The University of the State of New York

The State Education Department
State Review Officer
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No. 19-005

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

Appearances:
Jaspan Schlesinger LLP, attorneys for respondent, by Carol A. Melnick, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) that granted respondent's (the district's) motion to dismiss her due process complaint notices. The appeal must be sustained in part and, for reasons explained more fully below, the matter is remanded to an 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

Due to the procedural posture of this matter, the hearing record contains very little documentary or testimonial evidence (see Tr. pp. 1-74; Parent Exs. A-B; Dist. Ex. 1; IHO Exs. A-B).[1] Accordingly, the following background is derived from factual allegations in the parent's due process complaint notice dated July 21, 2018 (see IHO Ex. A). During the time the student attended a district middle school in the 2013-14 through the 2015-16 school years, school staff

[1] Citations to exhibits attached to one of the motion papers are identified by the exhibit letter or number corresponding to the motion itself followed by the exhibit letter or number corresponding to the appended document (e.g., Dist. Ex. 1.E).

reported that the student was falling asleep in class and did not turn in homework on a regular basis (id. at p. 2). The parent related that the student's grades were inconsistent and "surprisingly low" compared to his performance on standardized tests and that this continued to be the case when the student began to attend a district high school during the 2016-17 school year (id. at pp. 2-3). The parent noted that the student appeared to be frequently tired at home and had received poor grades in several classes, which the teachers attributed to the student's frequent failure to turn in homework and a tendency to fall asleep in class (id. at p. 3). Because the student's brother had recently received a diagnosis of sleep apnea, the parent arranged for the student to undergo a sleep study and, in March 2018, informed the student's teachers and guidance counselor of "the problem" (id.). Upon completion of the sleep study, the student received a diagnosis of sleep apnea (id.). On May 18, 2018, the parent referred the student to the district for an evaluation for eligibility for special education or for services pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) (section 504) (id.). The parent consented to initial evaluations and the district conducted academic testing and a psychological evaluation of the student (id. at p. 4).

According to the parent, the CSE met on July 6, 2018, and declined to classify the student as a student with a disability under the IDEA (IHO Ex. A at p. 4). Instead, the district developed an accommodations plan pursuant to section 504 (504 plan) for the student, recommending that the student receive group counseling and resource room services (id.). At the meeting, the parent contested the CSE's failure to find the student eligible for special education, arguing that the student met the qualifications for classification under the IDEA as a student with an other health-impairment and that the student required an IEP with specific goals to ensure progress was monitored, something that a 504 plan would not provide (id. at pp. 4-5). Also according to the parent, the CSE chairperson stated that she did not believe the student's disability adversely impacted his school performance and that she believed the evaluations performed by the district were inadequate and proposed to have the student re-evaluated "after the first marking period of the next school year" (id. at p. 5). The parent reaffirmed her belief that the student should be classified and urged the district to have an IEP in place at the start of the school year (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 21, 2018, the parent alleged that the district failed to fulfill its child find obligations under both the IDEA and section 504 beginning in the 2013-14 school year and failed to offer the student a FAPE for the 2018-19 school year based on procedural and substantive violations, particularly with respect to the July 2018 CSE's failure to classify the student and develop an IEP (see IHO Ex. A at pp. 6). For relief, the parent requested that the IHO order the student to be classified as a student with a disability under the IDEA and be provided with an IEP with specific goals to address the student's needs, and services reasonably calculated to meet those goals (id. at p. 7). The parent also requested "[c]ompensatory services" to address the student's needs with respect to self-management skills and social/emotional difficulties, among other requests (id.).

B. Events Post-Dating the Due Process Complaint Notice

Shortly after the parent filed the initial due process complaint notice, the parties participated in a resolution session on August 2, 2018 and, in a letter from the district dated August

8, 2018, the district summarized its view of the settlement reached at that meeting, including that it agreed to reconvene the CSE to consider the student's eligibility for special education and to conduct two independent educational evaluations (IEEs) (Dist. Ex. 1.E); however, the parent did not agree with "the course of action stated in [the district's] summary of [the] August 2, 2018 Resolution Meeting" (Parent Ex. A.7).

On August 3, 2018, the parent submitted an amended due process complaint notice that restated the claims in the July 2018 due process complaint notice and added claims with respect to the provision of FAPE to the student and proposed additional solutions (IHO Ex. B; see IHO Ex. A). Initially, the parent asserted that the accrual dates of her claims for statute of limitation purposes should be measured by the parent's discovery of certain information with respect to the student's needs, rather than the actual dates of the alleged denials of FAPE (IHO Ex. B at p. 6). The parent asserted that the district failed to fulfill its child find obligations under both the IDEA and section 504 beginning in the 2013-14 school year and failed to offer the student a FAPE for the 2018-19 school year (id. at p. 7). Specifically, the parent alleged that the district failed to offer the student a FAPE for the 2018-19 school year based on its failure to conduct a comprehensive evaluation of the student's needs and its failure to identify the student as a student with a disability eligible for special education (id. at pp. 7-8). The parent further argued that, as a result of its provision of a 504 plan "in lieu of an IEP," the district failed to provide the parent with an opportunity to participate in decisions regarding the student's special education and failed to provide the student with goals based on his individual needs, a functional behavioral assessment (FBA) and a behavior intervention plan (BIP), prior written notice, and transition planning and an exit summary (id.). The parent also alleged that the district denied the student a FAPE by failing to provide reasonable accommodations that minimized the impact of unfinished homework on the student's grades (id. at p. 8). The parent alleged that the district had a policy of denying funding for evaluations and services it deemed to be medical in nature (id.). The parent also alleged that the district had impermissibly predetermined what it would offer the student and impeded the parent's participation in developing the student's program in a number of ways (id. at pp. 7-8). The parent also alleged that the district discriminated against the student in violation of section 504 and the Americans with Disabilities Act (ADA) and that the district deprived the parent and student of rights under the Constitution and/or federal statutes (id. at p. 9). For relief, the parent proposed ten solutions including that the student be deemed eligible for special education, creation of an IEP with annual goals, "compensatory services," modification of the student's educational records and grades, declaration that the district's policy of denying funding for medical services was a systemic violation of the IDEA, and funding from the district "for medical services undertaken for diagnostic/assessment purpose[s] as part of an [IEE]," among other requests (id. at pp. 9-10).

A CSE convened to conduct an initial eligibility determination on August 28, 2018, and found the student eligible for special education as a student with an other health-impairment (Dist. Ex. 1.A at p. 1). The August 2018 CSE developed an IEP with annual goals and recommended one 44-minute session per day of resource room in a small group, two 30-minute sessions per month of individual counseling, health and safety supports (access to school nurse), testing and classroom modifications, and access to digital books (id. at pp. 8-12).

On September 18, 2018, the parent signed consent for the initial provision of special education services (Dist. Ex. 1.D at p. 2).

C. Impartial Hearing Officer Decision

According to the parties, a prehearing conference was held on September 21, 2018, at which the district stated its intent to move to dismiss both the original and amended due process complaint notices, and the IHO instructed the parties to submit written arguments (see Parent Ex. A at p. 6; Dist. Ex. 1 at p. 1).[2]

On October 5, 2018 the district submitted a motion to dismiss the parent's due process complaint notices (Dist. Ex. 1). With regard to the August 2018 amended due process complaint notice, the district argued that it should be dismissed because it had not consented to the amendment and the IHO had not granted the parent leave to amend the due process complaint notice (id. at p. 1). The district also contended that both the July and August 2018 due process complaint notices should be dismissed as moot, arguing that the parent had obtained all of the requested relief and that the IHO lacked jurisdiction over many remaining claims, such as record review, systemic violations, and attorney fees (id. at pp. 1-4). Lastly, the district contended that the parent's claims with respect to the 2013-14, 2014-15, and 2015-16 school years were barred by the statute of limitations (id. at pp. 5-6).

In a response dated October 16, 2018, the parent requested that the IHO accept the August 2018 amended due process complaint notice and deny the district's motion to dismiss (Parent Ex. A at pp. 1-2).[3] The parent contended that the due process complaint notice should be deemed to be sufficient since the district did not notify the IHO of an allegation of insufficiency in writing within 15 day of receiving either the July or August 2018 due process complaint notices (id. at p. 8). The parent also contended that, to the extent dismissal of her due process complaint notice(s) could be premised on an allegation that she failed to participate in a resolution session, she attended the first resolution session, the second resolution period arising from the amended due process complaint notice ended without a request from the district to have such a session, the district only requested a second resolution session after the parent noted that one had not occurred, and the parent did not refuse to participate in a second resolution session (id. at pp. 4-6, 8-9). The parent further alleged that the district had implicitly consented to the August 2018 amendment by failing to raise any objection to it in a timely manner (id. at pp. 9-11).

With regard to the district's argument that her claims were moot, the parent alleged that the district misrepresented the basis for the parent's IEE request, noting that, although the parties had agreed to have a neuropsychological and a psychiatric evaluation performed, the August 2018 amended due process complaint notice contained a request for a consultation with a sleep specialist, which the district denied as "medical" and outside the scope of the CSE process (Parent Ex. A at pp. 11-12). The parent also asserted that her claims pertaining to the district's policies of excluding medical procedures or conditions, refusing to issue prior written notices, offering 504

[2] The hearing record does not include a transcript or written summary of the September 21, 2018 prehearing conference as required by State regulation (8 NYCRR 200.5[j][3][xi]).

[3] The parent submitted a second response to the district's motion to dismiss that was virtually identical to the first response but corrected typographical errors (see Tr. pp. 3-5; Parent Ex. B). For purposes of this decision, the parent's original response is cited.

plans to student's who qualified for IEPs, and predetermining a student's program outside a CSE meeting were capable of repetition and therefore were not moot (id. at pp. 12-17). The parent next asserted that the allegation that the district violated its child find obligation remained live (id. at pp. 17-18). The parent further asserted that the district's provision of the August 2018 IEP did not render the parent's claims moot, in light of the parent's request for compensatory education (id. at pp. 18-19). The parent also asserted that other exceptions to the mootness doctrine applied (id. at p. 19). Finally, the parent contended that her request for other relief, including declaratory relief, was available through the impartial hearing process to remedy the district's violations (id. at pp. 19-20).

In response to the district's motion to dismiss her claims on the grounds of the statute of limitations, the parent argued that a determination of when a parent "knew or should have known" of his or her IDEA claim required a detailed, fact-specific inquiry requiring an evidentiary hearing, which had not occurred, and that, at the motion to dismiss state, the parent's knowledge—as described in the due process complaint notices—had to be taken as true for the purposes of a motion to dismiss (Parent Ex. A at pp. 20-24). Relatedly, the parent contended that a statute of limitations defense was an affirmative defense, which normally could not be decided on a motion to dismiss (id. at p. 24).

At the impartial hearing on October 22, 2018, the parties and the IHO discussed the district's motion and the parent's response (see Tr. pp. 1-74). The IHO rendered a decision, on or around December 3, 2018, that dismissed the parent's July and August 2018 due process complaint notices (see IHO Decision at p. 9).[4]

Initially, the IHO outlined the forms of relief sought in the parents' due process complaint notices and included notations about the district's arguments and/or the IHO's findings about such requests (IHO Decision at pp. 2-3). For example, the IHO found the parent's requests in the original and amended due process complaint notices that the student be classified and provided with an appropriate IEP to meet the student's needs was rendered moot by the CSE's development of the August 2018 IEP, which the "district argued" was "comprehensive" (id. at pp. 2, 3). Next, the IHO noted that the parent's request for compensatory education was "vague" and did not allege the specific services that were allegedly denied (id. at p. 2). The IHO opined that the parent's request for compensatory services "confuse[d] the request for services generally with the concept of past services denied" and that the August 2018 IEP satisfied the request for services (id. at pp. 2-3). Next, the IHO determined that the parent's request for attorney fees was outside his jurisdiction (id. at p. 3).

With regard to the amended due process complaint notice in particular, the IHO noted that it repeated the vague and moot claims of the original but added a "vague and unsupported allegation of purported inadequate District evaluations" (IHO Decision at p. 3). The IHO noted that, because the results of the two IEEs—which the district agreed to fund at the August 2, 2018 resolution session—had not yet been obtained it was "difficult if not impossible to find the district

[4] The IHO's decision is undated, but the parent indicates that the decision was dated December 3, 2018, and the district identifies the same date as the date that the parties received the decision (Req. for Rev. at. p. 1; Answer ¶1, n. 1).

evaluations deficient in this context" (id. at pp. 3-4). Although the IHO noted that the parent had raised concerns at a CSE meeting about the impact of the student's sleep apnea on his performance, had concerns that district staff did not fully understand the impact of sleep apnea and could not adequately address the student's issues, and wanted an "intense evaluation/analysis by a qualified sleep apnea medical specialist to give guidance to the staff," he nonetheless found that, because the IEEs had not yet been completed, "at this stage the parental concerns about the adequacy of the evaluations . . . must be deemed as nothing more than speculative" (id. at pp. 4-5).

With respect to the parent's argument that the statute of limitations accrual date should be placed at the time she made certain discoveries about the student's needs and the district's curriculum, the IHO found the parent's argument "at best self-serving and not supported in the exhibits of specific actions, facts of particulars which would explain, or potentially substantiate, or support such a claim if substantiated" (IHO Decision at pp. 5-6). With respect to the parent's claim that the district failed to conduct an FBA and develop a BIP to consider the student's falling asleep in some classes but not others and failed to develop a transition plan or conduct an exit summary with the student, the IHO found these claims "lack[ed] specification and particulars and remain[ed] vague and un-supported" and noted that the district "claim[ed]" that it provided the parent and the student with forms related to transitioning that had not been completed and "that the IEP addressed measures and services to address [the student's] behavior" (id. at p. 6). Finally, with respect to the parent's request for a review of the student's record concerning the effect of unfinished homework on grades, the IHO found this was "beyond the scope of the IHO" (id. at pp. 6-7).

After summarizing some of the district's arguments (IHO Decision at pp. 7-8), the IHO made additional determinations and/or reiterated earlier findings. The IHO found that the "failure of the parent to attend the mandated resolution meeting to discuss the amended request [wa]s a sufficient basis to dismiss the amended request on its own" because the district did not agree to waive the resolution meeting (IHO Decision at pp. 8-9). The IHO also found that the parent's claim that the district implicitly consented to the amended compliant to be "without merit" (id. at p. 9). The IHO also indicated that the basis for his dismissal of the original and amended due process complaint notices was the "vague and speculative" nature of the allegations (id.). Lastly, the IHO found that the district's "argument as to mootness" was sustained and dismissed both the original and amended due process complaint notices (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in dismissing her original and amended due process complaint notices. The parent asserts that the IHO erred in his findings that allegations in her due process complaint notices were vague or speculative. The parent asserts that the due process complaint notices should have been deemed sufficient because the district's challenge and the IHO's determination on sufficiency were untimely under the procedures set forth in the IDEA. The parent next asserts that the IHO failed to grasp major issues raised in the due process complaint notices and should have judged the sufficiency of the due process complaint notices on "the face[s] of the complaint[s]" rather than "retrospectively consider[ing] the pleading[s] in light of the contents of the IEP." The parent asserts that the IHO failed to provide her an opportunity to present evidence in that he failed to give her notice of his intention to consider evidence extrinsic to the

due process complaint notices at the October 22, 2018 hearing date and did not respond to the parent's request for an opportunity to present evidence thereafter. Next the parent asserts that the IHO improperly granted the district's motion to dismiss the due process complaint notices because there remained identifiable and genuine issues of material fact with respect to multiple issues, such as whether exceptions to mootness applied, what information a sleep specialist could offer that could contribute to the development of the IEP, whether the district's child find obligation was triggered in middle school, when the parent knew or should have known about her claims for purposes of accrual of the statute of limitations, whether sleep disorders and the evaluation thereof fell within the purview of the CSE, and whether compensatory education was warranted. The parent also claims that the IHO erred in failing to explicitly accept or reject the amended due process complaint notice. Next, the parent asserts that it was error for the IHO to dismiss the amended due process compliant notice on the ground that the parent failed to attend a resolution session because the resolution period would only be triggered if the IHO accepted the amended due process complaint notice and the 30-day resolution period had expired before the district acted to initiate a resolution session.

As for mootness, the parent alleges that the IHO erred in failing to consider the exceptions to the doctrine. Further, the parent asserts that IHO erred in making a blanket determination that all of her claims were moot, notwithstanding that some of her claims fell under statutes other than the IDEA and outside of the IHO's jurisdiction to adjudicate. With respect to the statute of limitations, the parent asserts that the IHO mischaracterized her allegations. The parent argues that her claims accrued when she became aware that a student pursuing a Career Development and Occupational Studies (CDOS) credential received instruction under a curriculum that addressed self-management and executive functioning skills. The parent argues that, upon learning about the curriculum, she became aware that the student's manifestations in these areas should have triggered the district's suspicion that the student had a disability.

The parent also asserts that the IHO erred by making factual findings based on flawed assumptions and analysis with respect to the parent's request for a consultation with a sleep specialist and the adequacy of the August 2018 IEP. Further, the parent argues that the IHO erred in failing to address the parent's claims as set forth in the due process complaint notices, including her claims regarding the district's refusal to issue prior written notice and regarding the district's reliance on policy, which caused violations of the child find mandate, predetermination, and denials of the parent's right to participation. Lastly, the parent contends that the IHO misunderstood and erred in dismissing her claim for compensatory education, which was premised on the assertion that the district should have found the student eligible for special education earlier and, due to the delay, denied the student a FAPE during the time he was not classified, which could be remedied by compensatory education.

For relief, the parent requests reversal of the IHO's dismissal and that an SRO adjudicate the claims in the August 2018 amended due process complaint notice. The parent also requests that the matter be remanded to the IHO to determine outstanding factual disputes relating to the statute of limitations and compensatory services. The parent also seeks a determination that the

IHO exhibited bias as a result of his multiple errors and his reliance on contradictory premises in this decision.[5]

In an answer, the district asserts general denials to the allegations raised in the request for review then sets forth "affirmative defenses" that generally argue that the IHO correctly dismissed the parent's claims in the original and amended due process complaint notices as failing outside the statute of limitations, as being moot, for failing to state a claim upon which relief could be granted, and/or as being outside the scope of the due process complaint notice since the amended due process complaint notice was not accepted. The district asserts that the IHO's decision should be upheld in its entirety. In addition, the district asserts that equitable considerations should bar the parent from seeking relief since the parent was an active and engaged participant in the student's education yet failed to raise concerns thereabout until July 2018.

In a reply, the parent asserts that the district's answer fails to respond to and oppose the issues raised in the parent's appeal. The parent goes on to respond to the district's arguments as set forth in its "affirmative defenses."

V. Discussion

As a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA; however, they should be used with caution and they are only appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]). State and local educational agencies are required "to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies," including the rights of parents to participate in the development of an IEP and "to challenge in administrative and court proceedings a proposed IEP with which they disagree" (Sch. Comm. Of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 361 [1985]; see 20 U.S.C. § 1415[a], [b], [f]). Additionally, the IDEA requires that parents be provided the "opportunity for an impartial due process hearing" relating to complaints they have with regard to their child's educational placement or the provision of a free appropriate public education to their child (20 U.S.C. § 1415[f]; see 20 U.S.C. § 1415[b][6]). State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). With this framework in mind,

[5] To the extent that the parent disagrees with the conclusions reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083). Accordingly, the parent's request for a finding that the IHO exhibited bias is without merit and will not be further discussed.

the IHO's dismissal of the parent's original and amended due process complaint notices is reviewed.

A. Amendment of the Due Process Complaint Notice

The first issue to be addressed pertains to the status of the parent's amended due process complaint notice. A party may amend its due process complaint notice either with the written consent of the other party, or by permission granted by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]).

The parent submitted her amended due process compliant notice on August 3, 2018 (IHO Ex. B). As set forth above in detail, the amended due process complaint notice restated arguments from the initial due process complaint notice and added claims and requests for relief (compare IHO Ex. B at pp. 6-10, with IHO Ex. A at pp. 6-8). Attached to her response to the district's motion to dismiss, the parent included various email communications between the parent and the district in which the district acknowledged the amended due process complaint notice but set forth no objection to it (see Parent Exs. A.6; A.7; A.9; A.10). Additionally, by letter to the parties dated August 13, 2018, the IHO acknowledged the August 3, 2018 due process complaint notice, indicated that "the law require[d] a 30 day resolution period," and set a date for a telephone conference (Parent Ex. A.8). In separate emails to the IHO, dated September 5 and September 7, 2018, respectively, the district stated its intent to move to dismiss the parent's initial and amended due process complaint notices and indicated that the district would convene a resolution meeting concerning the amended due process complaint notice "ASAP" (Parent Exs. A.10; A.11).

However, in an email to the IHO dated September 20, 2018, the district indicated that it had not consented in writing to the parent's amendment to the due process complaint notice and that it was "unclear as to whether [the IHO] accepted and/or granted permission for the Amendment" (Parent Ex. A.19). Although the hearing record does not include a summary or transcript of the prehearing conference that took place on September 21, 2018, according to the parent, during this conference, the IHO indicated he had been unaware of the filing of the original June 2018 due process complaint notice and directed the district to submit arguments concerning both the original and the amended due process complaint notices (Parent Ex. A at p. 6). The district reiterated its objection to the parent's amendment to the due process complaint notice in its October 5, 2018 motion but argued that the claims therein were, in any event, moot (Dist. Ex. 1 at pp. 1, 3-4). At the hearing date on October 22, 2018, the parent inquired as to whether or not her amended due process complaint notice had been accepted, to which the IHO responded that he "w[ould] decide that" (Tr. p. 64). In his final decision, other than rejecting the parent's claim that the district implicitly consented to the amended complaint, the IHO did not indicate whether or not he was permitting the amendment, although he did make findings about the claims therein (see IHO Decision at p. 9).

Although neither the district nor the IHO in this case explicitly agreed to or gave permission for the parent's amendment to her due process complaint notice, the circumstances of this case—including the passage of time after the parent filed the proposed amendment, the exchange of correspondence between and among the parties and the IHO that referenced the amendment, and the subsequent manner in which the both the district and the IHO treated the amendment (i.e., by

arguing or making determinations about its content), it would make little sense to consider the amendment ineffective at this juncture. Particularly for parents who file due process complaint notices without the assistance of an attorney, an IHO is "expect[ed] [to] exercise appropriate discretion in considering requests for amendments" (Due Process Complaint, 71 Fed. Reg. 46699 [Aug. 14, 2006]). The IHO's deferral of a determination as to whether or not to permit the amendment served no apparent purpose but instead put the status of the proceedings in a state of uncertainty in terms of the resolution processes and decision timelines that are required to follow the filing of amended due process complaint notice, as discussed below. Accordingly, under the circumstances of this case, I find that the parent's amended due process complaint notice dated August 3, 2018 is deemed accepted.

B. Sufficiency of the Due Process Complaint Notices

The IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). With respect to initiating an impartial hearing State regulation provides that a due process complaint notice shall include:

> (i) the name of the student;
>
> (ii) the address of the residence of the student . . .;
>
> (iii) the name of the school the student is attending;
>
> (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and
>
> (v) a proposed resolution of the problem to the extent known and available to the party at the time.

(8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]).

In most instances when a challenge to the sufficiency of a due process complaint notice is timely made, an impartial hearing may not proceed unless the due process complaint notice satisfies the sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 CFR 300.508[c]-[d]; 8 NYCRR 200.5[i][2]-[3]). If there has been an allegation that a due process complaint notice is insufficient, the IDEA and federal and State regulations provide that the party receiving the due process complaint notice must notify the other party and the IHO, in writing, of their challenge to the sufficiency of the complaint within 15 days of the receipt thereof (20 U.S.C. § 1415[c][2][A], [C]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3], [6][i]). The IHO must render a determination within five days of receiving the notice of insufficiency (20 U.S.C. § 1415[c][2][D]; 34 CFR 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]). If a receiving party fails to timely challenge the sufficiency of a due process complaint notice, the due process complaint must be deemed sufficient (20 U.S.C. § 1415[c][2]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]).

Here, the district did not elect to challenge the sufficiency of either the July or August 2018 due process complaint notices. Although the district identified its motion, in part, as an "Allegation of Insufficient Due Process Complaint Notice," the substance of the motion did not argue that the parent's original or amended due process complaint notices lacked sufficiency as a ground for dismissal under 8 NYCRR 200.5[i][1] (see Dist. Ex. 1).[6] Nor was the motion submitted in the required timeframe for a sufficiency challenge (see 20 U.S.C. § 1415[c][2][A], [C]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3], [6][i]). Nevertheless, the IHO repeatedly noted in his decision that the parent's allegations were vague, speculative, nonspecific, or unsupported (see IHO Decision at pp. 2, 3, 5, 6, 9).

Contrary to the IHO's characterizations, review of the due process complaint notices reveals that the parent provided the district with notice that she wanted an impartial hearing pursuant to State regulation regarding the evaluation and educational placement of the student who, at the time, she suspected of having a disability (see IHO Exs. A; B). The content of the due process complaint notices is set forth in more detail above and is such that, even if the district had timely challenged the due process complaint notice(s) as insufficient, there is a strong likelihood that they would nevertheless be sufficient to confer jurisdiction upon the IHO to proceed with an evidentiary hearing process and issue a decision.

Accordingly, to the extent that the IHO's decision could be read as concluding that either due process complaint notice was insufficient, such a finding was error.

C. Resolution Session

I next turn to the IHO's determination that the parent's failure to attend the resolution meeting to discuss the amended due process complaint notice was, "on this ground alone," a sufficient basis upon which to dismiss the amended due process complaint (IHO Decision at pp. 8-9).

The IDEA, as well as State and federal regulations, provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]). If a party files an amended due process complaint, the timelines for the

[6] The district made only passing reference to 8 NYCRR 200.5(i)(1) as authority for the proposition that an IHO lacks sufficient authority to resolve systemic complaints (Dist. Ex. 1 at p. 4).

impartial hearing, including the timelines for the resolution process recommence (20 U.S.C. § 1415[c][2][E][ii]; 34 CFR 300.508[d][4]; 8 NYCRR 200.5[i][7][ii]).[7]

Except where the parties agreed to waive the resolution process or use mediation, a parent's failure to participate in a resolution meeting "will delay the timeline for the resolution process," as well as the timeline for the impartial hearing, until the meeting is held (34 CFR 300.510[b][3]; 8 NYCRR 200.5[j][2][vi]). Further, a school district may request that an IHO dismiss a due process complaint notice if, at the conclusion of the 30-day resolution period and notwithstanding reasonable efforts having been made and documented, the district was unable to obtain the participation of the parent in the resolution meeting (34 CFR 300.510[b][4]; 8 NYCRR 200.5[j][2][vi][a]). On the other hand, if the district fails to hold the resolution meeting within 15 days of receipt of the parent's due process complaint notice or fails to participate in the resolution meeting, the parent may seek the intervention of the IHO to begin the impartial hearing timeline (34 CFR 300.510[b][5]; 8 NYCRR 200.5[j][2][vi][b]).

As to the parent's participation in the resolution session, the hearing record does not support the IHO's determination that the parent's refusal to attend the meeting warranted dismissal. By letter dated September 7, 2018, the district notified the parent of a resolution meeting scheduled for September 14, 2018 (Parent Ex. A.12 at p. 2). The scheduled September 14, 2018 resolution meeting fell beyond the 30-day resolution period and well beyond the 15 days allotted for scheduling the resolution meeting (see 20 U.S.C. § 1415[f][1][B][i][I]; [ii]; 34 CFR 300.510[a][1]; [b][1]; 8 NYCRR 200.5[j][2][i], [v]).

Moreover, the parent's inability to attend the September 14, 2018 resolution meeting (Parent Ex. A.13) would not warrant dismissal of the due process complaint notice on its own. First, the district's attempt to schedule the resolution meeting after expiration of the resolution period does not amount to a "reasonable effort" to secure the parent's participation in the resolution meeting as required by State and federal regulations (34 CFR 300.510[b][4]; 8 NYCRR 200.5[j][2][vi][a]). Further, the district did not request that the IHO dismiss the parent's amended due process complaint notice on the basis of her nonparticipation in the resolution meeting (see generally Dist. Ex. 1; see also 34 CFR 300.510[b][4]; 8 NYCRR 200.5[j][2][vi][a]). In contrast, the parent did seek the IHO's intervention to begin the impartial hearing timeline, albeit after the timeline should have already begun to run automatically even in the absence of a request by the parent (see Parent Exs. A.12; A.16; see also 20 U.S.C. § 1414[f][1][B][ii]; 34 CFR 300.510[b][1], [5]; 8 NYCRR 200.5[j][2][v], [vi][b]).[8]

[7] The Second Circuit has described the resolution period as the timeframe within which the district has to remedy any deficiencies in a challenged IEP without penalty (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 187[2d Cir. 2012]). When, at the conclusion of the resolution period, parents "feel their concerns have not been adequately addressed . . . , they can continue with the due process proceeding and seek reimbursement. The adequacy of the IEP will then be judged by its content at the close of the resolution period" (id. at 188). The resolution period allows a "district that inadvertently or in good faith omits a required service from the IEP [to] cure that deficiency during the resolution period without penalty once it receives a due process complaint" (id.).

[8] Additionally, the IHO's logic was flawed insofar as the IHO failed indicate to the parent if he was going to allow her August 2018 proposed amendment to the due process complaint to proceed as the operative complaint. The

In light of the above, the IHO erred in basing his decision to dismiss the August 3, 2018 complaint notice on the parent's failure to attend a resolution session, and that determination must be reversed (see IHO Decision at pp. 8-9).[9]

D. Statute of Limitations

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).[10] Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

Here, there is insufficient evidence in the hearing record to determine when each of the claims raised in the parent's original or amended due process complaint notices accrued. Initially, the IHO characterized as "self-serving" the parent's argument that the accrual dates of her claims should be the dates on which she discovered or became aware of the district's alleged action or inaction, rather than the actual dates of the alleged occurrence (IHO Decision at p. 6). Far from being self-serving and unsupported, the parent was attempting to argue the date she knew or should have known about the district's alleged action. The standard articulated by the parent is that which is required by the IDEA (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]). Moreover, although the IHO found that the parent's position about the dates she became aware of the district's

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parent's attendance at a second resolution session should not have been necessary unless and until the IHO made clear to the parent that her amendment had been accepted by the IHO.

[9] Because I have accepted the amended complaint, the parties should revisit the resolution process if they have not already done so.

[10] New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

alleged violations were "general and vague" and "not supported in the exhibits," these purported "deficiencies" in the parent's arguments (IHO Decision at pp. 5-6) are part and parcel to the preliminary pleading stage of due process proceedings, which are supposed to be resolved by advancing the matter to evidentiary phase wherein the gathering and marshalling of the evidence through the impartial hearing process would lead to a supportable ruling. It does not appear that the district presented any evidence regarding accrual of the statute of limitations, for which it held the burden of proof (K.H., 2014 WL 3866430, at *15). Consequently, the IHO erred in granting the district's motion to dismiss to the extent he characterized the parent's allegations as "self serving" or that she failed to support her allegations with evidence.

The accrual dates for some of the parent's claims may not require that the parties be given extensive or time consuming opportunities to present evidence regarding whether the parent knew or should have known about the district's alleged action at the time of that action, such as claims disputing the CSE's determination that the student was not eligible for special education (which was not, in any event, one of the claims questionable in terms of accrual). However, the parent's allegation that the district violated its child find obligation requires additional probing, especially in the year(s) preceding the CSE's decision to classify the student. The parent asserts that she became aware of the district's failure to meet its child find obligations when she became aware of curriculum requirements and realized that the student's failure to meet such requirements should have triggered the district's suspicion that the student could have had a disability. On the other hand, the district points out that the parent knew that the student's grades were declining as a result of his sleeping in class. Ultimately, the evidence in the hearing record is insufficient to resolve the factual dispute about when the parent knew or should have known about the district's alleged child find violations. Accordingly, on remand, the IHO is required to make a determination based on an adequate hearing record as to when each of the parent's claims accrued and then whether the parent's claims fall within the statute of limitations.

E. Mootness

Turning to the parent's claim that the IHO erred in finding her claims moot, a dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). However, in most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879

F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; see also Toth, 720 Fed. App'x at 51).

The IHO relied largely on the August 2018 IEP (see Dist. Ex. 1.A) to determine that the parent's claims as set forth in her July and August 2018 due process complaint notices had become moot (IHO Decision at pp. 2-3, 9). To the extent the parent sought, as relief, that the district convene a CSE to find the student eligible for special education and to develop an IEP with annual goals (IHO Exs. A at p. 8; B at p. 10), the IHO is correct that the development of the IEP may have rendered some aspects of the parent's claims moot; that is, unless an exception to mootness applies. However, it is unnecessary to review the application of the exceptions to the mootness doctrine in this instance since the parent also sought compensatory education as relief (IHO Exs. A at p. 8; B at p. 10) and, as noted above, in most instances, a claim seeking compensatory education as relief will not be rendered moot (see Mason, 879 F. Supp. at 219; see also Toth, 720 Fed. App'x at 51). The IHO's take on the parent's request for compensatory education—that it was, in fact, a request for services generally rather than one for a remedy for past services denied (IHO Decision at pp. 2-3)—is without support in the hearing record. The parent's due process complaint notices requested both types of relief: future services by development of an IEP, as well as compensatory services to put the student in the place he would have been but for the district's alleged denial of a FAPE (IHO Exs. A at p. 8; B at p. 10; see Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]).[11] Further, the IHO stated that the parent's request for compensatory education was vague because it did not specify the services that were allegedly denied (IHO Decision at p. 2); however, the pleading requirements for due process complaint notices are not that stringent (see M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *9 n.12 [S.D.N.Y. Sept. 14, 2016] [declining to find that a due process complaint notice was required to list "specific services" requested in order "to preserve the more

[11] The district's argument that compensatory education was not available because the parent could not establish a gross violation of the IDEA is without merit. The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]). However, compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). For example, SROs have awarded compensatory education services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]).

general argument of entitlement to compensatory education"]).[12] In addition to compensatory education, the parent also sought in her amended due process complaint notice district funding for the costs of "medical services undertaken for diagnostic/assessment purpose[s] as part of an [IEE]" (IHO Ex. B at p. 10). It does not appear that this request was resolved by the district's agreement to fund neuropsychological and psychiatric IEEs (see Dist. Ex. 1.E). To the extent that the IHO's decision may be read to find otherwise—i.e., that the parent's allegations about the district's lack of information about the student's sleep apnea were speculative as the agreed-upon IEEs had not yet been completed (IHO Decision at pp. 3-5)—such determinations are without support in the hearing record and must be reversed.

The parent should have been afforded the opportunity to be heard, clarify the nature of relief requested and, if found to have alleged a viable compensatory education claim, then the parties should have been given the opportunity to present evidence to support their arguments (see Application of a Student with a Disability, Appeal No. 11-044).

F. Other Issues—Jurisdiction

While it was not appropriate for the IHO to dismiss the parent's entire due process complaint notices, there were certain of the parent's claims and requests for relief which were or could have been appropriately resolved at the prehearing stage of the proceedings. Indeed, the parent requests, on appeal, that her claims "premised upon non-IDEA or systemic violations" be deemed exhausted or outside of the jurisdiction of the IHO."

An impartial hearing under the IDEA is limited to issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 CFR 300.507[a][1]; see 20 U.S.C. § 1415[b][6]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. School Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory damages are not available in the administrative forum under the IDEA, neither the IHO nor I have jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see also R.B. v. Bd. of Educ. of City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Further, although school districts may elect to satisfy the section 504 hearing requirement using the IDEA impartial hearing procedures (see 34 CFR 104.36), there is no indication in hearing record that the district elected to do so in this case (see Parent Ex. A.8). Moreover, in New York, the review procedure under section 504 does not include state-level review by a State Review Officer, whose jurisdiction is limited to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating

[12] Later in the proceeding, it is appropriate for an IHO to request that a party clarify the relief they seek as an IHO is not simply required to guess a what a party wants. In other words, by the conclusion of the hearing, the parent should be prepared clarify her position by identifying the particular compensatory services she is asking the IHO to order as relief and the reasons why she believes that is appropriate. The district similarly has an obligation to respond and point to evidence that supports its position.

to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]; see Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 97-80). As the courts have recognized, the New York Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 or the ADA (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]).

Therefore, neither the IHO nor the SRO has jurisdiction to review any portion of a parent's claims regarding section 504 (assuming that the district did not elect to satisfy the 504 hearing requirement using the IDEA impartial hearing procedures), section 1983, the ADA, or systemic policy claims and, to the extent such claims are asserted in this proceeding, they will not be further addressed and the IHO need not reach these claims on remand. Further, the IHO already determined that the parent's request for a review the student's records concerning the effect of unfinished homework on grades and for attorney fees were outside his jurisdiction and the parent has not appealed those portions of his decision (IHO Decision at p. 3); accordingly, those determination has become final and binding on the parties (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]; see 8 NYCRR 279.8[c][4] ["Any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]). With these exceptions, the issues in this matter are remanded to the IHO.

G. Remand

In summary, the IHO's decision rested on flawed legal analyses and a complete lack of a hearing record. On several other occasions during the impartial hearing date, the parent asserted that proof needed to be taken to refute the district's argument with respect to the parent's substantive claims, and/or asked for an opportunity to present evidence (see, e.g. Tr. pp. 7-9, 13, 32, 36-37, 41-42, 55-56, 63). As set forth above, State regulations ensure that each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). The parent was not provided with that opportunity. Accordingly, I remand this matter to the IHO to develop the hearing record and make determinations concerning the accrual of the parent's claims for statute of limitations purposes and the merits of the parent's claims to the extent they were timely. Although the parent requests that I adjudicate her claims in the August 2018 amended due process complaint notice, she also requests that the matter be remanded to the IHO to determine outstanding factual disputes relating to the statute of limitations and compensatory services. There being no hearing record upon which to make the determinations the parent seeks, remand is the better course so that both parties may receive the benefits of the impartial hearing process as envisioned by the IDEA and State law.

VI. Conclusion

This matter is remanded to the IHO to further develop the hearing record and, to the extent they are timely, make determinations upon the merits of the parent's claims as set forth in the

August 2018 amended due process complaint notice with the exceptions set forth above (see 8 NYCRR 279.10[c]). Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]). A prehearing conference to seek clarification, rather than an outright dismissal, is a far preferable mechanism for an IHO to address any concerns he might have about the specificity of a parent's claims.[13]

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, received by the parties on December 3, 2018, is modified by reversing so much thereof as dismissed the parent's due process complaint notices; and

IT IS ORDERED that the matter is remanded to the IHO who issued the December 3, 2018 decision for further development of the hearing record and a determination on the parent's claims, in accordance with this decision, and

IT IS FURTHER ORDERED that, in the event the IHO who issued the December 3, 2018 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
March 8, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER

[13] If the parent cannot or will not further clarify her claims, the IHO is not without recourse—he may issue a prehearing order listing the fact issues to be resolved as he reasonably interprets them from the August 2018 amended due process complaint notice and then allow the parties a limited period to file objections or clarifications (e.g., two or three days) (see Application of a Student with a Disability, Appeal No. 17-033 [using a similar method to clarify issues on appeal]). Such a prehearing order may also specify that the failure to file adequate objections/clarifications would constitute a waiver of any issue later raised and/or preclude a party from straying from the IHO's interpretation of the issues. Upon disposing of any objections and clarifications duly filed the IHO would finalize the list of issues to be addressed through the hearing process, and the parties and IHO would have the benefit of clear expectations regarding the specific fact issues for which evidence is required and determinations must be rendered (see Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086, 1090 [9th Cir. 2002] [holding that the parents' due process rights were not violated when the hearing officer, in her written decision, formulated the issues presented in words different from the words in the due process complaint]; J.W. v. Fresno Unified Sch. Dist., 611 F. Supp. 2d 1097, 1110-11 [E.D. Cal. 2009] [finding that the IHO's slight reorganization of the issues by consolidating the assessments claims into a single issue was inconsequential to the student], aff'd, 626 F.3d 431 [9th Cir. 2010]; Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 809 [5th Cir. 2003] [holding that the hearing officer's restatement and reorganization of the issues still addressed the merits of the parent's issues]).