The University of the State of New York

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

No. 16-040

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Westhampton Beach Union Free School District

Appearances:
Kevin A. Seaman, Esq., attorney for respondent

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which dismissed the parents' due process complaint notice with prejudice. The appeal must be sustained and, as explained more fully below, the matter must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

This appeal arises from a decision of an IHO which granted the district's motion to dismiss the due process complaint notice prior to conducting an impartial hearing. In light of the procedural posture of this matter, the evidence in the hearing record is sparse with respect to the facts leading up to the parents' due process complaint notice. Therefore, the following summary of facts is based on the parents' allegations, a federal district court decision involving the same underlying allegations (which were also dismissed on motion before trial), as well as copies of

correspondence and other documents provided to the IHO in support of the parties' respective motion papers.[1]

The student's district of residence is a sending school district, meaning that it contracts with other school districts to educate its resident pupils after a certain grade (see Ex. 11; 8 NYCRR 174.4[a][1]; see also Educ. Law § 2040). The school district that contracts with a sending school district is known as a receiving school district (8 NYCRR 174.4[a][2]). The hearing record includes a copy of a contract between the student's district of residence ("the sending school district") and the receiving school district ("the district") for the 2014-15 school year (Ex. 11).

A CSE of the sending school district met on March 30, 2015 and recommended a program for the student that the parents rejected because it could not be implemented in the district (Ex. 4 at p. 4). The CSE thereafter reconvened on April 24, 2015 and recommended a different program with which the parents also disagreed (id. at p. 5). The parents thereafter filed a due process complaint notice against the sending school district requesting placement of the student in the district (id.). The parents and the sending school district held a resolution meeting on June 17, 2015, during which they agreed to the contours of a stipulation of settlement (id.; Ex. 12).[2] The stipulation of settlement reflected that the sending school district would develop an IEP for the student for the 2015-16 school year that recommended placement in a 15:1+1 special class along with a 1:1 teaching assistant, 3:1+1 resource room services, and related services, and required the sending school district to contact the district and request that it implement the recommended program (Ex. 12 at p. 2). By letter dated June 23, 2015, the superintendent of the district informed the president of the board of education of the sending school district that the district could not implement the program recommended in the stipulation of settlement and asserted that an IHO should make a determination as to the appropriate program for the student (Ex. 15).

By letter dated July 9, 2015, counsel for the sending school district advised counsel for the district of the result of the resolution meeting and the agreed upon recommendations for the student's IEP for the 2015-16 school year and provided a copy of the stipulation (Ex. 10). In accordance with the terms of the settlement agreement, counsel for the sending school district requested that the district implement the agreed upon IEP, asserting that the district would be able to do so "with little burden" (id. at p. 2).

By letter dated July 13, 2015, counsel for the district responded to the sending school district's request (Ex. 14). The district contended that the recommended 15:1+1 special class was not an appropriate placement for the student and, further, that the district did not have an

[1] Since the IHO dismissed the parents' due process complaint notice without conducting a hearing, no exhibits were admitted into evidence by the IHO. The district submitted a number of documents, including correspondence between the parties, as the record on appeal. Each document included a numbered cover page. For ease of reference, citations to the record will refer to the cover page number as an exhibit number. Attachments to exhibits are cited by number and letter. In any event, given the posture of this case the facts are taken in the light most favorable to the parents.

[2] The copy of the stipulation of settlement included in the hearing record was not signed by either the sending school district or the parents (Ex. 12 at p. 6). It appears the copy submitted to the IHO was executed on August 3, 2015 (IHO Decision at p. 4; see Ex. 4 at p. 6). I remind the district that it is required to file "a true and complete copy of the hearing record before the impartial hearing officer" (8 NYCRR 279.9[a]).

appropriate placement for the student and could not implement the proposed IEP (id. at pp. 1-4). In conclusion, counsel for the district suggested that the board of education of the sending school district disapprove the settlement agreement and reaffirm the recommendation of its April 24, 2015 CSE, and further indicated that it may be appropriate for the district to intervene in the due process proceeding (id. at pp. 4-5).

On December 18, 2015, the parents filed an amended complaint in federal district court against the district seeking declaratory and injunctive relief ordering the district to develop an IEP for the student with the parents and the sending school district and to implement the IEP in the district (Ex. 1A).

By letter dated March 18, 2016, the superintendent of the district notified the superintendent of the sending school district that he was in receipt of a student registration form indicating that the student was to be enrolled in the district (Ex. 16). The superintendent of the district wrote that, pending the outcome of the parents' federal litigation, the student would not be enrolled in the district (id.).

On May 9, 2016, the parents' civil action in federal court was dismissed for failure to exhaust administrative remedies (Ex. 4 at p. 20). In particular, the Court found that, because the parents' request for an injunction permitting the student to attend the district was their primary relief requested, their challenge related to the district's refusal to implement the program set forth in the student's IEP, which, in turn, involved the educational placement of a student with a disability and should be addressed through the impartial hearing process (id. at pp. 17-19).

A. Due Process Complaint Notice

By due process complaint notice dated May 10, 2016, the parents alleged all of the claims set forth in their amended federal complaint against the district, incorporating them by reference (Exs. 1; 2).[3] The parents claimed that the district failed to offer the student a free appropriate public education (FAPE) and asserted that the student was unlawfully denied placement in the district (id. at p. 1). As relief, the parents requested that the district accept and enroll the student and provide him with a FAPE (id. at p. 2). In a letter to the parents dated May 12, 2016, counsel for the district advised the parents that the district was not a proper party and that the student should be referred to the sending school district's CSE to develop a program for the student for the 2016-17 school year (Ex. 3 at p. 1). Counsel for the district opined that the district was not required to develop an IEP for the student and that the sending school district should convene a CSE to develop an IEP for the 2016-17 school year and could invite the district to participate in the meeting (id. at pp. 1-3). Counsel for the district further advised the parents to withdraw their due process complaint notice and proceed against the sending school district (id. at pp. 2-3).

[3] The parents submitted two documents requesting an impartial hearing; one titled "due process complaint notice," the other titled "due process complaint seeking impartial hearing" (Exs. 1; 2). The documents are essentially identical, and attached to both as exhibits were the amended federal complaint and their opposition to the district's motion to dismiss their complaint (Exs. 1A; 1B; 2A; 2B). The amended complaint, as relevant here, asserted that the district violated the IDEA by refusing to develop a program for the student (Ex. 1A at pp. 15-17).

B. Impartial Hearing Officer Decision

By letter brief dated May 19, 2016, the district moved to dismiss the parents' due process complaint notice (Ex. 22). The district alleged that it was not a proper party and further argued that the due process complaint notice was not ripe based on the parents' pending appeals to the Commissioner of Education and the parents' failure to file a due process complaint notice against the sending school district for the 2016-17 school year (id.).[4] By affidavit dated May 20, 2016, the parents opposed the district's motion to dismiss the due process complaint notice, asserting that the district was obligated by its contract with the sending school district to develop an IEP for the student or implement the IEP developed by the sending school district (Ex. 23).

By decision dated June 4, 2016, the IHO dismissed the parents' due process complaint notice with prejudice (IHO Decision at pp. 13-14). In addition to the due process complaint notice and attachments, the district's motion to dismiss the due process complaint notice and attachments, and the parents' affidavit in opposition, the IHO considered the May 9, 2016 federal court decision (Ex. 4), the July 9, 2015 letter from counsel for the sending school district to counsel for the district (Ex. 10), the stipulation of settlement (Ex. 12), and the 2014-15 contract between the sending and receiving school districts (Ex. 11) (IHO Decision at pp. 1-4).[5] The IHO determined that the central issue before her was the district's refusal to admit the student into the district (id. at p. 9).

The IHO acknowledged that the parents had a right to an impartial hearing with respect to their son's educational placement (IHO Decision at pp. 9-10). The IHO found that residency triggered a district's obligations under the IDEA and that, although a district may contract to accept nonresident students, it has no obligation to do so (id. at pp. 10-11). However, the IHO noted that, once districts entered such a contract, State law precludes a receiving school district from refusing admission to a nonresident student from a sending school district without valid and sufficient reasons, and that such refusals are reviewable by the Commissioner of Education (id. at p. 11). The IHO accordingly determined that she did not have the authority to review the claims raised by the parents with respect to the district's contractual obligations, which she found were reviewable only by the Commissioner (id.).

Regarding the parents' claim that the district failed to implement the IEP developed by the sending school district, the IHO found that the sending school district was obligated to provide a FAPE to the student and had not offered a placement to the student (IHO Decision at p. 12). The IHO characterized the actions of the sending school district's CSE as a recommendation, not a placement, similar to a request for admission made by a school district to a private school, and that the sending school district did not have the authority to demand the placement of any particular

[4] Attached to the district's motion to dismiss were the May 12, 2016 letter to the parents from counsel for the district, the due process complaint, the federal court decision and judgment, and excerpts from State regulations (Exs. 22A-E). For purposes of this decision, to the extent possible, each attachment is cited as it appears elsewhere in the record (see Exs. 2; 3; 4).

[5] Although the IHO indicated that an October 19, 2015 IEP developed for the student was also among the documents considered (IHO Decision at p. 4), correspondence between the IHO and the parties relating to the IHO's request for certain evidence indicates that neither party produced a copy of the October 2015 IEP at that time (Ex. 19 at p. 2). While it is possible that the IHO received the IEP after this correspondence, a copy of the October 2015 IEP was not included in the hearing record submitted to the Office of State Review.

student in the district (id.). The IHO further found that the district was under no statutory or regulatory obligation to accept the student and granted the district's motion to dismiss the parents' due process complaint notice (id. at pp. 13-14).

IV. Appeal for State-Level Review

The parents appeal, contending that the IHO erred by determining that the sending school district was solely obligated to provide a FAPE to the student and further contend that the IHO should have considered the obligations of the district under the contract. The parents also argue that the IHO erred in finding that the sending school district did not place the student in the district but only made a recommendation for his placement. The parents request that the matter be remanded to the IHO for a hearing on the merits.[6]

In an answer, the district denies the parents' allegations and argues to uphold the IHO's decision in its entirety. The district also argues that the petition should be dismissed for noncompliance with the regulations governing practice before the Office of State Review.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142

[6] The parents initially filed their petition with the State Education Department's Office of Counsel, along with a petition purporting to seek review by the Commissioner of Education pursuant to Education Law § 310 of the issue of whether the district had valid and sufficient reason to refuse the student; the matter was transferred to the Office of State Review by the Commissioner pursuant to 8 NYCRR 276.10(a).

F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir. 2003]). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 254 [2d Cir. 2009]; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matter—Compliance with Practice Regulations

The district argues that the petition should be dismissed because the notice of intention to seek review was served with the petition, the petition does not contain the proper notice, the pages of the petition are not numbered, and the petition includes no citations to the record, does not indicate the reasons for challenging the IHO's decision, and does not request any relief from an SRO.

A parent who seeks review of an IHO's decision by an SRO shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the school district not less than ten days before service of a copy of the petition upon such school district, and within 25 days from the date of the IHO's decision sought to be reviewed (8 NYCRR 279.2[b]). The notice of intention to seek review serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (Application of a Student Suspected of Having a Disability, Appeal No. 12-014;

Application of a Student with a Disability, Appeal No. 11-162; Application of a Student with a Disability, Appeal No. 10-038; Application of a Child with a Disability, Appeal No. 04-018).

Here, the district correctly argues that the timing of service of the notice of intention to seek review upon the district did not technically comply with State regulations. It appears that a notice of intention to seek review was served contemporaneously with the petition (Pet. Aff. of Service; see 8 NYCRR 279.2[b]). However, as the district was provided the opportunity to file the hearing record, the purpose of the notice of intention to seek review (i.e. to ensure timely filing of the hearing record) was met, and there was no harm to the district (see Application of a Student with a Disability, Appeal No. 15-096; Application of a Child with a Disability, Appeal No. 00-062). Therefore, the district's request to dismiss the petition on this basis is denied.

Each petition filed with the Office of State Review must contain a notice with petition, the content of which is set forth in State regulation and generally notifies a respondent of the requirements with respect to answering the petition (8 NYCRR 279.3). State regulations further provide that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). In addition, a petition, answer, reply, and memorandum of law "shall each set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (8 NYCRR 279.8[b]). Moreover, the pages of all pleadings shall be consecutively numbered and fastened together (8 NYCRR 279.8[a][4]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015]).

First, although the district correctly indicates that the parent did not serve a notice of petition (or did not serve such notice in the proper form), the district answered the parents' allegations in this case in a timely manner (8 NYCRR 279.3). Further, contrary to the district's position, the petition adequately indicates the basis for challenging the decision of the IHO. To the extent the district contends the parents failed to cite to the hearing record, as noted above, no hearing dates were held and no evidence was entered into evidence. In addition, the parents seek relief from an SRO by requesting that the matter be remanded to the IHO so that the impartial hearing may proceed.

Thus, with regard to the district's contentions relative to the form of the petition and service of the notice of intent to seek review, I decline to dismiss the parent's petition on these grounds, given that the district was able to respond to the allegations raised in the petition in an answer and there is no indication that it suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

B. Jurisdiction

As indicated above, a parent may file a due process complaint notice with respect to any matter relating to the identification, evaluation, or educational placement of a student with a disability, or the provision of a FAPE to such student (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). The limited facts available indicate—and the federal district court held—that this appeal involves the educational placement of or the provision of a FAPE to a student with a disability (Dist. Ex. 4 at p. 18).

The hearing record shows that the district is or was a receiving school district under contract with the sending school district, requiring it to "teach all, or part, of the children of school age in grades 7 to 12" residing in the student's district of residence (Ex. 11 at p. 1). The IHO determined that the parents' claim was one for contract enforcement, over which she held she had no authority. State law and regulation authorize a board of education to designate one or more school districts for the purpose of contracting for the education of some or all of its resident pupils. (Educ. Law §§ 2040, 2045; 8 NYCRR 174.4). The Education Law provides that receiving school districts "shall not refuse to receive nonresident academic pupils for instruction without valid and sufficient reasons therefor" and further provides that "[a]ll acts of the board of education or other district officers relating to such pupils . . . are hereby declared subject to review by the commissioner of education" (Educ. Law § 2045[1]). The burden lies upon the receiving district to establish that valid and sufficient reasons exist to refuse to receive the student (Appeal of Bd. of Educ. of the Eastport/South Manor Cent. High Sch. Dist., et al., 40 Ed. Dep't Rep. 695, Decision No. 14,587 [2001]).

Inasmuch as Education Law § 2045 does not state that the Commissioner of Education shall have exclusive jurisdiction over these matters, rather, it provides that actions of school districts are "subject to review" by the Commissioner. Where, as here, the district's proffered reasons for refusing to receive the student as a nonresidential academic pupil for instruction implicate the student's needs related to his disability, there appears to be concurrent jurisdiction. In other words, the district's stated reasons for refusing to receive the student relate to the educational placement of a student with a disability and the district's belief that it cannot offer an appropriate placement to the student. As stated by the federal district court, such a determination would seem to be particularly well-suited to resolution by the administrative impartial due process hearing system established by the IDEA (Ex. 4 at pp. 17-19). The district has not cited to any authority, nor has independent research uncovered any, indicating that the Commissioner has exclusive jurisdiction over any issues relating to the placement of a student with a disability; however, on remand the IHO may revisit this issue if additional authority is provided (see Application of a Child with a Disability, Appeal No. 01-106 [finding that disagreements relating to the educational placement of a student with a disability may be resolved pursuant to the impartial hearing process, despite statutory language purporting to provide the Commissioner of Education with exclusive jurisdiction]; Appeal of a Student with a Disability, 41 Ed. Dep't Rep. 110, Decision No. 14,630 [2001] [same]). Based on the foregoing as well as the need for additional evidence as described below, the matter must be remanded for further proceedings.

C. The Matters on Remand

There remain some rather unique issues with which the IHO must grapple on remand. Therefore, some analysis of the relevant authority, including decisions of the Commissioner of Education relative to sections 2040 and 2045 of the Education Law, is set forth herein in an attempt to guide the parties and the IHO as to how to proceed.

In particular, the IHO should resolve the district's obligation to receive the student, as well as its obligation to convene a CSE to develop an IEP for the student. In resolving such obligations, the IHO should consider the interplay between: the district's contractual obligation to nonresident students with disabilities; the district's alleged "valid and sufficient reasons" for refusing to receive this student (Educ. Law § 2045[1]); and the district's obligation, as a receiving school district, to convene a CSE, as described below (8 NYCRR 200.2[f]). One initial question that arises from considering the foregoing is whether or not the district can refuse to receive the student based on the district's purported inability to meet his special education needs without first convening a CSE to consider those needs. The corollary to that question is whether or not the district must convene a CSE prior to receiving the student. Indeed, the circular nature of these questions has thus far resulted in the district's refusal to engage in educational planning for this student, with which both the IHO and the federal district court expressed frustration and concern (IHO Decision at pp. 9-10; Ex. 4 at p. 18).[7] While I considered ordering the district's CSE to convene and develop an IEP for the student as an alternative resolution to this appeal, as set forth below, the evidence in the hearing record is insufficient to support that result at this juncture.

State regulation expressly provides that the CSE of a receiving school district shall serve as the CSE for all students placed in such receiving school district pursuant to Education Law section 2040 or 2045 (8 NYCRR 200.2[f]). School districts are permitted to shift the obligation to provide a FAPE to a receiving school district by contract (Educ. Law §§ 2040, 2045; 8 NYCRR 174.4[d]; see, e.g., Letter to Lutjeharms, 16 IDELR 554 [OSERS 1990] [noting that federal law does not prohibit States from transferring the responsibility to provide a FAPE from the district of residence to the district in which the student attends school]; Letter to Tatel, 16 IDELR 349 [OSERS 1990] [holding it was not inconsistent with federal law for a State to delegate the provision of a FAPE to a receiving school district]). In an appeal involving reimbursement for nonresident tuition for a student with a disability, the Commissioner stated that, "[w]hen a receiving school district educates nonresident students pursuant to Education Law § 2040, it is obligated to comply with the [IDEA] and Article 89 of the Education Law. Limiting the range of services available to nonresident students with disabilities could deny them a FAPE" (Appeal of the Bd. of Educ. of the East Hampton Union Free Sch. Dist., 50 Ed. Dep't Rep., Decision No. 16,128 [2010]). The Commissioner also held that a receiving district's "CSE had the responsibility of providing the student a FAPE through her IEP" (id.).

It is the district's position that the student cannot be "placed" such that the district would have an obligation under 8 NYCRR 200.2(f), unless and until the student is accepted, and it will not accept the student because it does not have an appropriate program. In the present case, while

[7] In a letter to the parents in response to the parents' due process complaint notice, the district did suggest that, if the sending school district convened a CSE, it might be appropriate for the district to participate in the meeting (Ex. 3 at p. 3); however, it appears that the district will not go so far as to convene its own CSE.

the IHO determined that the sending school district only recommended that the student be placed in the district, there is insufficient evidence in the hearing record to sustain that determination. This is particularly so because the hearing record does not include a copy of the IEP developed for the student by the sending school district for the 2015-16 school year (which was purportedly based on the stipulation agreement) or any prior written notice or other documents generated in the process of developing the student's IEP and providing for the implementation thereof. Moreover, it appears at least arguable based on the foregoing authority that the district's obligation to convene a CSE was triggered by virtue of the contract with the sending school district in the first instance and not necessarily as a result of special education planning in which the sending school district engaged on the student's behalf.[8]

Evidence that might shed light on the question of whether the student was "placed" in the district would include any documents regarding the sending school district's educational planning for the student and attempts to recommend the student's enrollment in the district. In addition, the district should provide evidence of district policies, procedures, or actions defining its obligations to nonresident students from sending school districts. It may also be relevant to take evidence regarding the contract between the sending school district and receiving school district for the relevant periods and whether any such contract is in compliance with the requirements of the Education Law.

With regard to valid and sufficient reasons for refusing to receive nonresident pupils, the Commissioner has held that overcrowding may be a sufficient reason, but other factors, such as interruption of a pupil's learning experience, must also be considered (Appeal of Bd. of Educ. of the Eastport/South Manor Cent. High Sch. Dist., 40 Ed. Dep't Rep. 695, Decision No. 14,587 [2001]; Appeal of the Bd. of Educ. of South Manor Union Free Sch. Dist., 14 Ed. Dep't Rep. 412, Decision No. 9,042 [1975]). The fact that students could possibly attend another school has been held to be an insufficient reason, without more (Appeal of Bd. of Educ. of the Eastport/South Manor Cent. High Sch. Dist., 40 Ed. Dep't Rep. 695, Decision No. 14,587 [2001]; Appeal of Trustees of Common Sch. Dist. No. 2, 1 Ed. Dep't Rep. 143, Decision No. 6,505 [1958]).

Particularly illustrative of valid and sufficient reasons for refusal of a student is Appeal of Brunswick Common Sch. Dist., wherein a receiving school district refused to accept students from a sending school district, citing difficulties of rescheduling classes, planning for future classes, and the existence of other available receiving school districts (14 Ed. Dep't Rep. 33, Decision No. 8,851 [1974]). Of greatest import to the Commissioner was "where these pupils are to attend next month," stating that the receiving school district had known for some time "that it might be required to accept these pupils, and its extensive enumeration of the effects of acceptance demonstrates that it has already thoroughly reviewed the situation" (id.). The Commissioner further noted that the students "must be educated," and designating another school district to

[8] On remand, the parties and the IHO are encouraged to examine the issue and consider the relevance, if any, of the contractual language that "all, or part, of the children of school age in grades 7 to 12 residing in the school district of the [sending] district . . . shall be entitled to be taught in the [receiving] district" (Ex. 11), as well as authority that states that, typically, a student from a sending school district may choose the receiving school district he or she wants to attend (see, e.g., Appeal of Sabarese, 55 Ed. Dep't. Rep., Decision No. 16,820 [2015]; Appeal of Bd. of Educ. of the Eastport/South Manor Cent. High Sch. Dist., 40 Ed. Dep't Rep. 695, Decision No. 14,587 [2001]).

receive the students would cause the same scheduling and other difficulties "without the advance notice . . . and the careful forethought [the receiving school district] ha[d] already given to such problems" (id.).

The only way the district could genuinely assert a valid and sufficient reason for refusing to receive the student based on its purported inability to meet the student's needs is by understanding the student's special education needs. However, there is no information about the student's needs in the hearing record, the district has not yet engaged in any educational planning for the student, and the only educational placements referenced in the hearing record are those developed by the sending school district, which were either challenged in a due process complaint notice or resolved pursuant to a stipulation of settlement (Exs. 3; 10; 12; 14-16). Therefore, it is impossible to reach a reasoned conclusion on the issues raised based on the information presented thus far, and further evidence from the parties is necessary. It will be necessary for the IHO to take evidence regarding the student's needs and the recommended educational placement for the student (Educ. Law § 2045[1]).

In similar cases where a sending school district contracts with multiple receiving school districts, the Commissioner of Education has required joinder of necessary parties (Appeal of Sabarese, 55 Ed. Dep't. Rep., Decision No. 16,820 [2015] [a party whose rights would be adversely affected by a determination of an appeal in favor of a petitioner is a necessary party and must be joined as such]). At least the parents, the district, and the sending school district are all necessary parties to the full resolution of the claims presented. Therefore, upon remand, the sending school district should be joined in this matter or, preferably, this matter should be consolidated with any impartial hearing presently pending against the sending school district pursuant to a due process complaint notice filed by the parents (see Application of a Student with a Disability, Appeal No. 15-119; cf. 8 NYCRR 200.5[j][3][ii][a]).[9] Therefore, unless the parties otherwise agree to consolidate this matter before another IHO in a pending proceeding against the sending school district, the IHO should order consolidation or joinder to bring both districts into the present proceeding.[10]

As a final note, according to the decision of the federal district court, during the "pendency" of the action against the district, the student repeated sixth grade in the sending school district during the 2015-16 school year (Ex. 4 at p. 7). It is likely not appropriate for this arrangement to continue for the 2016-17 school year. The IHO and the parties are strongly encouraged to address the question of the student's educational program for the 2016-17 school year promptly, whether by way of a determination of the student's pendency (stay put) placement (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]) or by an expeditious

[9] It appears as though the district has previously attempted (unsuccessfully) to accomplish this by filing a motion to intervene in an impartial hearing brought by the parents against the sending school district (Ex. 14 at pp. 4-5).

[10] It is left to the sound discretion of the IHO to determine if the other receiving school district(s) with which the sending school district contracts should also be included as a necessary party.

agreement or determination on the merits of the dispute regarding the student's educational placement.[11]

VII. Conclusion

This case raises factual and legal issues that are neither frequently nor easily grappled with, and illuminates some of the limitations of the administrative due process system when multiple authorities and jurisdictions are involved. This situation is further complicated by a limited record as to the responsibilities of the district to evaluate the student and develop and implement an educational program. In this case, the record was not sufficiently developed to ascertain the parties' rights and responsibilities and, therefore, this matter must be remanded in accordance with the guidelines and directives set forth above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated June 4, 2016, is vacated; and

IT IS FURTHER ORDERED that this matter shall be remanded to the same IHO who issued the June 4, 2016 decision unless the parties otherwise agree to consolidation before a different IHO as described in the body of this decision.

Dated: **Albany, New York**
July 11, 2015

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[11] The pendency provision does not require that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]) or at a particular grade level (Application of the Dep't of Educ., Appeal No. 13-086; Application of a Child with a Disability, Appeal No. 03-032).