation of the student (Dist. Ex. 11).

On September 27, 2023, the district sent the parent a meeting notice for a CSE meeting to take place on September 29, 2023 (see Dist. Ex.16). In addition, on September 27, 2023 someone from the district contacted the parent about the September 29 CSE meeting and, according to the SESIS log, the parent stated she would check her schedule and get back to the individual (Dist. Ex. 14 at p. 2). On September 28, 2023, the CSE meeting link was emailed to the parent (id.). It is undisputed that a CSE meeting did not take place on September 29, 2023.

Thereafter, the SESIS log reflects that, on October 19, 2023 there was a telephone call between the parent and a member of the district staff in which the parent stated that she was unable to participate in a CSE meeting that day and asked for the meeting to be rescheduled to October 24, 2023 (Dist. Exs. 14 at p. 2; 15). According to an email between the charter school and the

[10] In her testimony, the parent denied having stated that she did not want a nonpublic school for the student (Tr. p. 97).

district, on October 24, 2023, the parent stated that her attorney was not available to participate and she needed to reschedule the meeting (Dist. Ex. 15). According to the email, during that exchange, an individual from the district informed the parent that the October 24, 2023 CSE meeting had to be held without the parent because of the "certain amount of days" the district had to hold the meeting because of the impartial hearing (id.). The CSE meeting went forward without the parent (see Dist. Ex. 1).

In an email dated October 24, 2023, the parent's attorney contacted the district about the October 2023 CSE meeting stating that the parent had been contacted for a CSE meeting that day for which she had "not receive[d] at least five business days notice" and had been "randomly" called "and told that she had to participate in an IEP meeting" and that the meeting would go forward without her (Parent Ex. P at p. 1).

Turning to the testimonial evidence, the parent testified that she became award of the need for a social history interview and participated in the interview by phone but that she learned that the district evaluated the student at the charter school without her "knowledge or written consent" (Parent Ex. O ¶ 12). Regarding the October 2023 CSE meeting, the parent testified that she became aware of the meeting when she received a telephone call on that day stating that she "had to participate in the [CSE] meeting at the same time that [she] was called" (Tr. p. 97; Parent Ex. O ¶ 10). The parent testified that she told the district representative that she had to wait for her attorney to be available and needed to contact her attorney about the CSE meeting (Tr. pp. 97-98). The parent testified that she was unable to participate in the CSE meeting (Tr. p. 98).

In weighing equitable considerations, the IHO noted that she did not credit the parent's testimony (IHO Decision at pp. 8-9). 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 *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). Here, the non-testimonial evidence in the hearing record justifies a contrary conclusion.

As an example of why she found the parent not credible, the IHO contrasted the parent's statement that she did not consent to an evaluation of the student with the district's SESIS log entry from September 14, 2023, which indicated that the parent wanted evaluations completed at the student's school (IHO Decision at p. 8). However, to the extent the parent expressed in a telephone conversation that she preferred that evaluations take place at the student's school, this does not contradict her statement that she did not provide "written consent" for the evaluations (compare Parent Ex. O ¶ 12, with Dist. Ex. 14 at p. 3). Rather, consistent with the parent's testimony, there is no evidence that the district requested or obtained the parent's written consent.

The evidence in the hearing record also does not support the IHO's determination that the parent was "unable to attend meetings and cancelling her attendance, on what appears to be the same day as the meeting was to take place, despite having been provided notice" or that the parent's claim that she was not provided notice of the October 2023 CSE meeting was contradicted by the

documentary evidence (IHO Decision at p. 8). The only CSE meeting notice included in the hearing record was dated September 27, 2023 for a meeting to take place on September 29, 2023 (see Dist. Ex.16) and it was September 27, 2023, two days before the scheduled meeting, that the parent expressed uncertainly about her ability to attend the proposed date (Dist. Ex. 14 at p. 2). The hearing record is not developed regarding the circumstances of the rescheduling of the September 29 meeting. As for October 19, 2023, although an email between staff from the charter school and the district reflected that, on October 3, 2023, someone from the district spoke to the parent and reminded her about a meeting "for the 19th," the note about this communication is unclear with respect to what type of meeting was being referenced and there is no entry in the district's SESIS log that a CSE meeting was scheduled for that date or a CSE meeting notice for that date (see generally Dist. Ex. 14). Finally, although the SESIS log indicated that parent asked for the CSE meeting to be rescheduled to October 24, 2023 (id.at p. 2), there is no subsequent events log or other evidence that the district notified the parent that the meeting was actually scheduled for that date until the parent received the phone call informing her that the meeting was taking place (see generally Dist. Ex. 14; see also Parent Ex. P; Dist. Ex. 15). Therefore, the parent's testimony that she was "randomly contacted by phone" on October 24, 2023, without "an IEP meeting notice informing [her] of the purpose of the IEP meeting or who would be participating" (Parent Ex. O ¶ 10) is not contradicted by the documentary evidence. Rather, the lapses in the district's SESIS log and the lack of a document in evidence reflect that the parent was notified of the meeting are consistent with the parent's testimony. As the parent notes, State regulations provide that "the parent must receive notification in writing at least five days prior to the [CSE] meeting" (8 NYCRR 200.5[c][1]), yet there is no documentation that, after the September 27, 2023 meeting notice—which was untimely provided two days prior to the scheduled September 29, 2023 meeting—the district provided any written notification of the rescheduled meeting dates.[11]

In light of the above, there is insufficient documentation of the district's scheduling efforts to find that the parent failed to cooperate or impeded the district's ability to engage in educational planning for the student.

Next, the IHO pointed to a document indicating that the parent did not appear for or agree to interview with a potential State-approved nonpublic school for the student (IHO Decision at pp. 8-9). Equitable considerations may weight against an award of tuition reimbursement where parents have failed to cooperate with a school district or have otherwise frustrated a district's attempt to offer a FAPE, such as by refusing to cooperate in the district's attempts to identify an appropriate nonpublic school (see S.D. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *11-*12 [S.D.N.Y. Dec. 16, 2011] [stating that refusal by the parent to attend intake session, refusal to take student with her to other intake interviews, and outright rejection of programs constituted conduct equating to a "veto," decision making power not granted to parents by the IDEA]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 [S.D.N.Y. Nov. 20,

[11] Federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]).

2007] [denying reimbursement on equitable grounds because parents refused to visit the schools proposed by the district]).

According to the document submitted by the district entitled "State Approved NPS Tracking Document," the student was referred to several nonpublic schools on November 6, 2023 (Dist. Ex. 13). There was a note next to one of the nonpublic schools that the "[p]arent did not appear for/agree to interview" and that the parent had "not responded to outreach from the school" (id.). However, absent other evidence to explain the circumstances of the parent's purported failure to appear for or agree to an interview, including evidence of which circumstance applied (i.e., whether the parent failed to appear to a scheduled interview or declined an interview) or what outreach was purportedly attempted, the hearing record is insufficiently developed to support the IHO's conclusion that the parent failed to cooperate in the process.

The remaining issue presented on appeal is whether the IHO erred in reducing the award of tuition reimbursement/direct funding based upon the timeliness of the ten-day notice.

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).

Here, the parent's ten-day notice was dated October 27, 2023 and stated that the student "w[ould] be unilaterally placed in the Winston Prep program for the 2023-[]24 school year and w[ould] begin attending the school on or about November 14, 2023" (Parent Ex. A at p. 2). The parent executed an enrollment agreement with Winston Prep for the 2023-24 school year beginning on November 14, 2023 and ending in June 2024 (see Parent Ex. J). Although the parent's signature was not dated, the enrollment contract bore a date of November 8, 2023 (see id.). According to the parent, the student was unilaterally placed at Winston Prep on November 21, 2023 and information from Winston Prep refers to the student beginning at the end of November 2023 (Parent Exs. M at p. 1; O ¶ 1).

The parent's notice of unilateral placement was timely provided to the district more than 10 business days before the student began at Winston Prep, which at the earliest occurred on November 14, 2023 (see Parent Ex. A). To the extent the IHO relied on the date on which the parent entered an enrollment agreement with Winston Prep to calculate whether the parent's notice was timely provided, there is authority that the date of the student's physical removal from the

district program is controlling, rather than the contract date (see Reg'l Sch. Unit 51 v. Doe, 920 F. Supp. 2d 168, 210-12 [D. Me. 2013]; Sarah M. v. Weast, 111 F. Supp. 2d 695, 701–02 [D. Md. 2000]; see also Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [in discussing timing of a 10 day notice, referring to the date of enrollment as the date the student began attending the unilateral placement separate from the date the contract was signed]; A.D. v. Creative Minds Int'l Pub. Charter Sch., 2020 WL 6373329, at *6-*7 [D.D.C. Sept. 28, 2020]). Therefore, the evidence in the hearing record does not support the IHO's finding that the timing of the ten-day notice warranted a reduction to the tuition relief awarded.

Based upon the foregoing, the evidence in the hearing record does not support the IHO's reduction of an award of the student's tuition costs at Winston Prep on equitable grounds.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's finding that equitable considerations did not weigh in favor of the parent, the parent is entitled to reimbursement for or direct funding of the student's full tuition at Winston Prep for the 2023-24 school year as reflected in the parent's contract with Winston Prep, representing a total award of $57,326.22 (see Parent Ex. J).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 31, 2024, is modified by reversing those portions of the decision that found equitable considerations warranted an award of tuition funding at a reduced amount; and

IT IS FURTHER ORDERED that the IHO's decision, dated May 31, 2024, is modified by directing the district to directly fund/reimburse the full cost of tuition for the student's attendance at Winston Prep for the 2023-24 school year.

Dated: **Albany, New York**
September 11, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER