PROSPECTIVE RELIEF IN IDEA CASES

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Prospective relief is a key remedy in cases that impartial hearing officers (IHOs) decide under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482. This paper will discuss the following categories of prospective relief:

- Ordering Compliance with Procedural Requirements
- Orders for Evaluations
- Overriding Denial or Failure of Consent to Evaluation
- Requiring New Placements
- Rescinding and Granting Diplomas
- Modifying Records
- Other Orders for Future Conduct
- Declarations

Although compensatory education may in some contexts be considered prospective in nature, *see Milliken v. Bradley*, 433 U.S. 267, 290 (1977), it bears such a close connection to the retrospective remedy of tuition reimbursement and is so large a topic that this paper will not discuss it. This paper will also leave for another day maintenance of placement ("stay-put") orders and orders in student discipline cases.

Compliance with Procedural Requirements

The IDEA provides that hearing decisions are generally to "be made on substantive grounds based on a determination of whether the child received a free appropriate public education," and in cases in which procedural violations are alleged, "a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii). Nevertheless, "Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section." *Id.* § 1415(f)(3)(E)(iii). This proviso implies a broad power on the part of IHOs to order school districts to follow IDEA procedures.

An out-of-area case that confirms the hearing officer's authority to order future compliance with procedural requirements when the district violated the requirements but did not deny the child free, appropriate public education (FAPE) is *Dawn G. v. Mabank Independent School District*, No. 3:13–CV–135–L, 2014 WL 1356084, 63 IDELR 63 (N.D. Tex. Apr. 7, 2014). The court stated, "Here, although the Hearing Officer concluded that D.B.'s IEPs [individualized education programs] were reasonably calculated to enable him to receive educational benefit, the Hearing Officer nevertheless found that MISD had not complied with certain procedural requirements regarding assessments and services under the IDEA. The IDEA does not preclude a hearing officer from ordering a local educational agency to comply with statutory procedural requirements, 20 U.S.C. § 1415(f)(3)(E) (iii), and the record supports the Hearing Officer's decision in this regard."

Orders for Evaluations

New York education regulations contemplate IHOs entering orders for evaluations of students when doing so is needed to decide a due process case. A regulation provides that "If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense." N.Y. Comp. Codes R. & Regs. tit. 8 § 200.5(g)(2). The provision matches one in the federal IDEA regulations, 34 C.F.R. § 300.502(d).

Authorities support the ability of IHOs to order evaluations as part of the decision-making process or as relief requested in a due process proceeding. The complaint in *In re Student with a Disability*, 114 LRP 19067 (N.Y. SRO Feb. 18, 2014), included a demand that the IHO order the school district to conduct updated neuropsychological, assistive technology, auditory processing, sensory integration, and occupational therapy evaluations, as well as a functional behavioral assessment. The district did not appeal the IHO's order that it provide the neuropsychological evaluation and an OT evaluation with a sensory component, but challenged the decision to require an assistive technology and auditory processing evaluation. The state review officer (SRO) stated that "A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2])." The SRO went on to declare that "Furthermore, as part of a hearing, IHOs are vested with the authority to request that a student be evaluated at district expense (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2], [j][3][viii])." The SRO affirmed the order for the district to fund an assistive technology evaluation, though the order for an additional auditory processing evaluation was reversed on the ground the testing was not needed. A placement order was also reversed.

Numerous out-of-area decisions concern IHO authority to order that children be evaluated. One example is *Lawrence County School District v. McDaniel*, No. 3:17-CV-00004, 2017 WL 4843229, 71 IDELR 3 (E.D. Ark. Oct. 26, 2017), in which the court granted the parent's motion for a preliminary injunction to force the school district to obey an order from the IHO that the school district engage a behavior analyst to conduct a functional behavioral assessment for the child, that the district assess the student's pragmatic language, adaptive behavior, and functional impairments, and that it allow mental health professionals to conduct an observation of the student in class. In a variation on the same theme, an administrative law judge in a Georgia case required a school district to "bring into the IEP planning process an educator with credentials in teaching TBI students with aphasia to evaluate and recommend an academic program" for a child with that condition. *In re Muscogee Cnty. Sch. Dist.*, 2002 LRP 936 (Ga. SEA Oct. 8, 1999).

Another out-of-jurisdiction case, *Butler v. District of Columbia*, No. 16–cv–01033, 2017 WL 3491827, 70 IDELR 149 (D.D.C. Aug. 14, 2017), involved the not-unusual situation in which a IHO finds a denial of FAPE and the parent requests compensatory education as a remedy, but fails to put forward evidence about what the child's status would be if FAPE had been provided and what type and amount of compensatory services would be needed for the child to achieve that status. The court reversed the IHO's denial of a compensatory education award, stating:

> A hearing officer who finds that he needs more information to make such an individualized assessment has at least two options. He can allow the parties to submit additional evidence to enable him to craft an appropriate compensatory education award, or he can order the assessments needed to make the compensatory education determination. In the end, he must solicit the evidence necessary to determine the student's "specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." What he cannot do is what the hearing officer did here, that is, outright reject an award for compensatory services and terminate the proceedings.

Id. at *3 (citations omitted). The court relied on *Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005), among other authorities. Cases similar to *Butler* include *Lopez-Young v. District of Columbia*, 211 F. Supp. 3d 42, 68 IDELR 186 (D.D.C. 2016). One or both parties could put forward a motion to extend the time for decision, citing as cause the need for the evaluation.

The IDEA regulations provide that a school district must reevaluate a child when the parent or teacher requests a reevaluation, subject to the conduction that the reevaluation may occur not more than once a year, except by agreement between the parent and the district. 34 C.F.R. § 300.303(a)(2), (b)(1). *Cartwright v. District of Columbia*, 267 F. Supp. 2d 83, 39 IDELR 94 (D.D.C. 2003), reversed an IHO's dismissal of a parent's due process complaint alleging that the defendant improperly failed to afford a reevaluation in response to the parent's request. The IHO required that the parent show the reevaluation was clearly warranted. The court found no such

requirement in the regulation (the predecessor of the current provision) providing for reevaluation at the parent's request. The court ordered the district to conduct the reevaluation.

The IDEA regulations further require that if parents are unhappy with a school district's evaluation of their child, they may request an independent educational evaluation at public expense, subject to the conditions that the district may promptly file a due process complaint to show that its evaluation is appropriate, and the parent is entitled to only one independent educational evaluation at public expense each time the district conducts an evaluation with which the parent disagrees. 34 C.F.R. § 300.503(b). A federal court of appeals upheld this provision when it was challenged as exceeding the regulatory authority of the U.S. Department of Education. *Phillip C. v. Jefferson Cnty. Bd. of Educ.*, 701 F.3d 691, 60 IDELR 30 (11th Cir. 2012). The regulations further require that a child be evaluated before a district determines that a child is no longer eligible under the IDEA as a child with a disability, unless the child exceeds age eligibility or attains a regular secondary school diploma. 34 C.F.R. § 300.305(e).

In *In re Board of Education of the Ossining Union Free School District*, 46 IDELR 180 (N.Y. SRO Aug. 29, 2006), the SRO upheld a school district's evaluation of a child as adequate to support the decision to declassify her from special education, affirming an IHO determination on that issue. However, the SRO also affirmed the IHO's ruling that the district failed to evaluate the child in all areas of suspected disability when in response to a later referral it did not adequately evaluate her as to her writing ability. Instead of immediately requiring an independent evaluation at public expense in accordance with a demand from the parent, the SRO directed that "respondent should first conduct this evaluation. If petitioner disagrees with the resulting evaluation, she may assert her right to request an IEE [independent educational evaluation] of the child's writing abilities, including written language skills at public expense." This decision is at odds with the position that if the district does not show that its evaluation is sufficient, the independent evaluation at public expense must be provided, and it is error to afford the district a second bite at the apple. *See M.Z. v. Bethlehem Area Sch. Dist.*, No. 11–2313, 2011 WL 2669248, 57 IDELR 5 (E.D. Pa. 2011), *aff'd*, 521 F. App'x 74 (3d Cir. 2013).

Overriding Denial or Failure of Consent to Evaluation

Mirroring the requirements of the federal regulations, New York regulations provide that "If the parents of a student with a disability refuse to give consent for an initial evaluation or reevaluation or fail to respond to a request to provide consent for an initial evaluation, the school district may, but is not required to, continue to pursue those evaluations by using the due process procedures described in subdivisions (h) through (k) of this section." N.Y. Comp. Codes R. & Regs. tit. 8 § 200.5(b)(3); *see* 34 C.F.R. § 300.300(a)(3)(i). IHOs have applied the federal regulation and parallel state law provisions with some regularity. *See, e.g.*, *In re Wissahickon Sch. Dist.*, 114 LRP 24889 (Pa. SEA May 14, 2014).

Nevertheless, the federal regulations provide that if a parent of a home-schooled child, or one placed in a private school at parental expense, does not consent to evaluation or reevaluation, or the parent does not respond to the request for consent, the school district is not permitted to use the due process procedure to compel evaluation. 34 C.F.R. § 300.300(d)(4)(i). Even before the adoption of the explicit provision of the federal regulations, a federal court in New York granted an injunction against a school district that sought to evaluate a home-schooled child over the parent's objection. *Durkee v. Livonia Cent. Sch. Dist.*, 487 F. Supp. 2d 313, 47 IDELR 161 (W.D.N.Y. Feb. 28, 2007). The court relied on *Fitzgerald v. Camdenton R–III School District,* 439 F.3d 773, 45 IDELR 59 (8th Cir.2006), which said that requiring an evaluation under such circumstances is inconsistent with the IDEA as a whole. The *Durkee* court relied as well on the language of the regulation cited above, which had not yet come into effect at the time of the district's request for consent and the parental refusal.

Requiring New Placements

Perhaps because reimbursement and compensatory education cases are such an important part of an IHO's docket, there may be a risk of failing to give adequate attention to cases in which IHOs are asked to order a placement prospectively. The prospective placement topic breaks down into cases that involve simple requests to have a district place a child in a public or private setting other than the one the child has been offered; a subcategory of those cases where an emergency placement order is requested; and a further subcategory where a request is made for placement in a school not approved by the state. The last subcategory may entail questions about whether a state educational agency may be made a party in the due process proceeding.

Prospective Placements in General

The Supreme Court's decision in *Burlington School Committee v. Department of Education* makes clear that IHOs and SROs may order a child to be offered a private or public placement when the placement offered by the school district does not provide FAPE. 471 U.S. 359, 370, 556 IDELR 389 (1985) ("In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school."). Nevertheless, private placement will not always be the best remedy. *In re Student with a Disability*, 114 LRP 19067 (N.Y. SRO Feb.18, 2014), discussed above in connection with orders to evaluate, is an example of a case in which the SRO believed that the IHO's order that a student be placed at a private school was not justified under the facts of the case. The SRO stated that the extent to which a student can be educated with peers who do not have disabilities needs to be part of the placement decision: "The IHO's order that the CSE [Committee on Special Education] refer the student to the CBST [community based support team] for placement in a nonpublic school, particularly when read in conjunction with his order that the CSE reconvene to consider the results of the various ordered evaluations of the student, violates the CSE's duty to

first determine if the student can be educated in a public school setting, and, as such, is premature." (citations omitted).

But in other situations, a private placement is proper relief, and may be the only proper relief. A recent case from the district court of the District of Columbia, *Q.C-C. v. District of Columbia*, 164 F. Supp. 3d 35, 67 IDELR 60 (D.D.C. Feb. 2, 2016), took an IHO to task for failing to order that a student be placed in a private school when the IHO found that the public school system denied a student FAPE by providing insufficient hours of specialized instruction in her IEP. The IHO had denied the private placement on the ground that he was not sure that the student needed to be in such a restrictive environment. The court said that although the least restrictive environment is a relevant factor, "the preponderance of the evidence supports a finding that Q.C-C. requires full-time specialized instruction throughout the school day and, given that Lab [School] is the only potential placement in the record that could satisfy Q.C-C.'s needs, an order directing the District to fund Q.C-C.'s continued placement at Lab is warranted." *Id*. at 52.

In another District of Columbia case, *Hill v. District of Columbia*, No. 14-cv-1893, 2016 WL 4506972, 68 IDELR 133 (D.D.C. Aug. 26, 2016), the court overturned an IHO decision and found that the school system had failed to conduct a proper IEP meeting, failed to adequately assess the student, failed to write a proper IEP, and failed to implement the IEP that was developed. The court required the system to place the student, who was 19, at a vocational school identified and proposed by the parent, noting that the school, like the one in *Q.C-C.*, was the only placement in the record that could meet the student's needs. Other remedies were also awarded. An IHO decision requiring revision of a middle school student's IEP and placement in a private school, after a public school placement in a self-contained class proved ineffective and the student was subjected to repeated disciplinary action, is *In re District of Columbia Public Schools*, 115 LRP 16784 (D.C. SEA Feb. 2, 2015).

In a Pennsylvania case, an IHO put forward a standard for when a prospective placement order should be entered. After discussing reimbursement remedies, the IHO stated:

> Here, however, the Parent is seeking not tuition reimbursement, but a prospective private placement. This hearing officer has concluded that this is a remedy which is within her jurisdiction to order. (HO-4) Hearing officers do enjoy broad discretion to fashion an appropriate remedy under the IDEA. *See, e.g.*, Forest Grove v. TA., 557 U.S. 230, 240 n. 11 (2009); Ferren C., [v. School Dist. of Phila., 612 F.3d 712.] 718 [(3d Cir. 2010)]. In a case such as this, there is no reason to for[]go application of this discretion to an order for a private school placement. *See, e.g.*, School Committee of Burlington v. Department of Education, 471 U.S. 359, 370 (1985); Draper v. Atlanta Independent School System, 518 F.3d 1275, 1285-86 (11th Cir. 2008); Ridgewood Board of Education v. NE., 172 F.3d 238, 248-49 (3d Cir. 1999).

> While the tuition reimbursement test may not be directly applicable, its prongs do provide concrete guidance for evaluating this type of claim. Additionally, however, the record must, in this hearing officer's estimation, support a conclusion that the LEA is not in a position to make timely and reasonable revisions to its special education program in order to offer and provide FAPE. *See, e.g.*, Burlington, *supra*, at 369 (explaining that private placement at public expense is warranted where an appropriate public school program is not possible). This does not mean that the Parent must establish that the LEA cannot 'in theory' provide an appropriate program, Draper, *supra*, at 1285 (quoting Ridgewood, *supra*, at 248-49), but the equitable nature of the requested remedy logically demands something more than a past denial of FAPE.

In re Young Scholars – Kenderton Charter Sch., 115 LRP 4481 (Pa. SEA Dec. 24, 2014). The IHO found that the program offered the student did not afford FAPE. Applying the standards articulated above, she ordered prospective placement in the private school proposed by the parent, as well as compensatory education.

Still other due process hearing decisions require prospective placement in specific programs. *E.g., In re Tucson Unified Sch. Dist.*, 28 IDELR 1037 (Ariz. SEA Aug. 10, 1998) (self-contained setting for students with emotional disabilities); *In re Winchester Pub. Schs.*, 28 IDELR 916 (Mass. SEA July 7, 1998) (private therapeutic school).

In contrast to *Q.C-C.*, *Hill*, *Young Scholars – Kenderton*, and similar decisions, and in line with *In re Student with a Disability*, discussed above, other cases have found orders for prospective placement premature or otherwise improper. In *Parents of Danielle v. Massachusetts Dep't of Educ.*, 430 F. Supp. 2d 3, 45 IDELR 247 (Apr. 7, 2006), the court affirmed an IHO decision that held that the student's IEP, as modified in accordance with the IHO's instructions, afforded FAPE, even though as originally drafted it did not, and that prospective placement in a private school was not warranted. In a case in which the now-superseded Pennsylvania hearing appeals panel found no basis to conclude that an IEP was not appropriate or not implemented, the panel overturned an IHO order that if the student's progress in his current placement ceased, the IEP team had to meet for the purpose of pursuing placement for him in a residential treatment facility. *In re Wilkes-Barre Area Sch. Dist.*, 32 IDELR 17 (Pa. SEA May 28, 1999) ("To the extent that the hearing officer's order attempts to direct future placement of [Student], the panel concludes that she exceeded her authority with respect to his current educational placement.").

Emergency Placements

Emergency circumstances may require an immediate placement, and an IHO may enter such relief. In the case of a 14-year-old student who had been sexually molested and physically injured by a male relative, and had a recent record of substance abuse, self-harm, suicide attempts, panic attacks, and other problems, *In re District of Columbia Public Schools*, 113 LRP 43241 (D.C. SEA Sept. 8, 2013), the school system

developed a program for the student in a general education classroom with pullout services. The school system maintained that it was its policy not to place a child immediately into full-time services upon finding a child eligible for special education. Instead, if a placement did not work out, it would be revisited in 30 days. The IHO, however, stated that "The severity of Student's behaviors, especially [ ] repeated suicide attempts, makes the risk of placing Student in an inappropriate setting with an insufficient IEP too high, as all it takes is one time for a suicide attempt to be successful." Accordingly, a placement in a private therapeutic school was ordered.

By contrast, in two New Jersey cases, administrative law judges (ALJs) found there was insufficient support for emergency placement orders. In *In re Jackson Township Board of Education*, 115 LRP 3501 (N.J. SEA Jan. 9, 2015), the ALJ applied a traditional preliminary injunction test to a request for an immediate out-of-district placement for a student and other relief. The student was ten years old and was diagnosed with autism, ADHD, and sensory processing disorder. He was educated in a self-contained class for some subjects, pull-out resource replacement for another subject, and in-class support for still other subjects. He was subject to wandering and at one point wandered out of the school building and was lost for an hour. The parents reported other difficulties with his educational progress. Nevertheless, applying the test (1) the petitioner would suffer irreparable harm without the relief; (2) the legal right underlying the claim was settled; (3) the petitioner was likely to prevail on the merits of the underlying claim; and (4) the petitioner would suffer greater harm than the respondent if the relief is not granted, the ALJ found that the standards were not met and denied the relief. Similarly, in *In re* Milltown Board of Education, 103 LRP 33932 (N.J. SEA June 18, 2003), the ALJ applied the preliminary injunction test to the case of a child in a preschool class whose parents sought a greatly increased level of services. The ALJ ruled that the claim failed for lack of showing of irreparable harm, noting that the child was receiving a previously-agreed level of services and a dispute was pending over reimbursement for additional purchased services.

Unapproved Placements

A longstanding controversy exists over the ability of the IHO or SRO to order the placement of a child in a placement that is not approved by the state educational agency. Interpreting the predecessor statute to IDEA, the Second Circuit in *Antkowiak v. Ambach*, 838 F. 2d 635, 559 IDELR 275 (2d Cir. 1988), held that neither a school district nor an IHO, and not even a court, could order a child's placement at an unapproved school. The court reasoned that all schools in which children are placed must meet state educational standards and that private schools in which children are placed must meet standards that apply to state and local educational agencies. But *Antkowiak* was decided before *Florence County School District 4 v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993), which held that parents may obtain reimbursement for unilateral placements in schools that are not approved by the state, as long as the child has been denied FAPE and the private school offers appropriate services. *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 441 IDELR 429 (2d Cir. 1989), a reimbursement case that relied heavily on *Antkowiak*, was abrogated by the *Carter* decision. *Carter*, 510 U.S. at 14. Since it dealt with reimbursement for a parental

placement, *Carter* is, of course, not directly on point with regard to IHO or school district placements. The *Carter* Court reasoned that the requirements about private school placements in IDEA should not be read to apply to parental placements.

Some New York precedent supports the ability of a hearing officer to require that a child be placed in an unapproved facility or program. In *Sabatini v. Corning-Painted Post Area School District*, 78 F. Supp. 2d 138 (W.D.N.Y. 1999), Chief Judge Larimer granted a preliminary injunction to enforce an IHO order requiring that a student be placed in an unapproved school. The district's CSE agreed with the parent's request that their child, who had anxiety disorder, depression, and a nonverbal learning disability and was classified as multiply disabled, needed a residential placement. The district's board of education rejected the request, and appointed a new CSE, which also recommended residential placement. The parents demanded a due process hearing, and the parties settled, with the district agreeing to actively search for a residential placement and provide an appropriate program. The district could not find a placement that would accept the student, but the parent obtained an acceptance for the student at a post-secondary institution with a specialized center for students with disabilities. The New York State Department of Education did not approve the school, however, so the district refused to place the student there. The parent requested a new due process hearing, contending the district reneged on the settlement, and the IHO agreed and ruled that placement of the student in a nonapproved residential program was authorized relief under IDEA. The district appealed, but the SRO did not issue a ruling despite the elapse of the time limit for the appeal decision, and the parent filed an action in court.

The court ruled that the parent sufficiently exhausted administrative remedies. It also rejected the district's argument that the Commissioner of Education was an indispensable party:

> Prior to the Supreme Court's decision in Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993), the District's argument might have been persuasive. Prior case law from the Second Circuit had indicated that it was beyond a district court's authority to order a child to be placed in a private facility that had not been approved by the Commissioner. See Antkowiak by Antkowiak v. Ambach, 838 F.2d 635, 640–41 (2d Cir.), *cert. denied*, 488 U.S. 850, 109 S. Ct. 133, 102 L.Ed.2d 105 (1988). In *Carter*, however, the Court held that the requirement in 20 U.S.C. § 1401(a)(18)(B) that the school meet the standards of the state educational agency does not apply to private parental placements. *Id*. at 14, 114 S. Ct. 361. In doing so, the Court expressly rejected the Second Circuit's holding in Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 568 (2d Cir.1989), that parental placement in a private school cannot be proper under IDEA unless the school meets the standards of the state agency. Carter, 510 U.S. at 14, 114 S. Ct. 361. The Court stated that "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of

> approval of the same public school system that failed to meet the child's needs in the first place." *Id.* (quoting Carter By and Through Carter v. Florence County School Dist. Four, 950 F.2d 156, 164 (4th Cir.1991)).

Sabatini, 78 F. Supp. 2d at 141-42. The court went on to declare that "This case . . . does present a situation where a child's right to a FAPE is in direct conflict with the State's approval process. *Carter* makes clear that in that circumstance, the State's interest in maintaining its approval process must yield to the child's and society's strong interest in making a FAPE available when mandated by IDEA." *Id.* at 142.

On the question of the parent's likelihood of success on the merits, the court reasoned that the program would meet the student's needs, had served secondary school students previously, and would enable the student to achieve a high school diploma. The court described the remedy as a form of compensatory education, and relied on cases in which courts approved post-secondary education as a compensatory education remedy. Under the facts of the case, however, it appears that the placement was to be an ongoing means of providing FAPE to the student.

Another New York case lending support to hearing officer authority to require an unapproved placement is *Connors v. Mills*, 34 F. Supp. 2d 795, 29 IDELR 946 (N.D.N.Y. 1998). The parent enrolled the child, who had multiple disabilities, at a Montessori school, which was a nonapproved placement. The parent filed a due process hearing request, and the district agreed that it could not provide appropriate education to the child, and that the Montessori school could. Under a settlement agreement, the district reimbursed the parent for a year's tuition and provided transportation to the Montessori school for the end of that school year. A subsequent due process hearing led to a settlement for the following school year calling for reimbursement for that year as well as compensatory services. A disagreement ensued over the child's stay-put placement, with the district ultimately agreeing to pay the tuition until the IHO decision. The parent sued the State Commissioner and other state defendants for reimbursement for costs of pursuing the relief she obtained in the various proceedings. The defendants moved for summary judgment. The court phrased the issue before it as "whether the school district, either through the CSE, LEA, or SEA, may place a child in a non-approved private school." *Id.* at 799. The court found exhaustion excused under the circumstances, and that the Commissioner was a proper party defendant.

On the merits, the court said that any statutory barrier to prospective placement in a nonapproved school is not ironclad:

> The statutory text, however, is not as transparent as Defendants contend. Whether the educational services offered a child "meet the standards of the State educational agency" is only one aspect of a "free appropriate public education." Section 1401(a)(18) also provides that a "free appropriate public education" includes "an appropriate ... education", § 1401(a)(18)(C), that is "in conformity with the [IEP]." § 1401(a)(18)(D). From the text, it is apparent that Congress intended "free appropriate public education" to include both procedural and substantive aspects.

> Defendants interpret the Act in such a way as to assign greater importance to the procedural aspects of "free appropriate public education" than to the substantive aspects.

Id. at 803. The court relied heavily on *Carter*, saying that "the important notion limned from *Carter* is that the substantive guarantee of a free and appropriate education takes primacy over a state's approval procedures when those two statutory provisions conflict." *Id*. "By prohibiting prospective placement, Defendants would deny assistance to families that are not able to front the cost of a private non-approved school, without exception. Id. at 804. The family's access to needed services should not depend on its ability to pay for tuition and hope for reimbursement later when school district and parent agree that the services are needed. The court went on:

> [W]hen a child's access to a free and appropriate public education in a substantive sense conflicts with the state's approval process, *Carter* instructs that the state's approval process must give way. Such a situation arises when a parent does not have the financial means to front the cost of a non-approved private school. Without external support, the child would have no chance at what has already been determined to be his or her opportunity to receive an appropriate education. As a result, once the Burlington prerequisites relative to a non-approved private school are met, and a parent shows that his or her financial circumstances eliminate the opportunity for unilateral placement in the non-approved school, the public school must pay the cost of private placement immediately.

Id. at 805-06 (footnotes omitted). The court noted that in the case before it, however, there was no allegation that the parent could not pay the tuition and seek reimbursement. Thus there was no conflict in this situation, and she lost her case. The court, however, said that unless circumstances changed, she would be entitled to reimbursement from the school district upon demand, with no further proceedings.

The SRO decision in *In re: Student with a Disability*, 114 LRP 46719 (N.Y. SRO June 30, 2014), echoes *Connors* on both its interpretation of IDEA and its ultimate conclusion on the facts of the case. A student had serious behavior problems and had diagnoses of ADHD, mood disorder, asthma, and a connective tissue disorder, was classified as a student with autism and previously as a student with emotional disturbance. After consideration and reconsideration of various programs and placements, the district proposed placement at a state-approved private day school. The parent objected and demanded a hearing. The IHO ruled that the district failed to provide FAPE for two school years, and found that the student should be prospectively placed at a secure facility that used an applied behavioral analysis model in a therapeutic setting, and offered social skills training. The CBST was directed to consider all options, including nonapproved private schools. The IHO also ordered other relief, including home services, parent training, adapted physical education, a functional behavioral analysis, a behavior intervention plan, and compensatory education. The district appealed the order to consider nonapproved schools. The SRO declared that "under certain circumstances an IHO may direct a district to place a student in an

appropriate school that has not been approved by the Commissioner." The SRO cited *Forest Grove School District v. T.A.*, 557 U.S. 230, 237, 52 IDELR 151 (2009), and other Supreme Court decisions to support the broad remedial authority of hearing officers and courts in IDEA cases.

However, the SRO also said that "under the circumstances presented in this matter, the specific relief awarded by the IHO directing the CBST to consider non-approved nonpublic school placements was improper." The parent never identified any specific placement, and despite *Carter*'s holding as to reimbursement cases, *Antkowiak* continued to bar *school districts* from considering placing students in nonapproved schools:

> Thus, while a parent may seek reimbursement or direct funding for a unilateral placement that is not approved by the Commissioner of Education and an administrative hearing officer may order a district to place a student in an appropriate but unapproved nonpublic school, the Second Circuit's holding in *Antkowiak* still applies to district placements and it is outside the authority of an IHO or an SRO to direct a district to consider placement of a student in a school that has not been approved by the Commissioner of Education and regarding which there has been no finding that the school constitutes an appropriate placement for the student.

The SRO noted that the district may request the state to approve an interim placement if needed.

But "[n]otwithstanding the above, in certain limited circumstances an award directing a district to prospectively place a student in an appropriate but unapproved school may be proper." The SRO cited *Connors v. Mills*, and declared:

> Thus while the IHO's order directing the district to consider placing the student in an unapproved school was not an appropriate delegation of the IHO's authority to award appropriate relief, in the event that the district does not identify an appropriate placement for the student the parent is not left without options. The parent may select an appropriate unapproved school and initiate a due process complaint proceeding requesting prospective equitable relief from an administrative hearing officer; however, in such a proceeding the parent would be responsible to establish with specific objective evidence before the IHO that such a unilateral placement, chosen by the parent without the consent of district officials, is an appropriate placement under the IDEA.

The appeal was sustained.

On further appeal to the district court, the court affirmed. In *Z.H. ex rel. Z.H. v. New York City Dep't of Educ.*, 107 F. Supp. 3d 369, 65 IDELR 235 (S.D.N.Y. 2015), the

court said that *Carter* did not overrule *Antkowiak*; the court appeared to read *Sabatini* as a reimbursement case. Id. at 376 & n.4. The court declared:

> *Carter* does not stand for the proposition that a school district can be mandated to identify and place a student in a non-approved, private school. Carter acknowledges the reimbursement remedy in the event that the student is denied a FAPE and the parent unilaterally chooses a placement for a student. *Antkowiak* and the related statutes and regulations govern school district's options as part of the efforts to provide placement. The fact that a school district may consider placement in a private school does not mean that it may place the student at any private school, including one that does not meet the Commissioner's approval standards.

Id. at 376. The court also noted that the decision of the SRO should be afforded deference, and it repeated the SRO's points about the availability of a request to the state for interim approval of a nonapproved placement. It also stated, "The SRO Decision observed that there may be 'certain limited circumstances' in which a school district could place a student in an unapproved school, specifically if the parent and the school district agreed that the district cannot otherwise provide a student with a FAPE, but that those circumstances did not exist here." *Id*. at 377.

A variety of out-of-jurisdiction precedent supports the ability of IHOs to require students be enrolled in nonapproved placements. *Delaware Cnty. Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206, 20 IDELR 363 (E.D. Penn. 1993), *disapproved in part on other grounds*, *Michael C. v. Radnor Twp. Sch. Dist.*, 202 F.3d 642, 653, 31 IDELR 184 (3d Cir. 2000), granted the prospective relief of placement in an applied behavioral analysis program conducted by persons not certified as teachers under state law, as well as reimbursement. The court rejected *Antkowiak* and relied on the Fourth Circuit decision that was affirmed in *Carter*. Administrative hearing decisions also require placement in nonapproved special education programs. *See In re Madison Bd. of Educ.*, 38 IDELR 169 (Conn. SEA Jan. 23, 2003) (stay-put placement); *In re Baltimore City Pub. Schs.*, 20 IDELR 400 (Md. SEA July 23, 1993); *In re Falmouth Pub. Schs.*, 18 IDELR 1168 (Mass. SEA June 2, 1992); *see also Letter to Tucker*, 18 IDELR 965 (OSERS Feb. 19, 1992) ("[I]t would be impermissible for an SEA to have a policy or procedures to override a local placement decision in a school or program which has or has not been State approved for State funding purposes. . . . The decision of the local placement team must be final, without provisions for veto by the State or local educational agency outside of due process or court action.").

One court case, *Dobbins* v. *District of Columbia*, No. 15-0039, 2016 WL 410995, 67 IDELR 34 (D.D.C. Feb. 2, 2016), occupies a middle ground. There, the court found that the parent had not made an adequate showing that the hearing officer should have placed the child in a nonapproved program, but it noted that a District of Columbia statute, § 38-2561.03, permits hearing officers to place and require funding of a student in a nonapproved program when "(A) There is no public school or program able to provide the student with a free appropriate public education; and, (B) There is no

nonpublic special education school or program with a valid Certificate of Approval that meets the requirements of subsection (a)(2) of this section."

A number of authorities, some out of jurisdiction, support the view that hearing officers have no authority to order a nonapproved placement. In *Struble v. Fallbrook Union High Sch. Dist.*, No. 07cv2328-LAB, 56 IDELR 4 (S.D. Cal. Jan. 27, 2011), the court affirmed an ALJ decision that a school district failed to provide a student with FAPE and said it was permissible for the ALJ to require the parties to meet and devise a plan for the student to achieve a high school diploma as a prospective remedy and compensatory education, rather than to require placement of the student at a private school that has not been certified by the state as an appropriate school for children with disabilities. The court cited both IDEA and California law and declared: These authorities make clear that school districts and hearing officers in California cannot place students prospectively in non-certified nonpublic schools." It responded to the argument that this leaves parents who cannot pay costs up front and hope for reimbursement without remedy by saying, "The plain language of the statute requires prospective placement in a certified private school, and it would be inappropriate to reject this restriction and order placement at a non-certified nonpublic school."

Administrative precedent against placement in nonapproved programs also exists. *See Winnacunnet Coop. Sch. Dist.*, 36 IDELR 199 (N.H. SEA Mar. 3, 2002) (also questioning appropriateness of placement). Moreover, an early letter from the Office of Special Education and Related Services casts doubt on the propriety of school district or IHO placement in facilities that do not meet state standards for approval. *Letter to McIntire*, 213 IDELR 171 (OSERS Oct. 5, 1988) ("As a part of its general supervisory responsibility for all educational programs . . . , the [state education department] may not permit public agencies to place handicapped children in programs that do not meet appropriate State standards. In any individual case where a local school district is prohibited by the State educational agency from implementing a decision of a hearing officer, it can appeal the hearing officer's decision through the State level administrative appeal, if any exists, and through an action in Federal court.") (citation omitted).

Joinder of the SEA in Non-Approved Placement Disputes

When a parent is seeking a placement for a child in a school that has not obtained approval from a state educational agency, the parent might seek to make the state educational agency a respondent in the due process proceeding. The parent may contend that as a party, the agency can be made subject to an order to approve a placement if that is needed for the child to receive FAPE. *Connors v. Mills*, *supra*, would appear to support state amenability to suit. In addition, in *Straube v. Florida Union Free School District*, 801 F. Supp. 1164, 19 IDELR 131 (S.D.N.Y. 1992), the parents of a child with dyslexia who was reading at a third-grade level in tenth grade but who improved dramatically while at a nine-month placement in a private school, sought an ongoing private placement at that school. The parents demanded a due process hearing, and the district agreed to place the student at the school but then informed the parents that the school was not approved by the state education department. The IHO held the district's proposed IEP and public school placement were not appropriate, but said the

student could not be placed at a nonapproved school and remanded the case back to the district. The parents sued state officials, the state education department, and the school district. The court rejected mootness, Eleventh Amendment, and immunity objections to the suit. The court declared that providing appropriate education is the obligation of both the state and the school district. Citing *Tucker* and *Antkowiak* and rendering its decision before *Carter*, the court further stated that it lacked the ability to order placement in the nonapproved school. Instead, it remanded the case to the CSE to develop a program that would meet the student's needs. But it declared that "should a residential placement be needed and none is available, the State is ordered to expand the alternative placements on its list," and the district and the state had to affirmative steps to conditionally approve the school chosen by the parents, if necessary. *Id*. at 1180. The court also required provision of compensatory education.

In *Letter to Anonymous*, 69 IDELR 189 (OSEP Jan. 2, 2017), the Office of Special Education Programs responded the question whether parents may file a due process complaint against a state educational agency by saying that "a parent may file a due process complaint against an SEA [state educational agency] and the hearing officer has the authority to determine, based on the individual facts and circumstances in the case, whether the SEA is a proper party to the due process hearing." The office referenced its earlier document *Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232 (OSEP 2013), which stated that "hearing officers have complete authority to determine the sufficiency of all due process complaints filed and to determine jurisdiction of issues raised in due process complaints consistent with 34 CFR §§ 300.508(d) and 300.513." Two recent cases from California go the OSEP documents one better by permitting review in due process proceedings of decisions of a state agency that is not the state educational agency. The courts relied on the fact that state law made the agency responsible for providing some forms of services for children with disabilities. *See Douglas v. California Office of Admin. Hearings*, 650 F. App'x 312, 67 IDELR 228 (9th Cir. 2016) (California Children's Services Program); *Department of Health Care Servs. v. Office of Admin. Hearings*, 210 Cal. Rptr. 3d 790 (Ct. App. 2016) (same).

Rescinding and Granting Diplomas

The FAPE obligation applies only through secondary schooling, 20 U.S.C. § 1401(9), so at times parents request IHOs or courts to rescind high school diplomas or certificates of completion in order that the right to special education will continue until the student's age eligibility expires. *See, e.g., Kevin T. v. Elmhurst Cmty. Sch. Dist. No. 205*, No. 01 C 0005, 34 IDELR 202 (N.D. Ill. 2001). More unusual are situations in which IHOs or courts are asked to compel school districts to issue diplomas or award credit toward graduation. In *Hills v. Lamar County School District,* No. 2:06CV53KS-MTP, 2008 WL 427775, 49 IDELR 188 (S.D. Miss. Feb. 2, 2008), the court granted summary judgment against a student who requested the court to order his school district to provide a certificate of graduation after he dropped out midway through senior year. The court declared that "The fact that he simply desires his grades changed and to be given a diploma is not a remedy available under the IDEA." *Id.* at *3. On the other hand, a California hearing officer, in a two-paragraph order, ruled that requiring a

school district to give credit toward graduation for academic work done "at a private school is not an issue of initial subject matter jurisdiction, but is an issue concerning the remedies that may be crafted by a hearing officer to address failures of a district to meet its obligations to provide a free appropriate public education." *In re Conejo Valley Unified Sch. Dist.*, 29 IDELR 779 (Cal. SEA Dec. 11, 1998).

Modifying Records

The IDEA regulations include provisions regarding amendment of records when circumstances so demand. The parent may request amendment, and if the school district fails to agree, the school district must afford the parent a hearing to challenge the information in the educational records that is inaccurate or misleading or violates the privacy or other rights of the child. *See* 34 CFR §§ 300.618-.619; *see also Letter to Jewett*, 211 IDELR 285 (OSEP 1982). The regulations do not specifically reference the IDEA due process hearing procedure, however, and instead say that a hearing under section 300.619 is to be conducted according to procedures in 34 C.F.R. § 99.22. Applying these provisions, a New York SRO dismissed an appeal of an IHO decision, holding that the IHO did not have the jurisdiction to amend a student's grades. *In re Student with a Disability*, 51 IDELR 261 (N.Y. SRO Sept. 10, 2008). After determining that parent's various claims for prospective relief for the child with regard to services were all moot, the SRO said the only claim remaining was one that "that the student's grades be amended to 80 or above, 'reflecting the grades that he would have achieved had the school district provided IEP services as required.'" The SRO said that using the due process hearing request process applicable to ordinary IDEA controversies was not proper.

Other Orders for Future Conduct

Courts have approved, or assuming the role of an IHO or SRO have themselves ordered, other kinds of prospective relief. One type of relief is a requirement for proper establishment of an IEP and a placement based on the IEP. *R.G. v. New York City Department of Education*, 980 F. Supp. 2d 345, 62 IDELR 84 (E.D.N.Y. 2013), entailed a school district's failure to include a general education teacher on the student's IEP team, a procedural violation of IDEA that impeded the child's right to a FAPE. The court declared that "[B]ecause the procedural violation prevented a full assessment of the appropriate placement for F.G., this Court orders Defendant to convene a legally sufficient committee to develop a new IEP and placement for F.G. In addition, pursuant to the pendency provisions of state and federal law, this Court directs Defendant to continue funding F.G.'s current special education programs until that process is complete." *Id.* at 349. The court disagreed with the SRO's conclusion that the procedural error did not deny FAPE, noting that the failure to include a general education teacher on the CSE prevented adequate consideration of a mainstreamed placement, as opposed to the separate class proposed by the district. The court noted that the pendency placement of the child maintained her in a general education class with supplemental services at a private school:

> Plaintiffs have not incurred any costs for placing F.G. in an alternative educational setting, and therefore the question of "reimbursement" for the parents is not before this Court. Instead [of reimbursement], the appropriate remedy for Defendant's failure to include a general education teacher on the CSE that formulated F.G.'s IEP, which failure impeded F.G.'s right to a FAPE, is to require Defendant to constitute a legally sufficient CSE to develop a new IEP and recommended placement for F.G. While requiring Defendant to create a new IEP for F.G. cannot undo the harm inflicted by Defendant's inadequate earlier process, it does ensure that the CSE fully and fairly considers whether a general education environment, with appropriate support, can provide F.G. with an education likely to produce progress, not regression.

Id. at 365 (citation omitted).

IHOs have directed the rewriting of IEPs when they have found the programs inadequate, even when the placement recommendation is appropriate. In *In re San Diego Unified Sch. Dist.*, 29 IDELR 998 (Cal. SEA Nov. 19, 1998), the IHO upheld a school district proposal to place an 11-year-old with global developmental delays, a visual impairment and a speech disorder in a mainstream class for up to 39% of the day and the remainder in other settings. The IHO nonetheless found that the school district denied the student FAPE, and commented:

> With regard to STUDENT's IEP, there is a disconnect between the IEP and the offer of placement. As noted above, the IEP contains no reading goal, and those goals that might be characterized as academic (such as improving language skills and learning to count and to tell time) bear little relationship to proposed courses such as science and current events. The offer of placement does not conform to the IEP. More importantly, the Hearing Officer concludes that IEP itself is legally deficient because it lacks appropriate reading and other academic goals. . . .
> The District's proposed placement will likely provide STUDENT with educational benefit. However, the District's proposed placement does not meet STUDENT's unique needs, and the IEP is legally inadequate.

The IHO held that the proper remedy was to require the district to develop a new IEP considering a "full spectrum of curriculum modifications and supplementary aid[]s and services that might enable STUDENT to succeed in a regular education setting, [i]ncremental approaches to mainstreaming[, and] [t]he presumption that STUDENT should be with peers that are reasonably close to her in age," among other matters. The district was also mandated to include an inclusion specialist on the IEP team.

IHOs have ordered remedies to enhance parental participation. In a case in which a school failed to provide periodic progress reports to the guardian as required by the IDEA, *In re School City of East. Chicago*, 31 IDELR 45 (Ind. SEA Nov. 6, 1998), the Board of Special Education Appeals ordered that "The Guardian shall be given the opportunity to participate in a parent-teacher conference with the teacher of record at

the conclusion of each grading period to report the Student's progress in attainment of goals in all areas of the curriculum. The IEP shall state that progress reports shall be provided to the Guardian and the manner in which they will be provided."

Sometimes, requested relief may exceed what is deemed permissible. In a New York case that did not involve the authority of an IHO or SRO, a court was asked to enter a preliminary injunction to force a school district to pay the moving expenses of a family who contended that their child was being denied FAPE by the district and wished to move to Newton, Massachusetts, where an appropriate program could be obtained. The court denied the motion; the court's language might apply to a similar request for prospective relief if it were made to an IHO:

> Plaintiffs offer no authority to support their argument that Defendants are responsible for non-educational costs associated with parents relocating to another State to obtain educational services for their disabled child. Nor have they established that the educational program offered by the Newton Public Schools cannot be obtained in New York State. Because the IDEA does not require school districts to pay for non-educational expenses and does not permit money damages, the Court doubts Plaintiffs can establish they are entitled to the injunction they seek. With respect to their request that Defendants cover the costs associated with Plaintiffs relocating to Newton, Massachusetts, the Court concludes that Plaintiffs have failed to demonstrate a likelihood of success on the merits.

R.S. v. Board of Educ. Shenendehowa Cent. Sch. Dist., No. 117CV501LEKCFH, 2017 WL 3382159, 70 IDELR 154 (N.D.N.Y. Aug. 7, 2017).

Limits to remedies may apply in other situations. The Pennsylvania appeals panel overturned a IHO's decision that had required the placement of a kindergartener in a hybrid program that would include both a half-day cross-categorical special education class and a half-day regular class. *In re Abington Sch. Dist.*, 41 IDELR 49 (Pa. SEA Nov. 1, 2003). The panel believed the order exceeded the IHO's authority by requiring a school day longer than that contemplated by state law, and further said that there was no testimony that the program offered by the district was insufficient for the student to make meaningful progress. Since the federal IDEA would preempt conflicting state law provisions, the second ground for decision may be more persuasive than the first.

The U.S. Department of Education's Office of Special Education Programs is of the view that states have broad control over the remedies IHOs may order. In *Letter to Armstrong*, 28 IDELR 303 (OSEP June 11, 1997), the office declared:

> Part B does not specify what particular remedies, including penalties or sanctions, are available to due process hearing officers or to decision makers in State-level appeals. The specific authority of hearing officers and appeal boards, including the types of sanctions that are available to them, generally will be set forth in State law or regulation. Part B provides that each SEA must exercise general supervision over all educational

> programs for children with disabilities within the State and must ensure that such programs are administered in accordance with State education standards and Part B requirements. . . . Therefore, it is ultimately the SEA's responsibility to ensure that hearing officers are provided the authority they need to grant relief necessary to the resolution of Part B complaints, that a hearing officer's orders are implemented, and that any actions necessary to enforce those orders are taken.

Declarations

The IHO or SRO has the power to issue declarations when that relief is justified. For reasons of finality and enforceability a declaration or order for future conduct is generally preferable to a mere recommendation. A court has found that a school system's failure to follow recommendations in an IHO decision did not justify the parent's failure to exhaust administrative procedures in an action challenging the school district's conduct inconsistent with the recommendations. *Cox v. Jenkins*, 878 F.2d 414, 441 IDELR 492 (D.C. Cir. 1989).

The New York caselaw includes instances in which IHOs have made declarations and the declarations have been given binding effect. In *In re Board of Education of the City School District of the City of New York*, 31 IDELR 18 (N.Y. SRO Dec. 28, 1998), an IHO found that a child who was not deemed eligible for special education should have been found eligible and classified as having a learning disability. The school district did not appeal the finding. A tuition reimbursement dispute arose for the following school year, and the IHO in that case found insufficient evidence to support the learning disability classification, even though the school district had classified the child as having a learning disability pursuant to the decision of the IHO in the first case and the district did not contest the classification in the later dispute. The SRO reversed the decision of the IHO in the second case on the issue and stated: "Because the issue of the child's classification had not been raised by the parties in this proceeding, it was not for the hearing officer to determine. Therefore, I find that the hearing officer's sua sponte determination that the boy was not a child with a disability must be annulled." (citation to record omitted).

A court may reverse an IHO decision that does not include a declaration that is requested by the plaintiff and warranted by the evidence. *See D.C. v. Department of Educ.*, No. 05-00562, 46 IDELR 6 (D. Haw. June 23, 2006) ("The Hearing Officer should make a determination of the student's eligibility forthwith, so that if the Hearing Officer determines that the student is eligible, the student's IEP team may have sufficient time to determine an appropriate IEP for the student before the start of the new school year.")

Additional Reference: Mark C. Weber, *Special Education Law and Litigation Treatise* § 20.13 (LRP Pubs. 4th ed. 2017) (discussing relief permitted in due process proceedings).

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