The University of the State of New York

The State Education Department
State Review Officer
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No. 18-002

Application of the BOARD OF EDUCATION OF THE DRYDEN CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Costello, Cooney & Fearon, PLLC, attorneys for petitioner, by Melinda B. Bowe, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the district denied the student a free appropriate public education (FAPE) based on its failure to provide related services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2016-17 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has been the subject of two prior administrative appeals (Application of a Student with a Disability, Appeal No. 17-058; Application of a Student with a Disability, Appeal No. 16-035). Accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeals is presumed and will not be repeated in detail.

Pursuant to an order dated April 28, 2016, which was the subject of an appeal in Application of a Student with a Disability, Appeal No. 16-035, dated August 8, 2016, the district was ordered, in relevant part, to provide the student with compensatory occupational therapy (OT) and counseling services as equitable relief for services the student did not receive pursuant to his IEP for the 2015-16 school year (Dist. Ex. 42 at pp. 9, 43-44). On August 12, the parent signed

consent for the provision of compensatory OT and counseling related to that order (Dist. Ex. 40 at p. 2).

The CSE convened for the student's annual review on August 31, 2016 (Dist. Exs 45; 46C; 50 at pp. 2-22). The CSE found that the student remained eligible for special education and related services as a student with autism, and in a draft IEP, recommended that the student receive integrated co-teaching services (ICT), with the related services of social skills training, parent counseling and training, and two 30-minute sessions of individual OT per week (Dist. Ex. 50 at pp. 18-19). The CSE also recommended the following supplemental aids and services, program modifications, and accommodations: adult support, directions clarified, a functional behavioral assessment (FBA) and behavioral intervention plan (BIP), chunking of assignments, breaks, refocusing and redirection, special seating arrangements, non-verbal cueing, use of a graphic organizer, modified homework assignments, additional time to complete assignments, and a sensory program (id. at pp. 19-20). The CSE also recommended that the student have access to assistive technology devices, including access to a portable word processor and the use of an MP3 player on the bus (id. at p. 20). As additional support for school personnel, the CSE recommended and the IEP reflected that the student's providers would meet once monthly in the student's classroom, that the parent agreed to attend monthly, and that a behavioral intervention consultant would be available to the team to aid in implementing the student's IEP and monitoring his progress (id.).

At the August 2016 CSE meeting, the parent refused to consent to the services recommended until she was provided with a written copy, stated she would not sign consent for the district to obtain a prescription for the student to receive OT services, and indicated she would not obtain a prescription for OT (Dist. Ex. 46C at p. 135). Attached to an email dated September 1, 2016, the district sent the parent the draft IEP so that she could review its contents and provide feedback (Dist. Ex. 50 at pp. 1-22).

On September 3 and 9, 2016, the parent wrote to the district to share a broad range of concerns and requested changes to the draft IEP, including a demand that the IEP be amended to explicitly include the compensatory services described above (Dist. Exs. 51 at p. 2; 52; 53).

On September 9, 2016, the parent signed a consent for the initial provision of special education services, which included a list of objections to the content of the IEP, and the IEP's omission of a number of services and accommodations that were requested by the parent (Dist. Ex. 54 at p. 3).

By letter dated September 13, 2016, the district sent the parent an updated IEP which included the compensatory OT services in the related services section (Dist. Ex. 57 at pp. 1, 20).

In an email to the parent dated September 13, 2016, the student's principal indicated, in relevant part, that the district had reached out to a number of OT providers to find an occupational therapist who would provide services without a prescription, but that "at this point, we have not found any OT willing to do this" (Dist. Ex. 59 at p. 1).

In an email to the district dated September 14, 2016, a Board of Cooperative Educational Services (BOCES) Medicaid compliance officer informed the district director of student services

that she had consulted with their school attorney and was advised not to provide OT services without a prescription (Dist. Ex. 86 at p. 1). In an email to the parent dated September 16, 2017, the district informed the parent that BOCES was the district's contracted third-party OT provider, that BOCES required consent for an order from the student's physician to provide OT services, and that BOCES staff asked to meet with the parent regarding their ability to provide OT to the student (Dist. Ex. 60 at p. 1). In a reply email dated September 17, 2016, the parent indicated "[t]here is no need to have a meeting", accused the district of receiving "kickbacks" for contracting with BOCES and refusing to hire their own OT provider, and requested that the district hire its own occupational therapist to provide the student with services (id.).

By letter dated September 27, 2016, the parent submitted a proposal to the district to "resolve all of the issues in the due process matters against the [d]istrict," wherein she proposed the district offer specific types and amounts of related services and additional annual goals, in exchange for the parent withdrawing her due process and State complaints, and signing consent for the district to obtain prescriptions for a physical therapy (PT) evaluation, and OT and PT services (Dist. Ex. 65). The parent indicated that if the district refused her offer, "there will be no other chances to resolve the issues and we will go to hearing" (id.).

The CSE reconvened on October 7, 2016, to consider a number of requests and concerns raised by the parent, including a request for a more restrictive classroom setting for the student (Dist. Exs. 76 at pp. 1-6, 9-10; 78 at p. 1). The CSE ultimately concluded that based on the student's present performance, he did not require the level of support provided in a smaller classroom setting (Dist. Ex. 78 at pp. 1, 21). In the district's prior written notice dated October 7, 2016, the district noted that "the parent's refusal to allow the school district to obtain the prescription from [the student's] physician to provide OT services" resulted in OT remaining "an area of concern that the district is unable to provide services to address" and indicated it was continuing to attempt to find a provider willing to provide OT without a prescription (id. at p. 2).

By letter to the parent dated November 1, 2016, the district reminded the parent that it previously requested consent to obtain a prescription for OT and offered to pay for any expense incurred in the process of obtaining a prescription, and that "[a]s of the date of this letter, you have not cooperated with the [d]istrict in obtaining the requested prescription in any way" (Dist. Ex. 80). The district detailed its unsuccessful efforts to obtain OT services without a prescription, requested consent to appoint a physician to conduct a medical assessment in order to obtain a prescription for OT, and offered mediation services in light of the "breakdown in communication" on the issue (id.).

The CSE reconvened on December 13, 2016 (Dist. Ex. 98). The CSE determined that the student did not qualify for adapted physical education, reviewed and finalized the student's BIP, determined that parent counseling and training services were not necessary to the provision of a FAPE and removed them from the IEP at the parent's request, and addressed the parent's concerns regarding the timing of when some of the student's related services were delivered (Dist. Ex. 101 at p. 1, see Dist. Ex. 98). The December 2016 CSE recommended continued special education programs and services and noted that "there were no changes recommended in the classroom and across all other settings" (Dist. Ex. 101 at p. 1).

A. Due Process Complaint Notices and Subsequent Interim Decisions

By due process complaint notice dated February 2, 2017, the parent alleged that the district interfered with an independent psychiatric evaluation, repeated assertions contained in a January 29, 2016 due process complaint notice which was withdrawn in March 2016, and requested an independent medical evaluation at public expense (IHO Ex. I at pp. 25-27).

On February 10, 2017, the district filed a combined response and motion to dismiss the parent's due process complaint notice (IHO Ex. 2 at pp. 27-29).

In a second due process complaint notice dated February 11, 2017, the parent alleged that the district failed to provide the student with home instruction for a period of 52 days during the 2015-16 school year (IHO Ex. 1 at pp. 30-35). The parent also raised a broad range of allegations related to the district's provision of special education and related services, changes to the student's placement without prior written notice, parent participation, sufficiency of evaluative information, collection of data regarding the student without parental consent, the provision of counseling outside of the school day, the lack of recommendations for PT and adapted physical education, and the recommendations for and provision of OT and social skills training (id. at pp. 36-47). Relevant to this appeal, the parent asserted that the district had an improper written policy requiring the parent to obtain a prescription for OT before OT would be provided and requested that the district provide the student's OT services "pursuant to the student's IEP, and absent the parent's voluntary consent to obtain a prescription" (id. at pp. 35-36, 48).

On February 22, 2017, the district filed a response to the parent's February 11, 2017 due process complaint notice (IHO Ex. 2 at pp. 19-26). Pertinent to this appeal, the district alleged that it did not have a policy requiring a prescription for the delivery of OT services and that it attempted to arrange for OT services without a prescription, pay for the cost of the parent obtaining a prescription, or have the district physician assess the student (id. at pp. 21-22).

The second IHO assigned to this matter issued an interim decision dated February 24, 2017, which consolidated the February 1, 2017 and February 11, 2017 due process complaint notices (IHO Ex. 3 at pp. 1-3).[1]

A prehearing conference was held on March 7, 2017 (March 7, 2017 Tr. pp. 1-74).

The district filed a due process complaint notice dated March 13, 2017 (IHO Ex. 2 at pp. 15-18). The district alleged that the parent impeded the district's delivery of services during the 2015-16 and 2016-17 school years, including the OT recommended by the district for the 2016-17 school year and an award of compensatory OT services from a prior hearing (id. at pp. 15-17). As a proposed resolution, the district requested an order finding that "the [p]arent's actions caused any established deprivation of OT services to the [s]tudent during the 2015-16 and/or 2016-17 school years," an order for a medical assessment to be immediately conducted to obtain a prescription for

[1] The initial IHO assigned to this matter determined that the issues presented in the February 1, 2017 due process complaint notice were sufficiently dissimilar from the issues raised in the January 2016 due process complaint notice, over which she presided, such that the district was required to appoint a different IHO in accordance with its rotational selection procedure (see Application of a Student with a Disability, Appeal No. 17-058).

OT for the student, a finding that the district is relieved of its responsibility to provide OT services pursuant to the student's IEPs for the 2015-16 and 2016-17 school years or the prior award of compensatory OT services, and an order appointing a guardian ad litem to serve in the proceeding to protect the student's interests (id. at p. 17).

On March 14, 2017, the parent responded to the district's due process complaint notice by moving to dismiss it and requesting an independent educational evaluation (IEE) (IHO Ex. 4 at p. 498). Following the parent's motion, the second IHO recused herself, and on March 17, 2017, a third IHO was appointed, who presided over the remainder of the proceeding (see IHO Decision at p. 4).

On March 29, 2017 the parent filed a motion for pendency (IHO Ex. 5 at pp. 1-4). A second prehearing conference took place on March 30, 2017 (March 30, 2017 Tr. pp. 1-14). The district responded to the parent's pendency motion on April 5, 2017 (id. at pp. 119-23). The parent submitted a reply to the district's response on April 6, 2017 (id. at pp. 6-21).

On April 7, 2017 the parent filed a motion to compel the district to provide educational records (IHO Ex. 5 at pp. 22-24). On April 9, 2017 the parent filed a motion to compel the district to respond to written interrogatories (id. at pp. 25-26).

On April 10, 2017 the IHO issued an interim decision denying the parent's request for a pendency order (IHO Ex. 6 at p. 5). On April 17, 2017 the IHO issued an interim decision denying the parent's request for interrogatories (id. at p. 9). On April 20, 2017 the IHO issued an interim decision addressing the district's combined responses/motions to dismiss the parent's February 1, 2017 and February 11, 2017 due process complaint notices (IHO Ex. 6 at pp. 11-16). The IHO denied the district's motions, except that the IHO granted the district's motion to dismiss the parent's claim regarding an alleged violation of the Family Educational Rights and Privacy Act (FERPA) (IHO Ex. 6 at p. 15).

On April 28, 2017, the parent submitted additional documentation in support of her motion to dismiss the district's due process complaint notice and for an IEE (IHO Ex. 5 at pp. 32-28).

By interim decision dated May 4, 2017, the IHO denied the parent's motion to dismiss the district's due process complaint notice, dismissed the parent's claims related to the issue of whether the district failed to properly evaluate the student and whether the parent was entitled to an IEE, and denied the district's request for the appointment of a guardian ad litem (IHO Ex. 6 at p. 20). That same day, the IHO issued a decision consolidating the parent and district due process complaint notices (IHO Ex. 3 at pp. 4-7).

By letter dated May 4, 2017, the parent objected to the IHO's interim decision, accusing him of not being impartial and advising the IHO that she was withdrawing her due process complaint notices and revoking consent for special education (IHO Ex. 5 at pp. 39-40, 44).[2] The

[2] In a letter sent May 4, 2017, the parent rescinded her revocation of consent for the provision of special education; however, the parent continued to revoke consent for the provision of OT and monthly team meetings (Dist. Ex. 131 at p. 1). In a letter dated May 8, 2017, the parent reiterated her revocation of consent for OT and monthly team meetings (id. at p. 2).

IHO responded on May 4, 2017, informing the parent that he "will now appoint a Guardian Ad Litem on behalf of the student with respect to the issue of withdrawing the [due process compliant notices] on behalf of the student" (IHO Ex. 5 at p. 42). Later that day, in response to an email from district counsel indicating that the parent's withdrawal "seemingly terminates the hearing process regarding the parent's complaints," the IHO informed the district's counsel that he was appointing a guardian ad litem with respect to the due process complaint notices "for the child" and to determine whether they should be withdrawn (id. at p. 50). In an email to the IHO and the district's counsel dated May 4, 2017, the parent notified the parties that she was rescinding her withdrawal until the guardian ad litem had "time to review the matter" (id. at p. 552). In a letter to the IHO dated May 5, 2017, the parent indicated that the rescission of her withdrawal was made under duress and sought clarification from the IHO of his authority "to strip the parent of their right to withdraw from a hearing prior to its commencement and appoint a [guardian ad litem] after the fact" (IHO Ex. 5 at pp. 56-58).

By letter dated May 7, 2017, the parent repeated her allegations of impartiality against the IHO and notified the district of her voluntary withdrawal of her due process complaint notices (Dist. Ex. 128).

A prehearing conference was held on May 16, 2017; however, no substantive discussions took place as the parent was not present (May 16, 2017 Tr. pp. 1-9).

In an interim order dated May 22, 2017, the IHO ordered that a guardian ad litem be appointed "to represent the student with respect to the [due process complaints] that were filed in this matter" (IHO Ex. 6 at p. 26). In appointing the guardian ad litem, the IHO noted that the parent had filed and withdrawn multiple due process complaints regarding the 2016-17 school year (id. at p. 25). The IHO reasoned that "the effect of the parent's withdrawal, in this instance, would foreclose [his] ability to address the issue of the provision and/or delivery of occupational therapy to the student, who, according to the parent, has not been receiving these services for quite some time" (id.).

On May 24, 2017, the parent made a motion for pendency with respect to transportation (IHO Ex. 5 at pp. 62-63). A prehearing conference regarding pendency with respect to transportation was held on May 30, 2017 (May 30, 2017 Tr. pp. 1-18).

In her third due process complaint notice, dated May 31, 2017, the parent raised allegations regarding transportation services for the 2016-17 school year and requested consolidation of her due process complaint notices (IHO Ex. 1 at p. 29).

On June 9, 2017, the IHO consolidated the parent's May 31, 2017 due process complaint notice with the preceding due process complaint notices (IHO Ex. 3 at pp. 8-11).

On June 12, 2017, the parent sent a letter to the IHO rescinding her prior withdrawal of the two due process complaint notices dated February 1, 2017 and February 11, 2017 (Dist. Ex. 142).

On June 12, 2017 the IHO issued an interim pendency order directing the district to provide the student with an afternoon bus with a smaller number of students as was provided to him during the 2016-17 school year (IHO Ex. 6 at p. 33).[3]

On June 23, 2017, the IHO issued an interim order naming the individual appointed to serve as a guardian ad litem for the student and directed the guardian ad litem to determine whether the parent's February 1, 2017 and February 11, 2017 due process complaint notices should be withdrawn (IHO Ex. 6 at p. 36).[4]

The CSE convened for a requested review on June 23, 2017 (Dist. Exs 138; 141). The CSE found that the student remained eligible for special education and related services as a student with autism, and recommended that the student receive ICT services, with the related services of social skills training, counseling, and OT (Dist. Ex. 141 at pp. 24-25). The June 23, 2017 IEP also included a number of supplementary aids and services, program modifications, and accommodations; however, the CSE did not recommend the student for extended school year (ESY) services (id. at pp. 25-27).

In her fourth due process complaint notice, dated June 23, 2017, the parent raised a number of allegations regarding a June 23, 2017 CSE meeting, and further asserted that the district failed to consider or recommend ESY services for the student (IHO Ex. 1 at pp. 5-24).

As a proposed resolution, the parent requested, among other things, the appointment of a guardian ad litem to represent the student's interests, compensatory and other relief related to ESY services, and IEEs in the areas of OT, PT, and speech-language therapy, as well as an independent FBA and neuropsychological evaluation (IHO Ex. 1 at pp. 24-25).

In her fifth due process complaint notice dated June 27, 2017, the parent alleged that the district retaliated against her for filing multiple due process complaint notices by contacting child protective services (CPS) and proposed various forms of relief including an out-of-district placement, sanctions against the district, and a monetary award to the parent (IHO Ex. 1 at pp. 1-4).

On July 1, 2017, the IHO consolidated the parent's fourth and fifth due process complaint notices with the previously consolidated due process complaint notices (IHO Ex. 3 at pp. 12-16).

In an interim order dated July 5, 2017, the IHO denied the parent's motion for summary judgment with respect to the issue of special transportation (IHO Ex. 6 at pp. 41-42).

[3] The June 12, 2017 interim order on pendency was the subject of the appeal in Application of a Student with a Disability, Appeal No. 17-058.

[4] The IHO occasionally refers to the parent's February 11, 2017 due process complaint notice as being dated February 14, 2017 (compare IHO Exs. 1 at p. 30; 3 at p. 2, with IHO Exs. 3 at p. 5; 6 at p. 36; IHO Decision at p. 2).

In an interim order dated July 7, 2017, the IHO directed that the guardian ad litem would represent the student's interests with respect to all five due process complaint notices (IHO Ex. 6 at p. 44).[5]

On July 14, 2017, the IHO issued an interim order finding that "the parent's advocate [] may not appear on behalf of the student in this matter" (IHO Ex. 6 at pp. 48).

On July 14, 2017, the parent sent an email to the IHO withdrawing her due process complaint notices asserting that she could not proceed without legal representation (IHO Ex. 5 at pp. 262-63).

By email to the IHO and district dated July 24, 2017, the parent indicated she would not attend the hearing, but requested electronic copies of the hearing transcript and exhibits, and to be informed of the date when written closing statements were due so that she could submit a written statement (IHO Ex. 5 at p. 257).

B. Impartial Hearing and IHO Decision

Representatives for the district and the guardian ad litem participated in an impartial hearing that convened on July 24, 2017 and which concluded on August 9, 2017, after three days of proceedings (Tr. pp. 1-275). The parent chose not to attend the impartial hearing (Tr. p. 5; IHO Ex. 5 at p. 257). During her opening statement the guardian ad litem declined to take a specific position with respect to any of the parent's due process complaint notices, except that the student required OT services and did not receive them (Tr. pp. 15-16).

The student moved out of the district and the student began attending school in another district for the 2017-18 school year (see Guardian Ad Litem Ex. 3 at p. 4; IHO Ex. 7 at pp. 10, 12).

On August 24, 2017, the parent filed a motion to dismiss the proceeding (see IHO Decision at pp. 8-9).[6] The district responded to the parent's motion and cross-moved to dismiss the parent's due process complaint notices for her failure to appear during the hearing, and alternatively to dismiss any claims for prospective relief as moot because the student no longer resided within the district (IHO Ex. 5 at pp. 244-50). The guardian ad litem filed an affidavit in support of the district's motion to dismiss the parent's due process complaint notices contending that any

[5] This consolidated proceeding includes six total due process complaint notices, five filed by the parent and one filed by the district (see IHO Exs. 1-3). It is unclear why the IHO identified five due process complaint notices in his July 7, 2017 order; however, based on the May 22, 2017 order appointing a guardian ad litem it appears the IHO's intention was to have her represent the student's interests in all of the due process complaint notices before him (IHO Ex. 6 at p. 44).

[6] A copy of the parent's August 24, 2017 motion to dismiss is not included in the hearing record. IHO Exhibit 4 is described as "Parent's Motions and Responses" (similar to other IHO Exhibits, it is not paginated and contains multiple documents within one exhibit); however, some of the parent's motions were included as a part of IHO Ex. 5, which is described as "District Motions and Responses" (IHO Exs. 4-5). Neither exhibit included the parent's August 24, 2017 motion.

compensatory relief awarded would "only result in further litigation and conflict" (Guardian Ad Litem Ex. 3).

The IHO sent an email to the parties on October 2, 2017, containing rulings "to assist the parties with their post-hearing briefs," noting that the issues would be addressed in the final decision (IHO Ex. 6 at p. 49).

The IHO issued a decision on November 29, 2017. The IHO reiterated his reasoning behind appointing a guardian ad litem, noting that the parent's behavior, particularly in filing and withdrawing multiple due process complaint notices, was "detrimental to the student's educational interests" (IHI Decision at pp. 27-28). Furthermore, the IHO found that the appointment of the guardian ad litem superseded the parent's right to withdraw any due process complaints on behalf of the student (id. at pp. 28-29). The IHO also found that the parent's reinstatement of her due process complaint notices after the appointment of the guardian ad litem cured any jurisdictional issue (id. at p. 28).

The IHO found that the parent's due process complaint notices should not be dismissed and the district was not entitled to a default judgment against the parent based on her failure to appear (IHO Decision at pp. 29-30). The IHO also declined to dismiss the parent's claims relating to the 2015-16 school year solely on the basis of res judicata or mootness (id. at pp. 36-37). The IHO then addressed issues related to Section 504, the administration of an FBA, ESY services for the 2015-16 and 2016-17 school years, retention of the student in fourth grade, the composition of and parent participation at the June 2017 CSE meeting, PT, adapted physical education, the substantive appropriateness of the CSE recommendations for the 2016-17 school year, home instruction, and IEEs (id. at pp. 37-44).

With respect to OT, the sole substantive issue briefed on appeal, the IHO held that the parent refused to provide a prescription and that the district was unable to find an occupational therapist to provide OT without a prescription (IHO Decision at p. 15). The IHO also found that the student did not receive OT during the 2016-17 school year (id.). The IHO further held that the student's doctor had provided a prescription to the district, but that the district's OT provider had failed to obtain consent from the parent, who thereafter revoked the issuance of the prescription (id. at p. 16).[7] After a review of the education law, regulations, and guidance documentation, the IHO held that the district did not have to obtain a prescription to provide the student with OT, and that OT could be provided without a prescription (id. at pp. 31-35). The IHO acknowledged the district's "exhaustive efforts" to obtain an OT provider, but held that those efforts did not excuse the district of its obligation to provide the student with OT, and the parent's refusal to provide a prescription "on principle" was not relevant to the district's obligations (id. at pp. 15, 33-34). The IHO determined that the parent provided consent for the delivery of OT, and that the district conceded that the student required OT (id. at pp. 44-45). The IHO therefore concluded that the district's failure to provide the student with OT denied him a FAPE, and the IHO denied the district's request for an order relieving it of its obligation to provide OT (id. at pp. 33-34). The

[7] The IHO raises this point in his discussion of the 2016-17 school year, however, the parent's revocation of this prescription occurred during the 2015-16 school year (see Dist. Ex. 8).

IHO ordered the district to provide 80 30-minute sessions of OT services as compensatory education for the student (id. at pp. 44-46).

IV. Appeal for State-Level Review

The district appeals and alleges that the IHO erred in failing to dismiss the parent's due process complaint notices because she refused to appear for the impartial hearing and because she withdrew her complaints prior to the start of the hearing. The district also asserts that the IHO erred in dismissing its due process complaint notice and in awarding compensatory OT. With respect to the need for a prescription, the district contends that the IHO erred in relying on a guidance document over regulatory language indicating that a prescription was required, in finding that the district had a policy requiring a prescription for OT services, and in not finding that the parent's actions impeded or obfuscated the delivery of OT services. The district asserts that the parent's actions in refusing to cooperate with the district's attempts to provide OT services under the circumstances made it impossible for the district to deliver OT services, and were therefore the cause of the deprivation of services.

In an answer, the parent alleges that she was not afforded a fair and impartial hearing, was denied her due process rights, and levels a variety of allegations of misconduct against the IHO. The parent agrees with the district in that the IHO should not have prevented her from withdrawing her due process complaint notices. The parent requests that the matter be remanded to a different hearing officer, and sanctions issued against the IHO and district. The parent further asserts that she was never under any legal obligation to provide a prescription for the delivery of OT services to the student, and therefore cannot be held accountable for any denial of a FAPE to the student.

In a reply to the parent's answer, the district generally denies the allegations and claims raised in the parent's answer and asserts that the parent's refusal to appear at or participate in the impartial hearing waived any due process claims she may have otherwise been entitled to. The district asserts that the parent's answer fails to conform with form requirements in that it does not set forth a clear and concise statement of the issues presented for review and the grounds for reversal. The district also alleges that the parent failed to serve a Notice of Intent to Cross-Appeal, or actually assert any Cross-Appeal in this proceeding, and therefore asserts that the parent's claims or challenges to the decision have been abandoned and are not properly at issue and must be dismissed. Lastly, the district asserts that additional evidence submitted by the parent with her answer is either already in the record, or was available at the time of the hearing and in light of the parent's choice to not attend the hearing, should be disregarded.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child

to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[8]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

I must first address a number of preliminary matters, including the threshold issue of whether the IHO erred in refusing the parent's withdrawal of her due process complaint notices, the scope of the district's due process complaint notice, and identifying the remaining issues raised on appeal. I deal with each issue in turn, below.

1. Scope of Impartial Hearing

a. Effect of Guardian Ad Litem Appointment on Parent's Right to Withdraw

The district alleges on appeal that the IHO lacked jurisdiction to hear any of the parent's due process complaint notices following the repeated voluntary withdrawal of her claims, and challenges the IHO's finding that he retained jurisdiction over the matter after those withdrawals by virtue of his decision to appoint a guardian ad litem. In her memorandum of law, attached to her answer, the parent concurs with this position, and asserts that she acted within her right to withdraw her due process complaint notices (Parent Mem. of Law at p. 2). As detailed below, the appointment of a guardian ad litem does not independently possess standing to file or maintain a

[8] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

due complaint on behalf of a student and, therefore, cannot affect the parent's right to withdraw her due process complaint notices.

According to State regulations, an impartial hearing officer is empowered to appoint a guardian ad litem to protect the interests of a student "[i]n the event the [IHO] determines that the interests of the parent are opposed to or are inconsistent with those of the student" (8 NYCRR 200.5[j][3][ix]). A guardian ad litem is defined as "a person familiar with the provisions of [8 NYCRR Part 200] who is appointed from the list of surrogate parents or who is a pro bono attorney appointed to represent the interests of a student in an impartial hearing . . . [who] shall have the right to fully participate in the impartial hearing" and, where appropriate, join in an appeal to the SRO initiated by the parent or district (8 NYCRR 200.1[s]). Although granted the right to participate in the impartial hearing, the guardian ad litem's authority is limited to the activities set forth in State regulation (8 NYCRR 200.1[s], see 8 NYCRR 200.5[j][3][xii]).

More specifically, the guardian ad litem's role is distinct from the role of an individual who serves as a parent under the IDEA. The IDEA provides that in addition to a student's natural parents, the term "parent" can include an adoptive parent, foster parent, guardian, an individual acting in the place of a natural or adoptive parent with whom the child lives or an individual with legal responsibility for the student's welfare, or an individual assigned as a surrogate parent (20 U.S.C. § 1401[23]; 34 CFR 300.30[a], 300.519[a]; see 8 NYCRR 200.1[ii]). Pursuant to State regulation, the definition of a parent includes a person in a parental relationship to the child as defined in Education Law § 3212, as well as an individual designated as a person in parental relation pursuant to article 5, title 15-a of the General Obligations Law (8 NYCRR 200.1[ii]).[9] Pursuant to federal regulation, the biological or adoptive parent of the student is presumed to be the parent unless they do not have legal authority to make educational decisions on behalf of the student or a judicial decree identifies a specific person to act as the parent or make educational decisions (34 CFR 300.30[b][1]-[2]).

A guardian ad litem appointed pursuant to 8 NYCRR 200.5[j][3][xii] is conspicuously absent from the list of individuals who are permitted to serve as a parent under the IDEA and attendant State law (20 U.S.C. § 1401[23]; Educ. Law 3212; 34 CFR 300.30[a][1]-[5], 8 NYCRR 200.1[ii]). The current language regarding an IHO's authority to appoint a guardian ad litem, and the guardian ad litem's limited rights, is the result of a request by United States Department of Education (USDOE) to clarify the procedural due process rights of parents and guardians in the event that another individual was appointed to represent the interests of the student during the course of an impartial hearing (Emergency/Proposed Rule Making, Guardian Ad Litem, N.Y. Reg., Aug. 14, 1991, at p. 14). Prior to August 1991, IHOs effectively had the power, under State regulation, to appoint a surrogate parent to act in place of parents or guardians as if the parents

[9] Education Law § 3212(1) provides that a person in a parental relation is an individual's "father or mother, by birth or adoption, his step-father or step-mother, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of another individual if he has assumed the charge and care of such individual because the parents or legally appointed guardian of such individual have died, are imprisoned, are mentally ill, or have been committed to an institution, or because, they have abandoned or deserted such individual or are living outside the state or their whereabouts are unknown, or have designated the person pursuant to title fifteen-A of article five of the general obligations law as a person in parental relation to the child."

were not known or unavailable, or the student was a ward of the State (id.).[10] The change requested by the USDOE was necessary for continued Federal funding and, in response, the Board of Regents established a new definition for a guardian ad litem that would not be confused with the role of a surrogate parent, and the language also required the IHO to ensure that the procedural due process rights were provided to the parent and preserved throughout the hearing whenever a guardian ad litem was appointed (id.). Accordingly, the guardian ad litem as contemplated in this section came into being, and the IHO's authority to appoint an individual with the educational decision making authority of a parent (i.e. a surrogate parent) was abolished (Notice of Adoption, Guardian Ad Litem, N.Y. Reg., Nov. 6, 1991, at p. 19). A guardian ad litem has the right to represent the interests of a student in an impartial hearing and fully participate in the hearing but does not have the authority to make educational decisions on behalf of a student (see 8 NYCRR 200.1[s]).

In this case, in an interim decision, dated May 22, 2017, the IHO cited to the parent's May 4, 2017 correspondence withdrawing her due process complaint notices, and further referenced the IHO's response to the parent, indicating that he would order that a guardian ad litem be appointed "with respect to the issue of the withdrawal of the [due process complaint notices] on behalf of the student," an appointment the parent objected to (IHO Ex. 6 at p. 27). The IHO held that "the effect of the parent's withdrawal, in this instance, would foreclose [his] ability to address the issue of the provision and/or delivery of occupational therapy to the student" and further noted that "the parent had previously filed 6 additional [due process complaint notices] in during [sic] the 2016-2017 school year, before a different IHO, and then withdrew those [due process complaint notices] just prior o [sic] the commencement of that hearing" (id. at p. 28). The IHO therefore held "that the parent's interests are opposed with those of the student and that the interests of the student would best be protected by appointment of a Guardian Ad Litem in this matter" (id. at p. 29). The IHO further noted that the district's request for an impartial hearing had not been withdrawn, and therefore held that appointment of a guardian ad litem was appropriate to represent the student's rights with respect to that due process complaint (id.).

As noted previously, when an IHO appoints a guardian ad litem, the IHO is required to "ensure that the procedural due process rights afforded to the student's parent … are preserved throughout the hearing" (8 NYCRR 200.5[j][3][ix]). State regulation provides that a "party requesting a hearing" may withdraw their complaint prior to the commencement of the hearing (8 NYCRR 200.5[j][6][i]). Although the IHO reasoned that the parent's rights and student's interests were not aligned with respect to the parents' due process complaint notices (see IHO Ex. 6 at p. 4; IHO Decision at p. 29), the guardian ad litem is a representative to protect the interests of the student, not a party, and State regulations do not provide a guardian ad litem with educational decision making authority of a parent. Thus, a guardian ad litem lacks standing to bring or independently maintain a due process complaint notice in an impartial hearing under the IDEA and attendant State law (see 8 NYCRR 200.1[s], [ii]). Prior to the impartial hearing, an IHO does not have the authority to prevent a party from withdrawing a due process complaint notice (see 8 NYCRR 200.1[s]; 8 NYCRR 200.5[j][6]). Consequently, the IHO erred in using the appointment of a guardian ad litem to, in effect, override the parent's exclusive right as a party, explicitly granted

[10] State regulations clarify that the Board of Education is the appointing authority for a surrogate parent under certain conditions and using the procedures prescribed therein (8 NYCRR 200.5[n]; see 34 CFR 300.519 [requiring the public agency to carry out the procedures regarding surrogate parents]).

by State regulation, to withdraw her due process complaint notices, and that is precisely what the 1991 amendments to the State regulations described above were designed to prevent. Therefore, the IHO's rulings relating to the parent's due process complaints must be reversed, and the parent's due process complaints are deemed withdrawn as of her last withdrawal, dated July 14, 2017 (IHO Ex. 5 at pp. 262-63).

Having determined that the parent withdrew her due process complaints, and the guardian ad litem lacked standing to proceed on the parent's withdrawn complaints, the IHO's rulings relating to the parent's due process complaint notices were also made in error, and his findings regarding those due process complaints must be also be reversed. Accordingly, the sole issues on appeal relate to the district's due process complaint, and the IHO's findings related thereto.

b. District's Authority to Request an Impartial Hearing

As a result of the determination above, the only matters remaining on appeal relate to the district's due process complaint notice dated March 13, 2017 (IHO Ex. 2 at pp. 15-18). In light of the fact that the issue who has standing to bring a due process complaint notice has featured prominently in this case, I note that the IDEA also grants school districts the right to request an impartial hearing (I.R. v. Los Angeles Unified Sch. Dist., 805 F.3d 1164, 1168 [9th Cir. 2015]; citing 20 U.S.C. § 1415). Both a parent and school district may file a due process complaint notice "with respect to any matter relating to the identification, evaluation or educational placement" of a student with or suspected of having a disability, as well as "the provision of a free appropriate public education to such a student" (8 NYCRR 200.5[i][1]; see 34 CFR 300.507[a]; Intravaia v. Rocky Point Union Free Sch. Dist., 919 F. Supp. 2d 285, 291 [E.D.N.Y. 2013]). The regulations enabling a district to seek a determination relating to the provision of a FAPE to a student are "consistent with the terms, purposes, and policy underpinnings of the IDEA" (Yates v. Charles Cty. Bd. of Educ., 212 F. Supp. 2d 470, 472 [D. Md. 2002]). In instances when a district is faced with a parent that offers extensive revisions to a school district's draft IEP, the Ninth Circuit has held that the district has two options: continue to work with the parent to attempt to develop a mutually acceptable IEP, or unilaterally revise the IEP and file a request for an impartial hearing in pursuit of a finding that the IEP offered the student a FAPE (Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1056 [9th Cir. 2012]). Accordingly, insofar as the district's due process complaint notice seeks a determination relating to its provision of a FAPE to the student on the issue of OT services, it is properly asserted, and will be considered herein.

B. Scope of Review

The district's due process complaint notice raises issues regarding the provision of OT during the 2016-17 school year that implicate compensatory services that were awarded as part of a prior administrative hearing related to the 2015-16 school year. The district requests an order relieving it from providing those compensatory OT services (IHO Ex. 2 at pp. 15-17; see Application of a Student with a Disability, Appeal No. 16-035). Although the IHO did not address the issue directly, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]). An SRO does not have the authority to reopen and modify

a final decision. Accordingly, issues relating to the previous award of compensatory OT services set forth in Application of a Student with a Disability, Appeal No. 16-035, and the district's request to be relieved of liability or obligation to provide those compensatory OT services related to the 2015-16 school year will not be reopened and ruled upon herein.

Turning to the parent's answer to the district's appeal, I also note that the parent does not cross-appeal any of the IHO's specific findings and only makes broad allegations that she was denied her due process rights, and that the entire hearing be remanded to a new IHO. Normally, the parent's failure to assert a cross-appeal would otherwise have required that the IHO's determinations become final and binding on the parties and would not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). However, for the reasons described above, the parent's due process complaint notices were withdrawn and the IHO's findings regarding the parent's claims must be reversed on that basis. To the extent the parent asserts in an answer that she was not afforded a fair and impartial hearing, the parent has not served and filed a cross-appeal from the IHO's decision and such claims are deemed abandoned as expressly required by State regulations (8 NYCRR 279.4[f], 279.8[c][4]) and no relief may be granted by an SRO in the absence of a cross-appeal. Nevertheless, as set forth above, I will conduct an impartial review of the IHO's findings, conclusions, and decision and 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 solely upon the hearing record (34 CFR 300.514 [b][2]; 8 NYCRR 279.12 [a]).

In this instance, I have paid particular attention to the potential influence that the IHO's decision to appoint a guardian ad litem to proceed on behalf of the student may have had on the parent's due process rights, including the IHO's determination that the parent's advocate may not appear on behalf of the student (IHO Ex. 6 at pp. 48). The IHO communicated to the parent, by email dated May 26, 2017, that his interim decisions had not terminated her parental rights and that she would be able to attend the hearing (IHO Ex. 5 at p. 166). However, in email correspondence on May 24, 2017, the IHO informed the parent that she withdrew the due process complaints notices filed on her behalf and, in response to the parent's request for pendency to protect the student's rights, the IHO informed her that she did not have standing on behalf of the student (id. at p. 171). On July 14, 2017, the parent sent an email to the IHO withdrawing her due process complaint notices asserting that she could not proceed without legal representation (IHO Ex. 5 at pp. 262-63). At the start of the hearing, the IHO explained to the guardian ad litem that the parent was "well-aware … that her advocate could come today and represent the parent" which the IHO indicated was clearly stated in email correspondence (Tr. p. 7).[11] As discussed above, the IHO should have taken further steps to preserve the procedural due process rights afforded to the student's parent after the appointment of a guardian ad litem including the right to be accompanied at the hearing and advised by legal counsel or an individual with special knowledge or training with respect to the problems of students with disabilities (see 8 NYCRR 200.5[j][3][vii], [ix]); however, the hearing record indicates that the parent was informed that she could attend the hearing with her chosen representative but chose not to attend or otherwise participate. As noted by the

[11] Included in the additional evidence annexed to the parent's answer, is a July 14, 2017 email from the IHO to the parent advising her that she may be represented by an attorney or advocate (Answer Ex. O).

IHO, the parent already had a history of filing and withdrawing due process complaints and I am not convinced that the IHO's misstep in stating that the parent lacked standing (with an explanation that she could participate in a hearing regarding her son's education with her attorney or representative) was so infirm regarding her right to due process that the matter should be remanded to another IHO for another hearing as requested by the parent.

Furthermore, the parent submitted a memorandum of law with her answer, which included a wide range of allegations and factual assertions not included in her answer (see generally Parent Mem. of Law). It has long been held that a memorandum of law is not a substitute for a petition for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8 [c][3], [d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). To hold otherwise would permit parties to circumvent the page limitations set by State regulation (8 NYCRR 279.8[b], [c]). Thus, any argument included solely within a memorandum of law has not been properly asserted.

Lastly, on appeal, the parent submitted additional evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, other than emails that were intended to be a part of the hearing record as set forth above, the evidence provided could have been presented during the hearing had she chosen to participate and is not necessary to decide the remaining issues on appeal, and therefore will not be considered further.

C. Implementation of Occupational Therapy and Need for a Prescription

The remaining disputed issue to be resolved is the district's challenge to the IHO's determination that the district was obligated to provide OT to the student during the 2016-17 school year, and the effect, if any, that the parent's conduct had on the district's responsibility to provide OT. As noted above, the IHO found that the district was not required to obtain a prescription in order to provide the student with OT so long as the OT was not being provided as part of a treatment plan to restore function that had been lost (IHO Decision at pp. 31-33). According to the district the IHO erred in placing emphasis on a practice guideline rather than upon the express terms of 8 NYCRR 76.5 (which requires a prescription for the delivery of OT services), and as a result the IHO erroneously concluded that the district denied the student a FAPE when the OT services were not delivered. The district does not appeal the IHO's factual determination that the student was, in fact, not provided with OT during the 2016-17 school year, or the fact that the student required the OT services listed in the IEP in order to receive an appropriate education.

The district also asserts that the IHO erred in failing to find that the parent was responsible for preventing the district from providing the student with OT by failing to allow it to obtain or otherwise provide a prescription, which in turn would have enabled the district to deliver the needed OT services. The district asserts that it should not be responsible for the provision of OT given the parent's alleged impediment and/or obfuscation of the district's delivery of this related service. In response, the parent alleges that she was never under a legal obligation to provide a

prescription for the OT services, and cannot be held accountable for any denial of a FAPE to the student.

As further described below, there are two distinct issues in the parties' arguments, the first being a legal defense regarding whether the district had the authority and obligation to deliver OT services to the student in the absence of a prescription for the 2016-17 school year and/or were there events that absolved the district of that legal responsibility. Assuming the district continued to have an obligation to continue to provide OT services, the second area of inquiry raised by the district's arguments is whether equitable considerations preclude relief for the 2016-17 school year, in whole or in part, in light of the parent's conduct. I will address each of these areas of inquiry below.

1. Responsibility to Deliver Occupational Therapy Services

As for the challenges to the IHO's decision regarding the district's responsibility to provide OT services for the 2016-17 school year, a review of the legislative history governing the provision of OT treatment programs is necessary. Prior to 2012, Education Law § 7901 expressly stated that any OT "treatment program shall be rendered on the prescription or referral of a physician or nurse practitioner" (L. 1993, ch. 146, Educ. Law § 7901). However, in 2011, the State Legislature amended Education Law § 7901, effective February 3, 2012, to state that an OT "treatment program designed to restore function, shall be rendered on the prescription or referral of a physician, nurse practitioner or other health care provider acting within his or her scope of practice pursuant to this title" (Educ. Law § 7901 [emphasis added]; see L. 2011, ch. 460).

The language of Education Law § 7901 as amended (Section 7901), when read plainly, specifies that the circumstances under which a prescription is required for the provision of OT is specific to treatment plans that are designed to restore function. In the facts of this case, the district does not take the position that Section 7901 makes a prescription necessary in order to provide the student with the recommended OT services, as the evidence in the hearing record indicates that the OT services in the IEP for the student are for "nonrestorative" purposes (Dist. Ex. 86 at pp.1, 23).

The IHO recognized the district's concern that at the time of the impartial hearing the regulation implementing Section 7901 continued to indicate, as it had prior to 2012, that a prescription was required for all OT services (IHO Decision at 15, 16, 34; see 8 NYCRR 76.5 [c] [1], [d] [noting that "[a]ny treatment program described in this regulation shall be rendered on the prescription or referral of a physician," which included treatment programs that are "directed toward maximizing functional skill and task-related performance for the development of a client's vocational, avocational, daily living or related capacities"]). Thus, the language of the Education law and State regulations regarding the need for a prescription appeared to conflict under the circumstances of this case in which the student required nonrestorative OT services (Bill Jacket, Introducer's Memorandum in Support, L. 2011, ch. 460).

While the district's strategy to provide the services by attempting to obtain a prescription was one possible way to overcome the obstacle in locating a OT provider and its attempt to locate

a provider who would deliver the nonrestorative services without a prescription was another, the fact that these strategies were unsuccessful did not absolve the district from its obligation.[12]

The parent does not have a responsibility to provide a FAPE to the student, and, therefore her conduct does not affect the district's obligation to provide the student with OT services in this case.[13] However, the parent's conduct is relevant insofar as it may provide an equitable basis to reduce or preclude relief, and I will turn to that issue next.

2. Equitable Considerations

I now turn to the question of whether there is any basis to deny the equitable relief awarded by the IHO based upon the parent's conduct. Although the parent is correct that, as a matter of law, she was not obligated to provide the district with a prescription in order for the student to receive OT services, the circumstances of this case create a unique situation in which the parent's conduct constituted a sufficient basis to deny compensatory services on equitable grounds.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]). Reviewing the IHO's award of compensatory OT services as a form of equitable relief, it is noted that IHOs are "granted broad authority in their handling of the hearing process and to determine the type of relief which is appropriate considering the equitable factors present and those which will effectuate the purposes underlying IDEA" (Warren

[12] If there was any lingering doubt regarding the intention of the agency in the application of Section 7901 after the 2011 amendment that the July 2017 guidance did not address, while this matter was pending, the Board of Regents adopted an amendment that conformed the regulatory language to Section 7901, striking the regulatory language that required a prescription to provide nonrestorative OT services, and noting that the nonconformity of the regulation was an oversight (see "Proposed Amendment of §76.5 of the Regulations of the Commissioner of Education Relating to the Definition of Occupational Therapy Practice" available at http://www.regents.nysed.gov/common/regents/files/118brca12.pdf; N.Y. Reg., Feb. 7, 2018 at 12; N.Y. Reg., Nov. 11, 2017 at 14-16).

[13] Although the parent's conduct in refusing to provide the district with a prescription for OT does not affect the district's obligation to provide the student with services, her consent is required in order for the district to provide those services (8 NYCRR 200.5[b][1][ii]). A parent may choose, however, to revoke consent for the provision of special education services in writing, an action that would require the district to cease the provision of special education services (8 NYCRR 200.5[b][5][i]). Therefore, the parent's May 4 and May 8, 2017 letters revoking consent for the provision of OT and monthly team meetings terminated the district's obligation to provide those services as of that date, and the fact that the district did not provide the student with OT after May 4, 2017 cannot be considered a violation of its obligation to provide the student with a FAPE (Dist. Ex. 131 at pp. 1-2; see 8 NYCRR 200.5[b][5][i], [iii]).

Consolidated Schs., 106 LRP 70659 [LEA MI 2000]). However, in this instance, the record provides sufficient justification to reverse the IHO's award based on equitable factors.

For context, the controversy between the parent and district regarding the provision of OT predates the 2016-17 school year at issue. On August 13, 2015, the parent sent an email to the district indicating that she had requested the student's doctor withdraw a prescription for OT that was purportedly sent without her knowledge or consent (Dist. Ex. 8 at p. 1). That same day, the student's doctor revoked the OT prescription, at the parent's request (id. at p. 4). On September 4, 2015, the parent again sent an email to the district forwarding the doctor's withdrawal of the student's prescription for the 2015-16 school year (IHO Ex. 10).

Turning to the time period at issue, the parent signed consent for compensatory OT and counseling services on August 12, 2016 (Dist. Ex. 40 at pp. 1-2). At the August 31, 2016 CSE meeting, the parent refused to provide consent to implement the proposed IEP until she obtained a hard copy, and also refused to sign a consent to obtain a prescription for OT (Dist. Ex. 46C at p. 135). Attached to a prior written notice, dated September 9, 2016, the district sent the parent a copy of the student's IEP with consent forms for services, additional evaluations, and release of student information regarding OT and PT services, which indicated that any medical assessment to acquire a prescription from a health care provider would be provided to the parent at no cost (Dist. Ex. 53 at pp. 1-35). By email dated September 9, 2016, the parent responded with an altered consent form (Dist. Ex. 54 at pp. 1-4). The district's director of student services testified that the parent signed an initial consent for services on September 9, 2016, but refused to sign a FERPA consent, resulting in the district being unable to obtain a prescription for OT (Tr. pp. 50-51).

On September 13, 2016, the student's principal sent the parent an email indicating that none of the providers the district had contacted were willing to provide OT without a prescription (Dist. Ex. 59 at pp. 1-2). By email to the parent dated September 16, 2016, the principal indicated that the BOCES OT providers contracted by the district, would not provide the student with OT in light of the parent's refusal to sign consent for them to obtain an order for an OT prescription from the student's physician and further indicated that they would like to meet to discuss their ability to provide OT (Dist. Ex. 60). On September 17, 2016, the parent replied that there was no need to have a meeting, accused the district of receiving "kickbacks" from BOCES, informed the district she would not sign consent for the district to obtain a prescription for OT, and requested that the district hire its own OT staff (id.). The director of student services testified that she tried to set up the meeting to try to explain to the parent why a prescription was needed to provide OT services, but the parent refused to attend (Tr. pp. 55-56). She also testified that she spoke with BOCES staff regarding the provision of services without a prescription, who told her they had been advised by their legal counsel that a prescription was required to provide OT (Tr. pp. 57). The director of student services also testified that the district attempted to hire its own OT provider, reached out to neighboring districts, an OT association, and private providers and agencies, but was unable to find anyone who was willing to provide OT without a prescription (Tr. pp. 57-59; Dist. Ex. 86 at pp. 1-31).

By letter dated September 27, 2016, the parent submitted a proposal to the district to "resolve all of the issues in the due process matters against the District," wherein she proposed that the district offer the student two 30-minute sessions per week of speech-language therapy, two 30-minute individual sessions per week of PT, adapted physical education classes, and the addition

of two speech-language goals, two PT goals, and one adapted physical education goal to the student's IEP (Dist. Ex. 65). The parent indicated if the district incorporated these terms into the student's IEP, she would "withdraw all of my due process and state complaints against the District, with prejudice, and I will sign consent for the district to obtain a prescription for the PT evaluation, and the OT and PT services," but would not waive her due process rights for any future violations, and indicated that if the district refused her offer, "there will be no other chances to resolve the issues and we will go to hearing" (id.).

By letter to the parent dated October 5, 2016, the district superintendent indicated, in relevant part, that the district would continue to seek an occupational therapist to provide services in the school without a prescription (Dist. Ex. 75). The director of student services testified that the parent indicated at the October 7, 2016 CSE meeting that she was opposed to signing the consent to get a prescription "out of principle" (Tr. p. 55).

In a follow-up letter to the parent dated November 1, 2016, the district attached a consent form to permit the district to appoint a physician to conduct an assessment regarding an OT prescription, and offered mediation services due to a breakdown in communication on the issue of OT (Dist. Ex. 80). By prior written notice dated November 4, 2016, the district indicated to the parent that any medical assessment required to obtain a prescription for OT would be at no cost to the parent, and included consent forms for a medical evaluation and to release student information regarding PT and OT services (Dist. Ex. 85).

By email dated November 16, 2016, the parent rejected the following services and supports: monthly team meetings, parent training and counseling, psychological counseling, the BIP, behavioral consultation services, and social skills training, asserting that those services/supports were not being provided in accordance with the student's IEP (Dist. Ex. 126). By email dated November 17, 2016, the parent revoked consent for the district to conduct a PT evaluation (Dist. Ex. 94). By email dated December 7, 2017, in response to the student's special education teacher sending the parent a monthly team meeting agenda, the parent reiterated that she had rejected monthly team meetings and that implementing parts of the IEP she did not accept was in violation of her son's rights, stating, among other things, that she would not attend any meetings with the district (Dist. Ex. 96 at pp. 1-6).

By email dated March 7, 2017, the parent requested copies of all prescriptions the district had for the student for services for the 2016-17 school year (Dist. Ex. 112). The district responded via email that day with one attachment of a prescription for counseling services (id.)

In an email dated March 20, 2017, the parent indicated that she had an OT prescription in her possession, but that she was "not sending it anywhere" until she found out if the district would accept it without an "ICD" code (Dist. Ex. 116 at pp. 1-2; see Tr. pp. 61-62).[14] By email dated

[14] IDC presumably refers to International Classification of Diseases, which is a system of alphanumeric codes that describe medical diagnoses.

March 30, 2017 the parent indicated that the prescription she had was for outpatient OT, not school-based OT (Dist. Ex. 117).[15]

By email to the student's special education teacher dated May 4, 2016, in response to another team meeting agenda, the parent revoked consent for all email communication, threatened to seek charges for harassment if the district emailed her again, and indicated that she did not wish to be contacted by the district by email again (Dist. Ex. 127 at pp. 1-2). By letter dated May 4, 2017 the parent rescinded her revocation of special education and related services, sent earlier the same day, but also maintained that she was still revoking consent for OT and monthly team meetings (Dist. Ex. 131 at pp. 1-2).

In letters to the district dated May 4 and May 8, 2017, the parent again revoked consent for the provision of OT (Dist. Ex. 131 at pp. 1-2).

In light of the foregoing, it is very clear that parent had no obligation to obtain a prescription for OT, even in light of the district informing the parent that the numerous OT providers the district had reached out to indicated that they required a prescription to provide services (Tr. pp. 55-59; Dist. Exs. 59 at pp. 1-2; 60; see Dist. Ex. 86 at pp. 1-31).[16] But that does not end the facts to be weighed. Although the lack of a prescription was not a legal defense on the FAPE issue, it was a very real, factual conundrum that the district was trying very hard to overcome. As described above, the district was willing to solve the issue by obtaining the prescription at district expense (Dist. Exs. 80, 85). But no cooperation in letting the district obtain a prescription was forthcoming from the parent. The parent went ahead and actually obtained a prescription in March 2017, but ultimately did not provide it to the district at that time (see Dist. Ex. 116 at pp. 1-3; IHO Ex. 5 at p. 18), Furthermore, in her September 27, 2016 email to the district, the parent, for reasons that are inexplicable, was willing to use her consent to allow the district to obtain a prescription for OT as a bargaining chip, in exchange for the district conceding to the parent's demands—made outside of a CSE meeting—for specific modifications to the student's IEP (Dist. Ex. 65). This is not the

[15] They parent may have provided the district with a prescription for OT in March 2017. The parent alleges, in an April 6, 2017 sur-reply on an emergency motion for stay put, that two weeks beforehand she disclosed to the district that she had a prescription in her possession that did not include an ICD-10 code for Medicaid billing, that the district refused to accept (IHO Ex. 5 at p. 7). The parent attached a copy of a prescription dated March 16, 2017 to her motion (IHO Ex. 5 at p. 18). In a March 17, 2017 email to the district, the parent indicated that she had been in contact with the student's pediatrician and she was inquiring as to what information was needed on a prescription/referral for OT in the school setting, and specifically if an ICD-10 code needed to be included (Dist. Ex. 116 at p. 2). The parent and district exchanged a series of emails in which the parent indicated she had a prescription in her possession; the district asked the parent to send the prescription to school for the occupational therapists to review, and directed the parent to have the physician contact the district office if there were any questions; and the parent replied that she would not send the prescription anywhere until she knew if it would be accepted without an ICD-10 code (Dist. Ex. 116 at pp. 1-2). However, the record does not include a response to the parent's April 6, 2017 sur-reply, nor does it establish that the district received the prescription outside the hearing or if the parent gave consent for the district to utilize it. Furthermore, on March 30, 2017 the parent sent an email to the district, in which she stated that she was mistaken and the prescription was for outpatient OT, not school-based OT, and, in addition, the Office of Professions had confirmed that a prescription was not required to provide OT for handwriting in the school setting (Dist. Ex. 117).

[16] Even though parent was not mandated to obtain a prescription, I do not find the district's request that she obtain one to be improper as Section 7901 does not preclude the use of a prescription for nonrestorative OT services.

kind of collaborative process envisioned under the IDEA. In weighing the conduct of the parties, the parent's actions appear to be attempts to find one excuse after another to avoid working collaboratively with the district to obtain a therapist willing to provide the needed OT services for the student. If that were not enough, as noted above, the parent has again revoked consent for OT services in May 2017, thus ending, once again, any ability of the district to deliver OT services. The IHO did not explain why he was awarding compensatory relief for a service for which the parent revoked consent. The SRO in Application of a Student with a Disability, Appeal No. 16-035 warned the parent that her continued refusals to cooperate and provide consent for the district provide a FAPE could form the basis to deny compensatory education relief, yet she continued in this continued this conduct with respect to OT services into the 2016-17 school year.

Lastly, I do not overlook the fact that there is a child at the center of this education dispute. I will also factor what a denial of compensatory OT services on equitable grounds would look like in term of student's access education and ability to make progress. Accordingly, review of the hearing record reflects that although the student required OT in order to receive a FAPE and he did not receive OT services, the student did otherwise receive some benefit from instruction during the 2016-17 school year (see Tr. p. 251; Dist. Ex. 125). The student's regular education teacher for the 2015-16 and 2016-17 school years testified that the student had made slow, steady progress during that time, and he was on grade level in some areas and approaching grade level in some areas (Tr. pp. 228-30). The student's teacher stated that reading, writing, and focus were the areas where the student struggled the most and where he required support and encouragement (Tr. p. 231). The teacher indicated that the student's handwriting was not the neatest, but she was able to read it and the student used a laptop for any writing longer than a sentence or two (Tr. pp. 251, 253). The teacher stated that the student did very well in math and was able to draw models and show his calculations, although he required teacher support to line up his work at times (Tr. p. 252). The teacher also testified about using a variety of "OT types of tools" with the student to see what worked for him, and the sensory strategies were included in a May 3, 2017 progress report (Tr. pp. 252-53; Dist. Ex. 134 at pp. 7-8; see Dist. Ex. 3 at pp. 3-32). Similarly, the social worker who provided counseling services to the student during the 2016-17 school year testified that the student made progress using sensory strategies to improve his focus and achieved his IEP annual goal for the same (Tr. p. 189).

According to the student's June 2017 IEP progress report, the student had achieved nine out of twelve annual goals and was making progress toward three annual goals (Dist. Ex. 125 at pp. 1-9).[17] The student's August 2016 progress report indicated that when asked to write answers, the student frequently avoided the task, gave very basic responses, or needed extensive prompting and reinforcement; in contrast, the student's June 2017 progress report indicated that he required minimal teacher support to focus him on important details, he was increasing the number of sentences in his writing and was more consistent in his use of complete sentences, and he had "dramatically improved his paragraph writing" (compare Dist. Ex. 46A at pp. 1-2, with Dist. Ex. 125 at pp. 2-3). In math, during the course of the school year the student made errors when rewriting numbers to show his work; however, by the end of the year he had achieved that annual goal (id. at p. 4). The student also achieved an annual goal to independently self-monitor and self-

[17] Two additional OT annual goals were included in the progress report; however, they were not rated because OT services had not been provided during the 2016-17 school year (Dist. Ex. 25 at p. 9).

regulate using sensory strategies, especially during academic instruction (id. at p. 5). In summary, the lack of OT services, while hardly appropriate, does not inhibit all meaningful progress in the student's programming and thus does not factor so heavily in this instance to overcome the parent's intransigence in cooperating with the district's efforts to provide the needed OT services.

Accordingly, the district made a misstep in its belief that it may be absolved of responsibility for OT services, but it continued to work with the parent and attempt to overcome the obstacles it experienced in delivering the services. I find that the parent's lack of cooperativeness with district-initiated efforts to deliver the needed OT services to the student during the 2016-17 school year— in addition to her eventual revocation of consent for OT services in May 2017—weigh against any award of compensatory OT services. While that outcome was avoidable and thus unfortunate, the lack of OT services did not so undermine the student's programming as to prevent meaningful progress in a number of significant areas during the 2016-17 school year even in the absence of the recommended OT services. Therefore, the portion of the IHO's decision that awarded of 80 30-minute sessions of compensatory OT services is not supported by equitable considerations and must therefore be reversed.

VII. Conclusion

Having reviewed the parties' contentions on appeal, I conclude that the parent's due process complaints were validly withdrawn as of July 14, 2017. I also find that the guardian ad litem appointed by the IHO lacked standing to pursue the parent's due process complaints once the parent withdrew her complaints. I find that the IHO correctly found that the district was obligated to provide OT services regardless of the parent's provision of a prescription for that service, but reverse the IHO's award of compensatory OT services based on a weighing of equitable factors.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the IHO's decision dated November 29, 2017 which held that the IHO retained jurisdiction over the parent's due process complaint notices addressed those claims, including all related findings of fact, are reversed, and the underlying complaints are deemed withdrawn; and

IT IS FURTHER ORDERED that the portion of the IHO's decision dated November 29, 2017 awarding compensatory OT services for the 2016-17 school year is reversed.

Dated: **Albany, New York**
February 8, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER