CASE SCENARIO

NYSED IDEA IMPARTIAL HEARING OFFICER TRAINING
WEDNESDAY, OCTOBER 7, 2015 · MONDAY, OCTOBER 19, 2015

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DEUSDEDI MERCED
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K.O. is a very intelligent child who was precocious from an early age. He also had extreme difficulty relating to other children, preferring to engage in long hours of solitary intellectual activities on his computer. In the early grades, he had no difficulty excelling in reading, written expression, mathematics, and science, as reflected in both his standardized test scores and grades. However, his peers regarded him as either a quiet isolate or "weird geek." He rarely got invited to birthday parties, and on the occasions he was invited, he tended to sit by himself engaged in his iPad. Similarly, the other children did not include him in sleepovers, play dates, and other social activities.

K.O.'s parents are divorced. The parents share joint custody, but Ms. O typically handles the day-to-day communications with the school.

In grade 4, K.O. had some difficulties with his teacher, who resisted providing him with the challenging assignments that his parents requested. She opined that he needed to spend more time on mastering the basics and that it would help him gain more acceptance with his peers. Although his grades were not quite as high due to his teacher's dissatisfaction with his "attitude," his standardized test scores continued to be several years above grade level, likely due to his independent work and his parents' support.

In grade 5, he entered middle school, which was much larger and more heterogeneous than his elementary school. He came home with complaints about bullying by not only the older children but also those in the same grade. At first the bullying was name-calling but it escalated by the second semester to nasty texts and Facebook postings, physical threats and occasional pushes and punches. His mother complained to his homeroom teacher, and when that didn't seem to abate the problem to the assistant principal. The assistant principal spoke with and subsequently disciplined the primary perpetrators, and also referred K.O. to the counselor for his grade, but did not keep Ms. O informed of any actions taken. The counselor recommended to Ms. O various, generic strategies for K.O. to relate better to his peers and be more assertive with those who continued to bully him. His mother enrolled him in a karate school and had him see a private psychologist, who provided to the parents during the last month of the school year a detailed diagnosis of Asperger syndrome.

When grade 6 started, the bullying continued despite the school's and the mother's efforts. K.O. complained to his mother on an almost daily basis about being bullied in school, and it appeared to her that the bullying increasingly made K.O. emotionally

unavailable to learn. When his anxiety worsened, his behavior showed signs of depression, and his grades started to drop, Ms. O requested an evaluation for special education services. At a meeting with the principal, Ms. O acquiesced instead to general education interventions, including counseling, and when that did not seem to suffice, a Section 504 plan that formalized and increased the accommodations and related services. In late November, when the private psychologist reported that his depression was becoming more severe, Ms. O shared with the school the Asperger diagnosis and the follow-up report of K.O.'s worsening depression. The school responded by obtaining the mother's consent and completing a CSE evaluation. Upon the recommendation of the school psychologist (who had met with most CSE members before the CSE meeting to discuss her results and recommendation to get their buy-in), the CSE concluded, despite the mother's dissent, that K.O. did not qualify as "a student with a disability" because 1) he did not meet the IDEA criteria for autism, and even if he did, 2) he did not evidence an adverse effect on educational performance that would require special education. The bullying persisted, but the CSE's view was that it had no bearing on the evaluation's outcome in light of these missing essential elements for eligibility.

After expressing her disagreement with the evaluation, Ms. O obtained an independent educational evaluation (IEE) from a psychiatrist who worked with the private psychologist. The psychiatrist's report revealed that the bullying had continued, K.O.'s academic performance had virtually "shut down," and that he was engaging in suicidal ideation. He strongly recommended noted expert Dan Olweus's systematic school-based bullying intervention program to address K.O.'s bullying situation. The program "restructures the learning environment to create a social climate characterized by supportive adult involvement, positive adult role models, firm limits, and consistent, noncorporal sanctions for bullying behavior."[1] The program leads teachers, administrators, and staff through a series of tasks at the school, classroom, and individual levels that make them aware of the extent of the bullying problem and help them solve it.[2]

Ms. O provided the IEE to the school, requesting reimbursement for its cost. The CSE chair asked the school psychologist to review the IEE carefully and summarize it for the rest of the team. She did so as part of a new evaluation report for the CSE, opining that the IEE did not provide useful educational insights into K.O.'s individual needs because it was based on the medical model (specifically, DSM-V) rather than the IDEA. However, her own independent testing recommended that K.O. was now eligible "as a student with a disability" under the classification of emotional disturbance (ED). Although the CSE members had the opportunity to question the school psychologist about her summary and assessment of the IEE, none of them did so. Nevertheless, 55-days after obtaining parental consent, they completed the evaluation, which did not include an FBA, unanimously agreeing with the school psychologist's recommendation

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[1] *See, e.g., Bullying Intervention Strategies That Work*, EDUC. WORLD, http://www.educationworld.com/a_issues/issues/issues103.shtml#sthash.2M9tFwru.dpuf (last visited Aug. 31, 2015).

[2] *Id.*

that K.O. was eligible for special education services. The CSE rejected the systematic school-based bullying intervention program without comment in the IEP.

In June of K.O.'s grade 6 school year, the CSE, without K.O.'s counselor in attendance, proposed an IEP that included rather broad goals about improving 1) K.O.'s attendance (based on school records); 2) his task orientation and attitude toward school (based on teacher judgment); and 3) his relationship with peers (based on the counselor's reports). The IEP did not include a BIP, but it did include relevant related services, such as counseling services and positive behavioral strategies. Further, the parents were told that even though it was not in the IEP, the social worker would include K.O. in support groups for bullied students.

During the summer, Ms. O filed for an impartial hearing. Her complaint contained the following claims:

1) the district violated the IDEA's child find obligation starting in grade 4 or at least grade 5[3]

2) the district's belated, first evaluation should have concluded that K.O. was eligible[4]

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[3] *See*, *e.g.*, *A.P. v. Woodstock Sch. Dist.*, 572 F. Supp. 2d 221 (D. Conn. 2008), *aff'd*, 370 F. App'x 202 (2d Cir. 2010) (upholding IHO's careful denial of child find claim on behalf of student subsequently found eligible—1) lack of diagnosis after screening and 2) student's progress in response to teacher's proactive activities and school's prereferral interventions); *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394 (N.D.N.Y. 2004) (upholding child find violation when district did not conduct the evaluation for 10 months after the parent informed the school superintendent that the child was experiencing emotional difficulties and the school psychologist recommended the a private therapeutic placement); *Paul T. v. S. Huntington Union Free Sch. Dist.*, 14 N.Y.S.3d 627 (Sup. Ct., Suffolk Cnty. 2015) (upholding IHO's denial of child find and eligibility claims – IEE added little to the district's evaluation that concluded that child's condition as a result of bullying, even if OHI or ED, did not notably impact his academic performance. For a synthesis of the applicable case law nationally, *see*, *e.g.*, Perry A. Zirkel, *Child Find: The Lore v. the Law*, 307 EDUC. L. REP. 574 (2014) (revealing wide variation in case-by-case application of the successive standards of reasonable suspicion and reasonable period).

[4] *See*, *e.g.*, *C.B. v. Dep't of Educ.*, 322 F. App'x 20 (2d Cir. 2009) (ruling that student with ADHD and bipolar disorder was not eligible under IDEA due to successful "educational performance," in narrow academic view); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282 (S.D.N.Y. 2010) (ruling that child with various diagnoses was not eligible as OHI or ED based on narrow, academic view of adverse affect on "educational performance"); *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299 (E.D.N.Y. 2010) (ruling that child with Asperger Disorder was ineligible for special education and related services because his academic performance—"which appears to be the principal, if not only, guiding factor"—showed that his disability did not have an adverse effect on his educational performance, although the adverse effect need not be severe or significant).

3) the district's ineligibility decision was predetermined, thus significantly denying the parents the opportunity for participation[5]

4) both evaluations failed to include all of K.O.'s suspected needs particularly in the social and emotional areas[6]

But see M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 149 (S.D.N.Y. 2014) (ruling that high school student with psychiatric problems who had good but declining grades, long absences, and not enough credits to move to the next grade qualified as ED).

[5] *See Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004) (holding that the district denied the parents meaningful participation in the IEP process because the district "never even treated a one-on-one ABA program as a viable option"). *But see T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247 (2d Cir. 2009) (holding that preparatory activities that fall short of a pre-meeting agreement do not equate to predetermination); *T.Y. v. New York City Dep't of Educ.*, 51 IDELR ¶ 78 (E.D.N.Y. 2008), *aff'd*, 584 F.3d 412 (2d Cir. 2009) (finding that the lack of the parents' presence when the district decided the specific location of the child's services was not predetermination because the parents participated in the placement decision and the district provided the parents with a choice of two public school programs); G.*W. v. Rye City Sch. Dist.*, 61 IDELR ¶ 14 (S.D.N.Y. 2013), *aff'd*, 554 F. App'x 56 (2d Cir. 2014) (finding no predetermination where LEA discussed the draft IEPs with the private school personnel and incorporated many of their recommendations for the student's program); *FB v. New York City Dep't of Educ.*, __ F. Supp. 3d __ (S.D.N.Y. 2015) (finding that preparation does not amount to predetermination); *S.W. v. New York City Dep't of Educ.*, 92 F. Supp. 3d 143 (S.D.N.Y. 2015) (finding that there was no predetermination because the IEP team came to the meeting with an "open mind" despite the principal telling the step-father that the district planned on recommending an ICT class and the IEP team coming to the meeting with a draft IEP, which was not altered prior to finalization); *J.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F. Supp. 2d 606 (S.D.N.Y. 2011) (ruling that the record did not support a finding that the district went so far as to improperly predetermine the student's IEP when it did not offer a regular education option and recommended placement in its special education classroom because there was evidence of the district's willingness to support its children in regular education environments, if appropriate).

[6] *See, e.g.*, *R.B. v. New York City Dep't of Educ.*, 15 F. Supp. 3d 421 (S.D.N.Y. 2014) (ruling that the absence of one single measure—when the CSE considered a host of measures in drafting the IEP—should not itself render an IEP invalid so long as the CSE team otherwise has sufficient information about the student to determine the student's educational needs); *A.M. v. New York City Dep't of Educ.*, 964 F. Supp. 2d 270 (S.D.N.Y. 2013) (ruling that the child was assessed in all areas related to suspected disability based on detailed reading of evaluation reports); *Letter to Baus*, 65 IDELR ¶ 81 (OSEP 2015) (stating that assessments must be comprehensive enough to address every area related to the child's suspected disabilities).

5) the district failed to sufficiently consider the IEE[7] and failed to provide it at public expense[8]

[7] *See*, *e.g.*, *T.S. v. Bd. of Educ.*, 10 F.3d 87 (2d Cir. 1993) (finding sufficient that LEA representative read the IEE before the meeting and school psychologist summarized it for the IEP team); *S.W. v. New York City Dep't of Educ.*, 92 F. Supp. 3d 143 (S.D.N.Y. 2015) (synthesizing that "[c]onsideration does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight"—her school psychologist's review and use of the IEE sufficed); *see also K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011) (concluding that incorporating some of the recommendations more than met the requirement); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991) (finding sufficient that IEP team reviewed the report—substantive discussion not required); *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804 (N.D. Ill. 2009) (finding sufficient that IEP team read and rejected the IEE); *Letter to Faustini*, 32 IDELR ¶ 206 (OSEP 1999) (stating that there is no requirement that the recommendations of parents be adopted but, if a prior written notice is required following an IEP, it must contain, among other things, a description of any other options the agency *considered* and the reasons why those options were rejected). *But cf. Plainville Bd. of Educ. v. R.N.,* 58 IDELR ¶ 257 (D. Conn. 2012) (ruling that district violated IEE consideration requirement but second step also applied—here substantive denial of FAPE).

[8] The IDEA regulations, as judicially interpreted, result in a multi-step, flowchart-type test similar to tuition reimbursement analysis: 1) did the parent disagree and the district file? 2) was the district's evaluation appropriate? 3) if not, was the IEE appropriate? *See generally* Perry A. Zirkel, *Independent Educational Evaluation Reimbursement under the IDEA: An Update*, 306 EDUC. L. REP. 32 (2014). For New York cases, which are largely unpublished, at these successive steps see, e.g., 1) *M.V. v. Shenendehowa Cent. Sch. Dist.*, 60 IDELR ¶ 213 (N.D.N.Y. 2013) (concluding that parents' failure to notify district of their disagreement excused district's failure to file for a hearing); *Hiller v. Bd. of Educ.*, 687 F. Supp. 735 (N.D.N.Y. 1988) (ruling that parents' failure to timely notify district of their disagreement was not a bar where district did not file for a hearing upon subsequently learning of the disagreement); 2) *M.C. v. Katonah/Lewisboro Union Free Sch. Dist.*, 58 IDELR ¶ 196 (S.D.N.Y. 2012) (upholding the appropriateness of the district's evaluation); 3) *M.V. v. Shenendehowa Cent. Sch. Dist.,* 60 IDELR ¶ 213 (N.D.N.Y. 2013) (upholding district's position that IEE exceeded district's general cap, without a showing of possible exception).

6) the IEP denied FAPE due to procedural violations, including the absence of K.O.'s counselor at the CSE meeting[9] the lack of measurable goals,[10] and the failure to

[9] *Cf. Mahoney v. Carlsbad Unified Sch. Dist.*, 430 F. App'x 562 (9th Cir. 2011) (rejecting the argument that the required special education teacher had to be the child's current teacher but noting that the attending special education teacher had actually taught the student); *Deal v. Hamilton Cnty. Dep't of Educ.*, 392 F.3d 840 (6th Cir. 2004) (ruling that the absence of the "unique perspective" of a general education teacher had a real impact on the decision-making process where the IEP team was considering the extent to which the student may be integrated into a regular education classroom); *S.W. v. New York City Dep't of Educ.*, 92 F. Supp. 3d 143 (S.D.N.Y. 2015) (finding that the absence of a parent member – an additional parent of a child with a disability—per state law did not deny the student FAPE or impeded the parents' right to participate despite the parents' contention that the father who attended the meeting was less knowledgeable than the mother who was not able to attend the meeting because she was ill, given the father's active participation in the CSE meeting and the presence of the student's then-current providers at the meeting); *R.G. v. New York City Dep't of Educ.*, 980 F. Supp. 2d 345 (E.D.N.Y. 2013) (ruling that the failure to include a general education teacher in the IEP meeting denied the student FAPE where omission caused IEP team to not consider general education placement); *A.M. v. New York City Dep't of Educ.*, 964 F. Supp. 270 (S.D.N.Y. 2013) (ruling that although the special education teacher attending the CSE meeting was not the child's teacher and, therefore, a technical violation of the IDEA, the participation of the parents and other personnel enabled the CSE members to obtain student specific information and expertise so as not to significantly impede the parent's participation or cause a deprivation of educational benefits).

[10] *See, e.g., B.P. v. New York City Dep't of Educ.*, 64 IDELR ¶ 199 (S.D.N.Y. 2014) (finding that, although the annual goals were not measurable when viewed in isolation, the inclusion of detailed short-term objectives cured any substantive defects with the annual goals in the student's IEP); *D.A.B. v. New York City Dep't of Educ.*, 973 F. Supp. 2d 344 (S.D.N.Y. 2013) (affirming the SRO's findings that the 96 short-term objectives in the IEP ameliorated any procedural violations that could have flowed from the annual goals and noting that "the sufficiency of goals and strategies in an IEP is precisely the type of issue upon which the IDEA requires deference to the expertise in the administrative decisions"); *Pawling Cent. Sch. Dist. v. New York State Educ. Dep't*, 771 N.Y.S.2d 572 (App. Div. 2004) (finding that the IEP was inadequate because it failed to contain measurable goals in written expression and spelling, fundamental areas in which the child experienced a deficiency).

include a BIP[11]

7) the IEP did not meet the substantive standard for FAPE, including the lack of any provisions to deal with the persistent absenteeism,[12] rejection of the

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[11] *See*, *e.g.*, *T.M. v. Cornwall Central Sch. Dist.*, 752 F.3d 145 (2d Cir. 2014) (finding that the SRO correctly determined that the student's behaviors were not of such a frequency or degree so as to impede his learning or that of others and that his IEPs correctly identified his problematic behaviors and adequately planned to meet his behavioral needs and, therefore, the student was not denied FAPE by the failure of the CSE to conduct an FBA or develop a BIP); *R.C. v. Byram Hills sch. Dist.*, 906 F. Supp. 2d 256 (S.D.N.Y. 2012) (holding that the failure to create a BIP does not render an IEP procedurally inadequate where the child's behavior can be addressed by other means – here, the child's IEP contained several "modifications" or strategies to address the student's various behavioral issues); *cf. M.W. v. New York City Dep't of Educ.*, 725 F.3d 131 (2d Cir. 2013) (holding that the failure to conduct an FBA does not render an IEP legally inadequate so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior).

[12] *See*, *e.g.*, *Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150 (D. Mass. 2009) (ruling that the length and frequency of the student's absenteeism was serious enough to establish in the particular circumstances of this case an affirmative duty for the IEP team to address this issue); *Lamoine Sch. Comm. v. Ms. Z.*, 353 F. Supp. 2d 18 (D. Me. 2005) (ruling that failure to address attendance issues linked to the child's disability, upon consideration of the inherent limitations of the school district, amounted to denial of FAPE in this case); *cf. Independent Sch. Dist. No. 413 v. H.M.J.*, __ F. Supp. 3d __ (D. Minn. 2015) (citing excessive absenteeism in combination with prior knowledge of potentially eligible OHI condition as a child find evaluation in terms of medical evaluation); *M.M. v. New York City Dep't of Educ.*, 26 F. Supp. 2d 249 (S.D.N.Y. 2014) (citing long absences as one of the factor supporting this student's eligibility as a child with emotional disturbance). *But cf. Mendoza v. Placentia Yorba Linda Unified Sch. Dist.*, 278 F. App'x 737 (9th Cir. 2008) (upheld substantive appropriateness of IEP, with one of various factors being that child's poor attendance giving district little time to evaluate its benefits); *L.O. v. New York City Dep't of Educ.*, __ F. Supp. 3d __ (S.D.N.Y. 2015) (noting that that most of the case law concerns eligibility, not FAPE, and even though improper handling of absenteeism could result in the denial of FAPE it would require specific proof of school district failures); *Joaquin v. Friendship Pub. Charter Sch.*, 66 IDELR ¶ 64 (D.D.C. 2015) (reasoning that IDEA protects opportunities rather than outcomes in rejecting district's truancy defense regarding material failure in implementation of IEP); *S.S. v. Dist. of Columbia*, 68 F. Supp. 3d 1 (D.D.C. 2014) (upholding IHO's determination that child's lack of progress was due absenteeism due to his separable medical condition, not due to bullying or alleged school phobia); *S.J. v. Issaquah Sch. Dist. No. 411*, 48 IDELR ¶ 218 (W.D. Wash. 2007) (upheld ruling that the district did not deny FAPE where the district repeatedly notified the parent and she did not have disability-based justification for the child's attendance problems).

recommended bullying intervention program,[13] and failure otherwise to remedy the bullying[14]

[13] *T.K. v. New York City Dep't of Educ.*, 32 F. Supp. 3d 405 (S.D.N.Y. 2014) (ruling, *inter alia*, that the IEP team include an anti-bullying program in the IEP when there is a substantial probability that it will severely restrict the child's educational opportunities); *cf. R.B. v. New York City Dep't of Educ.*, 589 F. App'x 572 (2d Cir. 2014) (ruling that the IEP's failure to identify a specific methodology did not amount to a procedural violation where the IEP was reasonably calculated to produce benefit); *A.S. v. New York City Dep't of Educ.*, 573 F. App'x 63 (2d Cir. 2014) (upholding the appropriateness of an IEP that utilized a particular methodology where the parents did not preponderantly prove that the student could only progress with another specific methodology); *cf. E.H. v. New York City Dep't of Educ.*, 611 F. App'x 728 (2d Cir. 2015) (remanding to determine whether the parents' designated methodology is necessary to implement the goals in the IEP); *see also Letter to Anonymous*, 49 IDELR ¶ 258 (OSEP 2007) (stating that it would be appropriate to list a specific method or instructional approach on a student's plan when it is "integral to the design of an 'individualized' program" of the student); *Letter to Wilson*, 37 IDELR ¶ 96 (OSEP 2002) (interpreting the IDEA as making it appropriate to specify methodology in an IFSP where it was integrally necessary for FAPE).

[14] *See, e.g., T.K. v. New York City Dep't of Educ.*, 32 F. Supp. 3d 405 (S.D.N.Y. 2014) (ruling, *inter alia*, that the IEP team must consider bullying in developing the IEP when there is a legitimate concern that it will severely restrict the child's educational opportunities) (citing *Dear Colleague Letter*, 61 IDELR ¶ 263 (OSERS 2013), which interpreted the IDEA as establishing that bullying of a student with a disability—regardless if connected with the student's disability—constitutes denial of FAPE if it results in the student not receiving meaningful educational benefit, triggering the IEP team's obligation to arrange for other or different services and/or placement). *But see M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005) (ruling that bullying amounts to denial of FAPE where the district is deliberately indifferent to such severity that the child cannot reasonably benefit from the IEP); *S.S. v. Dist. of Columbia*, 68 F. Supp. 3d 1 (D.D.C. 2014) (upholding IHO's determination that bullying was not sufficiently severe to deny the child FAPE); *N.M. v. Cent. Bucks Sch. Dist.*, 992 F. Supp. 2d 452 (E.D. Pa. 2014) (ruling that the district's response to bullying, although not optimal, met the requisite standard of being reasonable).

Additionally, what if at the prehearing conference/start of the hearing you are presented with the following situations and asked to address them:

8) the district denied Ms. O's request for all teacher/administrator emails that identified K.O.[15]

9) the district refused to allow the psychiatrist to observe the K.O.'s class except when the other students were not present based on student privacy concerns[16]

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[15] *See, e.g., S.A. v. Tulare Cnty. Office of Educ.*, 53 IDELR ¶ 111 (E.D. Cal. 2009) (holding that the district was only required to disclose emails that were printed out and placed in the student's permanent file); *see also Middleton-Cross Plains Area Sch. Dist.*, 115 LRP 31928 (Wis. 2015) (concluding that, although the district did not provide the parents with all of the emails they sought, the district was only required to provide emails kept in a central, cumulative file, not those that might appear in a staff member's inbox); *Washoe Cnty. Sch. Dist.*, 114 LRP 25728 (Nev. SEA 2014) (holding that the district did not maintain the requested emails because they were not kept in a filing cabinet in a records room at the school, saved on a permanent secure database, or printed and placed in a student's file). For FERPA's definition of education records, see *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433 (2002) ("The word "maintain" suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database"); *cf. Goldberg v. Reg'l Sch. Dist.*, 59 Conn. L. Rep. 232 (Conn. Super. Ct. Oct. 20, 2014) (supporting dicta that videos of bullying were education records). *But cf. Bryner v. Canyons Sch. Dist.*, 351 P.3d 852 (Utah Ct. App. 2015) (interpreting, in a footnote, *Owasso* as not requiring a central location to meet "maintaining" requirement).

[16] *See, e.g., R.K. v. Clifton Bd. of Educ.*, 587 F. App'x 17 (3d Cir. 2014) (dismissing as unpersuasive the parents' argument that the district's refusal to allow the parents' expert to observe the proposed class violated their procedural right to an IEE because the IEE would not have been "of the child" as the student was attending a private program at the time of the request); *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804 (N.D. Ill. 2009) (finding that the IHO did not abuse his discretion when he denied the parents' motion to allow their expert to observe the district's recommended program sans the student); *cf. L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900 (9th Cir. 2009) (holding that the district did not deny the parents an opportunity to meaningfully participate in the placement decision when the district limited the independent psychologist's observations of the proposed placement to 20 minute increments because said limitation did not prevent the psychologist from forming an opinion about the appropriateness of the placement); *J.M. v. Cumberland Pub. Sch.*, 115 LRP 24329 (D.R.I. 2015) (finding that the parent did not have a legal right to observe instruction in a special education classroom); *see also Sch. Bd. of Manatee Cnty. v. L.H.*, 666 F. Supp. 2d 1285 (M.D. Fla. 2009) (concluding that there is no reason to differentiate between private and publicly funded IEEs when determining whether an evaluator should have classroom access); *Letter to Savit*, 64 IDELR ¶ 250 (OSEP 2014) (opining that it would conflict with IDEA for a district to have a policy granting IEE evaluators less time than it grants district evaluators); *Washoe Cnty. Sch. Dist.*, 106 LRP 11741 (Nev. SEA 2005)

10) after the discussion regarding the issues and evidence, you direct each party to present their case in one day believing the time is reasonable but both vigorously object[17]

11) Mr. O seeks to have his own attorney represent him in the matter even though Ms. O has her own attorney[18]

12) the district refused a recent request to provide the parents with copies of certain educational records of K.O. until two days prior to the hearing[19]

(district must strike an appropriate balance between the parent's need for information gained from the observation in order to exercise a right under the IDEA and a district's obligation to assure that the classroom is not disrupted or that distractions are minimal); *Letter to Mamas*, 42 IDELR ¶ 10 (OSEP 2004) (encouraging districts to give parents the opportunity to observe classrooms, and also noting there may be circumstances in which access may need to be provided, e.g., when parents invoke their right to an IEE and the evaluation requires observing the child in the educational placement).

[17] 8 NYCRR § 200.5(j)(3)(xiii) (2013); *see also*, *B.S. v. Anoka Hennepin Pub. Sch.*, 799 F.3d 1215 (8th Cir. 2015) (finding no evidence that the time limit imposed by the ALJ on the parties to present their claims was neither inappropriate nor unreasonable); *L.S. v. Bd. of Educ. of Lansing Sch. Dist.*, 65 IDELR ¶ 225 (N.D. Ill. 2015) (finding that IHO did not improperly exclude evidence when IHO set time limits for witness examination); *T.M. v. Dist. of Columbia*, 75 F. Supp. 3d 233 (D.D.C. 2014) (finding the IHO's approach to limit the parents' cross-examination time reasonable); *Letter to Kane*, 65 IDELR ¶ 20 (OSEP 2015) (IHOs generally have authority to determine procedural matters not specifically outlined in the IDEA, including limiting the time a party may spend presenting evidence or questioning witnesses); *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995) (decisions regarding the conduct of IDEA hearings are left to the discretion of the IHO, subject to review on appeal).

[18] *Fuentes v. Bd. of Educ.*, 540 F.3d 145 (2d Cir. 2008), *further proceedings*, 569 F.3d 46 (2d Cir. 2009) (holding that State law determines whether a noncustodial parent retains the right to participate in educational decisions of their child with a disability where the divorce decree grants exclusive custody to the other parent but is silent on the matter of educational decision-making); *Fuentes v. Bd. of Educ.*, 907 N.E.2d 696 (N.Y. 2009) (held that a noncustodial parent does not have the right to control educational decisions unless the custody order expressly gives him such decision-making authority but may request education information); c*f. Letter to Cox*, 54 IDELR ¶ 60 (OSEP 2009) (divorce parents who both have legal authority to make educational decisions share equally in exercising IDEA's procedural safeguards).

[19] *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995) (opining that it is the responsibility of the hearing officer to accord each party a meaningful opportunity to exercise their hearing rights during the course of the hearing); c*f. Letter to Mamas*, 42 IDELR ¶ 10 (OSEP 2004) (noting that if parents invoke their right to an IEE, and the evaluation requires observing the child in the placement, the district may need to provide the evaluator with access to the placement).

13) Ms. O makes a motion *in limine* to prohibit any testimony regarding K.O. participating in support groups for bullied students.[20]

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[20] *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012) (adopting modified "four corners" rule that prohibits testimony that goes beyond the face of the IEP except to explain or justify its contents—"retrospective testimony may not be used to materially alter a deficient written IEP by establishing that the student would have received services beyond those listed in the IEP"). For subsequent applications, *see, e.g.*, *F.L v. New York City Dep't of Educ.*, 553 F. App'x 2 (2d Cir. 2014) (ruling that testimony that how the related services in the IEP would be implemented was not beyond the boundaries of *R.E.*); *K.L v. New York City Dep't of Educ.*, 530 F. App'x 81 (2d Cir. 2013) (ruling that under *R.E.* the question is whether permissible evidence establishes the substantive appropriateness of the IEP, regardless of admission and reliance on retrospective evidence); *S.B. v. New York City Dep't of Educ.,* ___ F. Supp. 3d ___ (S.D.N.Y. 2015) (recognizing variation in *R.E.* progeny in terms of strictness of interpretation); *D.C. v. New York City Dep't of Educ.,* 950 F. Supp. 2d 494 (S.D.N.Y. 2013) (ruling that *R.E.* applies to the implementation, not just the suitability, of the IEP).