The University of the State of New York

The State Education Department
State Review Officer
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No. 24-304

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Lauren A. Baum, P.C., attorneys for petitioners, by Lauren A. Baum, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jared Arader, Esq.

No. 24-310

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Jared Arader, Esq.

DECISION

I. Introduction

These proceedings arise under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Appeal No. 24-304 and Appeal No. 24-310 are decided together because, as described below, they involve the same student and the same school year. With respect to Appeal No. 24-304, petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed their due process complaint notice requesting tuition reimbursement from respondent (the district) for the student's attendance at Kulanu Academy (Kulanu) for the 10-month portion of the 2023-24 school year without prejudice. The appeal must be dismissed. In connection with Appeal No. 24-310, petitioner (the district) appeals from the decision of an IHO which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the

parents for their son's tuition costs at Big N Little: Stars of Israel (Stars of Israel) for the summer portion of the 2023-24 school year. The appeal must be sustained.

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

For purposes of clarity, Appeal No. 24-304 was identified as case number 269716 at the impartial hearing level and originated from a due process complaint notice dated January 18, 2024 and later amended on May 6, 2024, which was filed by the parent through her attorney Lauren A. Baum, Esq. (see 24-304 IHO Exs. I-II).[1] The IHO rendered a decision on June 6, 2024 (24-304 IHO Decision), and the request for review was served on July 16, 2024. This appeal shall be referred to herein as the "Baum proceeding." Appeal No. 24-310 was identified as case number 251636 at the impartial hearing level and originated from a due process complaint notice filed by an attorney, XXXXXXX XXXXXXXX XXXXX, Esq., on July 12, 2023 and amended on September 21, 2023 (see 24-310 Parent Exs. A-B). A different IHO rendered a decision on June 13, 2024 (24-310 IHO Decision), and the request for review was personally served upon the parent on July 19, 2024. This appeal shall be referred to herein as the "XXXXX proceeding."

The following underlying facts are relevant to both proceedings. For the 2022-23 school year, the student was attending an eighth grade special class at Stars of Israel (see 24-310 Parent Exs. C at p. 2; K).

A CSE convened on November 30, 2022, and formulated an IEP with a projected implementation date of December 7, 2022 and a projected annual review date of November 30, 2023 (see 24-310 Parent Ex. C at pp. 1, 17-18, 23). The November 2022 CSE found the student eligible for special education services as a student with an other health-impairment and recommended that the student receive integrated co-teaching (ICT) services in English language arts (ELA), math, social studies, and science together with one 30-minute session per week of individual counseling services, two-30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of group speech-language therapy (id. at pp. 1, 17-18, 23-24).

A. Subsequent Events and Due Process Complaint Notices

1. XXXXX Proceeding

In a letter dated June 19, 2023, bearing a typed name of the parent in place of a written signature and referencing the XXXXX Law Firm, PC (XXXXX Law Firm) as being authorized to proceed on the parents' behalf, the district was advised that the student had "not received a proper or adequate educational and school placement for the upcoming twelve-month 2023-2024 school

[1] The hearing record in Appeal No. 24-304 includes a transcript of the impartial hearing and documents marked and entered as parent exhibits A through D, district exhibits 1 through 3, and IHO exhibits I through II. The hearing record in Appeal No. 24-310 includes a transcript of the impartial hearing and documents marked and entered as parent exhibits A through M, and district exhibits 2 through 6. All citations to transcripts, parent exhibits, district exhibits, pleadings, and IHO decisions will be preceded by the associated appeal number, i.e., 24-304 or 24-310.

year" and of the parents' intent to unilaterally place the student at Stars of Israel for the extended 2023-24 school year (24-310 Parent Ex. I at p. 2).[2, 3]

On June 23, 2023, the parent entered into a contract with Stars of Israel for the student's attendance for July and August 2023 (24-310 Parent Ex. D).

In a due process complaint notice, dated July 12, 2023, filed by XXXXXXX XXXXXXXX XXXXX, Esq. of the XXXXX Law Firm and identifying herself as "Attorney for [the student], it was alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 12-month 2023-24 school year (see 24-310 Parent Ex. A).[4] The July 2023 due process complaint notice recounted prior due process proceedings for the 2019-20, 2020-21, 2021-22, and 2022-23 school years in which tuition reimbursement was sought for the student's placement at Stars of Israel for each of the referenced school years (id. at pp. 3-4; see 24-310 Parent Exs. I; K). It was alleged that the November 2022 IEP was "inadequate and insufficient to assist [the student] to meet all of his academic, social, and behavioral needs for the 2023-2024 school year" (24-310 Parent Ex. A at p. 4). Further, it was alleged that the student required placement at Stars of Israel "in the full time special education classroom to meet all of his academic, social, and behavioral needs" (id.). As relief, the due process complaint notice sought pendency and direct funding/tuition reimbursement for the "full-time extended twelve-month 2023-2024 school year" (id. at p. 5).

In an amended due process complaint notice dated September 21, 2023, one again signed and filed by XXXXXXX XXXXXXXX XXXXX, Esq. as "Attorney for [the student]", it was clarified that the parent was seeking relief for the summer of the 2023-24 school year (see generally 24-310 Parent Ex. B).

2. Baum Proceeding

In a letter dated September 5, 2023, the parents, through attorney Lauren A. Baum who identified herself as attorney for the student's parents, notified the district of their disagreement with the November 2022 IEP and of their intent to unilaterally place the student at Kulanu for the 2023-24 school year (24-304 Parent Ex. A).[5] In response, the district sent a letter to the parents seeking to work and resolve the matter and requesting that the parents provide certain information (see 24-304 Parent Ex. B).

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[2] The letter was accompanied by a fax cover sheet but not with a fax confirmation sheet (see 24-310 Parent Ex. I).

[3] Stars of Israel has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

[4] The July 2023 due process complaint notice was signed and submitted to the district by XXXXXXX XXXXXXXX XXXXX, Esq. (24-310 Parent Ex. A at pp. 5-6, 8).

[5] Kulanu has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

In a due process complaint notice, dated January 18, 2024, and filed February 18, 2024, by the Law Offices of Lauren A. Baum, P.C. (Baum Law Firm), the parents alleged that the district failed to offer the student a FAPE for the 2023-24 school year (see 24-304 IHO Ex. I). In particular, the parents alleged that the November 2022 IEP recommendation for ICT services and related services was inappropriate because the CSE failed to consider "necessary and appropriate evaluations and documentation to support their recommendations" for example, the CSE failed to consider a psychoeducational evaluation, neuropsychological evaluation, OT evaluation, or speech-language therapy evaluation (24-304 IHO Ex. I at pp. 1-2). In addition, the parents argued that the ICT services did not offer the student individualized attention and support (id. at p. 2). The parents claimed that no IEP was developed after the November 2022 IEP, and they did not receive notice of the student's public-school placement for the 2023-24 school year (id.). As a result, the parents unilaterally placed the student at Kulanu, which they claimed was appropriate to meet the student's needs, and asserted that equitable considerations weighed in their favor (id.). As relief, the parents requested direct funding/reimbursement of the Kulanu tuition for the 2023-24 school year (id. at p. 3).

An amended due process complaint notice dated May 6, 2024 was filed by the parents to address new developments since the filing of the January 18, 2024 due process complaint notice (see generally 24-304 IHO Ex. II).[6] In addition, the amended due process complaint notice clarified that the allegations pertaining to the November 2022 IEP pertained to the 10-month portion of the 2023-24 school year only (id. at pp. 1-3). The parents continued to seek direct funding/reimbursement of the Kulanu tuition (id. at p. 4).

B. Impartial Hearing Officer Decisions

1. XXXXX Proceeding

After the appointment of a per diem IHO to the case, a prehearing conference was held on September 26, 2023, followed by two status conferences on November 16, 2023 and December 21, 2023, and an impartial hearing date devoted to the merits on February 6, 2024 (24-310 Tr. pp. 1-50).[7]

In a final decision dated June 13, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that Stars of Israel was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement for the summer of the 2023-24 school year (Appeal No. 24-310 IHO Decision at pp. 8-13). The IHO stated that, although the district offered documentary evidence, the district nevertheless was in "default" because it did not present any testimonial evidence and

[6] The IHO granted the parents' request to amend their due process complaint notice.

[7] On July 14, 2023, the IHO denied consolidation of this case with a previously filed case which alleged a denial of FAPE for the 2022-23 school year through a December 23, 2022 due process complaint notice (24-310 Interim IHO Decision; see 24-310 Parent Ex. K at p. 5). On August 4, 2023, a pendency implementation form was electronically signed by the district indicating that the student's pendency placement was at Stars of Israel as found in a September 10, 2021 unappealed IHO decision (see generally 24-310 Parent Ex. J).

that this style of case presentation amounted to a "concession" that the district failed to meet its burden and denied the student a FAPE for the 2023-24 school year (id. at pp. 8-10, 12).

Next, the IHO addressed whether Stars of Israel was an appropriate unilateral placement (24-310 IHO Decision at pp. 11-13). In a one-sentence analysis, the IHO stated that the hearing record, "as summarized by the parties above… support[ed] a finding that the decision to place the student at the private school was 'reasonable' as an appropriate placement for the student's 2023-2024 school year" (id. at p. 13). As relief, the IHO ordered the district to directly fund/reimburse the parents for the cost of the student's tuition at Stars of Israel for the summer of the 2023-24 school year (id.).

2. Baum Proceeding

While the XXXXX proceeding was still pending and before the issuance of a final decision in that matter, an IHO from the Office of Administrative Trials and Hearings (OATH) was assigned to hearing the Baum proceeding and a prehearing conference was held on March 25, 2024, followed by three status conferences on April 15, 2024, May 3, 2024, and May 9, 2024 (24-304 Tr. pp. 1-86).

On May 17, 2024, the district made an application to the IHO seeking dismissal of the due process complaint notice or in the alternative, a stay of the proceedings until resolution of the XXXXX proceeding (see 24-304 Dist. Mot. to Dismiss). More specifically, the district asserted that "multiple complaints" had been filed "for the same school year based on the same FAPE issues" and that a dismissal based on res judicata may be appropriate but, because there was no final decision in the XXXXX proceeding, such motion was not yet ripe and the matter could be dismissed under the claim splitting doctrine (id. at ¶ 14). In reply to the district's motion, the parents argued that the motion should be denied because the district failed to consolidate the two matters and failed to assign both matters to an IHO from OATH (24-304 Parent Response to Mot. to Dismiss at ¶¶ 13-17). The parents also asserted that the doctrine of claim splitting did not apply in this matter (id. at ¶ 18).

In an interim decision dated June 6, 2024, the IHO provided a detailed summary of both the XXXXX proceeding and the Baum proceeding (24-304 IHO Decision at p. 5). First, the IHO found that the matter was not barred by the doctrine of res judicata (id. at pp. 6-9). After restating the arguments made by the district in support of its motion to dismiss and by the parents in their opposition thereto, the IHO found that the elements required under res judicata were not met under the circumstances of this case (id. at pp. 6-8). The IHO stated that, although the XXXXX proceeding had been adjudicated, there was no decision (id. at pp. 8-9).

However, the IHO found that the Baum proceeding was barred, in part, by the doctrine of claim splitting (24-304 IHO Decision at pp. 9-15). After stating the positions of each of the parties and discussing the legal standards for claim splitting, the IHO found that both cases involved the same parties, were both filed in the same administrative venue, both alleged that the November 2022 IEP denied the student a FAPE, and both requested tuition funding and/or reimbursement, albeit for different nonpublic schools (id. at pp. 9-12). The IHO further found that, since the XXXXX proceeding was still pending, "both claims [were] duplicative" and, therefore, the parents' claims pending before her—namely, that the November 2022 IEP denied the student a FAPE, that

the CSE failed to consider evaluative information in recommending a program, and that the district failed to recommend a school placement—were barred by the doctrine of claim splitting (id. at p. 13). In addition, the IHO found that the amended due process complaint notice did allege a denial of FAPE for the district's failure to develop a new IEP after November 30, 2022 and such claim was not barred by claim splitting (id.).[8] The IHO found that this claim was based on later conduct of the district not known at the time of filing either the due process complaint notice or amended due process complaint notice in the XXXXX proceeding (id. at p. 14). Accordingly, the IHO granted, in part, the district's motion to dismiss without prejudice with respect to the parents' claims regarding the alleged denial of FAPE for the 2023-24 school year because of an inappropriate IEP, failure to conduct evaluations, and failure to recommend a school placement (id. at. 15).

IV. Appeal for State-Level Review

A. XXXXX Proceeding

The district appeals from the per diem IHO's June 13, 2024 decision. At the outset, the district requests that the additional documents submitted with the request for review be considered on appeal. The district asserts that the additional evidence could not have been offered at the time of the impartial hearing and are "germane" to the issues on appeal.[9] As part of the additional evidence, the district offers documentation of email exchanges between the parties and the IHO and a motion filed by the district (see 24-310 SRO Exs. 4-7). In its motion to dismiss, the district asserted that the XXXXX Law Firm did not have standing or authority to file a due process complaint notice on the parents' behalf (see 24-310 SRO Ex. 7). The district argues that the IHO erred in not allowing further proceedings or ruling on the district's motion to dismiss. Next, the district claims that the IHO denied it due process by failing to allow the district to present evidence as to whether the parents authorized the XXXXX Law Firm to proceed on their behalf.

Additionally, the district argues that the IHO erred in finding that the district conceded and/or defaulted on its burden because it did not present testimonial evidence. Furthermore, the

[8] Although the IHO referred to the CSE's failure to develop a "new IESP after November 30, 2024," it is presumed that the reference to an individualized education services program (IESP) was a typographical error (24-310 IHO Decision at p. 13).

[9] The proposed additional evidence is marked by the district and described as follows: SRO Exhibit 1 – due process complaint notice dated January 18, 2024 in the Baum proceeding; SRO Exhibit 2 – amended due process complaint notice dated May 6, 2024 in the Baum proceeding; SRO Exhibit 3 – hearing transcript from May 9, 2024 in the Baum proceeding; SRO Exhibit 4 - Email dated May 10, 2024 to the IHO regarding a conflict of interest in the XXXXX proceeding; SRO Exhibit 5 - Email dated May 15, 2024 from the IHO regarding further proceedings in the XXXXX proceeding; SRO Exhibit 6 - Email dated May 16, 2024 from the XXXXX Law Firm in the XXXXX proceeding; and SRO Exhibit 7 – district's motion to dismiss in the XXXXX proceeding. As noted above, since both matters (Baum proceeding and XXXXX proceeding) are being decided in this decision, consideration of the hearing records in both proceedings is necessary (cf. Anderson, 337 F.3d at 205 n.4). As for proposed SRO Exhibits 4-7, State regulation provides that the hearing record includes copies of "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer," as well as "all written orders, rulings, or decisions issued in the case" (8 NYCRR 200.5[j][5][vi]; 279.9[a]). Here, the email exchanges pertaining the parents' legal representation (24-310 SRO Exhibits 4-6) and the district's motion to dismiss (24-310 SRO Exhibit 7) should have been included as a part of the hearing record and will be considered as part of the hearing record on appeal.

district argues that the IHO failed to conduct a thorough analysis of whether the unilateral placement was appropriate or whether equitable considerations weighed in favor of the parents. As relief, the district requests that its motion to dismiss be granted or in the alternative the case be remanded for further proceedings. The parents, who were personally served twice with respect to the notice of intention to seek review and the request for review via the student's mother, did not submit an answer to the district's request for review.

B. Baum Proceeding

The parents appeal seeking to overturn the IHO's June 6, 2024 dismissal without prejudice in the Baum proceeding. First, the parents assert that the IHO incorrectly found that claim splitting applied to the facts of this case rather than the doctrine of collateral estoppel. Second, the parents argue that, in finding that claim splitting was applicable, the IHO permitted the district to "benefit from its failure to follow the New York State regulations regarding the assignment of hearing officers." The parents further assert that the district failed to assign and consolidate this case with the XXXXX proceeding. Third, the parents argue that, even if claim splitting was appliable to the facts of this case, it should not have been applied rigidly and equities mitigated against dismissal of the parents' claims. The parents attached several documents to their request for review for consideration as additional evidence.[10]

In an answer and cross-appeal, the district generally denies the material allegations contained in the request for review.[11] The district asserts that the appeal should be dismissed as

[10] The parents submit the following proposed additional documentary evidence, marked by the parent as follows: Parent Exhibit E - June 13, 2024 Findings of Fact & Decision from the XXXXX proceeding; Parent Exhibit F – Email between the parties and IHO with respect to the parents' reply to the district's motion to dismiss in the Baum proceeding; Parent Exhibit G – District's due process response in Baum proceeding; Parent Exhibit H – Emails between the parties and IHO regarding scheduling and a subpoena in Baum proceeding; and Parent Exhibit I – Notice of intention to seek review in the XXXXX proceeding. Generally, documentary evidence not presented at an impartial hearing is 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; Application of a Student with a Disability, Appeal No. 08-003; 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]). As to the documents that are included in the hearing record on appeal in the XXXXX proceeding (i.e., proposed Parent Exhibits E and I), to the extent necessary for a thorough review of the issues relevant to this proceeding, relevant evidence in the hearing record underlying the Baum proceeding and XXXXX proceeding may be considered (cf. Anderson v. Rochester-Genesee Reg'l Transp. Auth., 337 F.3d 201, 205 n.4 [2d Cir. 2003] [taking judicial notice of record in prior litigation between same parties]). Therefore, those documents are already before me. Although the emails in the proposed Parent Exhibits F and H were not available at the time of the impartial hearing, the documents are unnecessary to render a decision in this matter and will not be considered. Lastly, the district's due process response is already a part of the hearing record (see 8 NYCRR 200.5[j][5][vi]; 279.9[a]).

[11] State regulations also provide that a "respondent who wishes to seek review of an [IHO]'s decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within the time permitted by section 279.5 of this Part" (8 NYCRR 279.4[f]). Under section 279.5, a "respondent may, within 5 business days after the date of service of the request for review, answer the same either by concurring in a statement of facts with the petitioner or by service of an answer" (8 NYCRR 279.5[a]). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR

the IHO's decision was an "interim" decision and this appeal was premature. In addition, the district asserts that the appeal should be dismissed as the IHO's dismissal was without prejudice, therefore, allowing the parents to refile their claims. The district also argues that the IHO did not err in applying the claim splitting doctrine and that the doctrine of collateral estoppel was not applicable under the circumstances. Next, the district claims that the appeal should be denied or held in abeyance while the XXXXX proceeding is being decided. The district then asserts that the IHO properly retained jurisdiction of this matter. In its cross-appeal, the district argues that the IHO erred in failing to dismiss the entire due process complaint notice.

In an answer to the district's cross-appeal, the parents respond to the district's allegations and argue that the district's cross-appeal is premature as the parents' claims for the period of December 2023 through June 2024 have not come to a final determination by the IHO. As for the remaining claims, however, the parent asserts that the IHO's interim decision may be reviewed by an SRO as the decision was final as to the parents' claims for the period of September through November 2023.

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. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures

279.11[b]). An SRO may, in the SRO's sole discretion, reject an answer that does not comply with the form requirement set forth in State regulation, or with the requirements for service and filing of an answer (8 NYCRR 279.5, 279.8[a]). Upon request, the district sought an extension of time to answer and cross-appeal until August 6, 2024. However, the district's affidavit of service indicates that the district served the parents on August 7, 2024, which renders the answer and cross-appeal untimely. However, due to the procedural nature of my findings below, I will exercise my discretion and not dismiss the answer and cross-appeal.

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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[12]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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. XXXXX Proceeding

As discussed further below, I find that the XXXXX Law Firm was not authorized to file a due process complaint notice on behalf of the parents or the student in the XXXXX proceeding.

Under the IDEA and State law, a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 531 [2007]). The IDEA defines parent to include a "natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent)," a guardian, a person acting in place of a parent with whom the child lives or an individual legally responsible for the child's welfare, or 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 regulation, where more than one individual is qualified to act as the parent, 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]; 8 NYCRR 200.1[ii][3]).

[12] 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., 580 U.S. at 402).

In contrast, a private entity lacks standing under the IDEA to maintain a claim against a school district in its own right, as the statute was intended to provide a private right of action only to disabled children and their parents (see Lawrence Twp. Bd. of Educ. v. New Jersey, 417 F.3d 368, 371-72 [3d Cir. 2005]; Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006]; see also Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007]).

Here, there is no dispute that the parents have legal authority to make educational decisions on behalf of the student. In addition, there is no signed document authorizing the XXXXX Law Firm to commence an impartial hearing on behalf of the parents and student. Moreover, the XXXXX Law Firm has not interposed an answer in the XXXXX proceeding although the XXXXX Law Firm appeared for the student during the prehearing conference, status conferences, and impartial hearing (24-310 Tr. pp. 1, 5, 9, 13). Most importantly, as discussed below, the student's mother has provided sworn testimony in the Baum proceeding that she did not hire the XXXXX Law Firm in the XXXXX proceeding and believes that the XXXXX Law Firm represents the nonpublic school, Stars of Israel.

Specially, during the impartial hearing in the Baum proceeding, pursuant to a subpoena, the mother of the student testified (24-304 Tr. pp. 66-85).[13] Initially, the IHO questioned the mother, about the amended due process complaint notice in the XXXXX proceeding which sought tuition for the summer of the 2023-24 school year (24-304 Tr. pp. 66-67; see 24-310 Parent Ex. B). The mother testified that the only lawyers that they hired were from the Baum Law Firm who represented the parents in the Baum proceeding (24-304 Tr. pp. 67, 69). Then, the IHO asked whether the parents were represented by any other law firm and the mother testified that they never signed anything nor paid for any other attorney to represent them for any claims regarding the Stars of Israel tuition (XXXXX proceeding) (24-304 Tr. pp. 67-68). The IHO showed the student's mother the amended due process complaint notice in the XXXXX proceeding but the mother testified that she did not recall seeing that complaint prior to that day (24-304 Tr. pp. 84-85; 24-310 see Parent Ex. B).

Upon further questioning of the mother by the district's attorney, she stated that she testified in another proceeding several months prior to this hearing (the Baum hearing), and possibly in February 2024 (24-304 Tr. p. 72). Counsel for the district further asked the student's mother if she was familiar with the XXXXX Law Firm and its attorneys and she testified that she heard one of the attorney's name, but she never hired the XXXXX Law Firm because they represented Stars of Israel (24-304 Tr. pp. 72, 78-80). The mother also testified that in connection with this other prior proceeding in which she testified she did not remember who was involved or if a decision was rendered in that matter (24-304 Tr. p. 73). The mother further testified that she had also appeared in other hearings involving her son but did not hire any attorney to represent her during those other proceedings (24-304 Tr. p. 79).

Given the parent's sworn testimony in the Baum proceeding, on May 10, 2024, the district requested a hearing in the XXXXX proceeding to determine whether the XXXXX Firm had a

[13] On May 9, 2024, the IHO in the Baum proceeding permitted testimony of the mother of the student to determine whether the parents were represented by an attorney for their claims pertaining to the summer of the 2023-24 school year (24-304 Tr. p. 65).

conflict of interest and whether an attorney-client relationship existed between the parents and the XXXXX Law Firm (24-310 SRO Ex. 4).[14] The per diem IHO refused the district's request for a hearing (24-310 SRO Ex. 5 at p. 1). In another email, the district requested that the IHO reconsider her position and hold a "hearing to determine the authority of [parents'] counsel to proceed on [the parents] behalf" in the XXXXX proceeding (24-310 SRO Ex. 6 at p. 2). Then, the XXXXX Law Firm submitted an email explaining the nature of the two cases and stated that the issue raised by the district was:

> created by the Order of the Commissioner of Education, Betty Rosa, apparently issued December 28, 2023, which ordered the [district] to stop assigning cases to impartial hearing officers who were not employees of OATH. Apparently, this Order has been accepted by the [district] as superseding the Regulations of the Commissioner of Education, 8 NYCRR 200.5(j)(3)(ii)(1) requiring that any newly filed case be assigned to the impartial hearing officer appointed to the prior open case involving the same parties, unless that impartial hearing officer is unavailable. Thus, when the second case was filed, it was not assigned to you, and consolidation was not considered. Had the regulations been followed, Parents' new counsel would have been on notice of the earlier filing, and could have sought consolidation of the two cases. The regulation was issued to prevent occurrences such as the one now present - two hearing officers assigned to hear claims regarding the same school year on the same set of facts, but seeking different remedies for different parts of the school year. The December 2023 Order thus created this circumstance of two hearing officers assigned to hear cases involving the same school year.
>
> The Parent would like to request that you recuse yourself from this case, to allow the matter to be reassigned to OATH, so that the two matters concerning this school year can be consolidated, as anticipated by 8 NYCRR 200.5(j)(3)(ii)(1), as the [district] impartial hearing office[] has advised that firm that they cannot assign any case filed after January 1 to a hearing officer who is not employed by OATH.

[14] The parent's attorney stated on the record in the Baum proceeding that she attempted to communicate with Ms. XXXXX and that she was unresponsive (Tr. p. 80).

(24-310 SRO Ex. 6 at p. 1).[15] Noticeably absent from the email was any acknowledgment that the XXXXX Law Firm represented the parents on behalf of their son (id.).[16]

On June 7, 2024, the district made a motion to dismiss the parents' claims without prejudice in the XXXXX proceeding on the basis that the XXXXX Law Firm lacked standing to file a due process complaint notice on the parents' behalf and, in the alternative, that the parents should be required to testify about whether the XXXXX Law Firm represented them (24-310 SRO Ex. 7 at pp. 2, 4-5). The hearing record did not include a response from the XXXXX Law Firm with respect to the district's motion. Furthermore, it does not appear that the IHO considered the district's motion to dismiss (see generally 24-310 IHO Decision).

Based upon the foregoing evidence, especially upon the unequivocal sworn testimony of the parent that she did not hire the XXXXX Firm and did not authorize the due process complaint notices in that proceeding, it is clear that the XXXXX Law Firm did not represent the parents in the XXXXX proceeding. To the extent the XXXXX Law Firm is actually representing Stars of Israel as the parent believes, it is undisputed that Stars of Israel did not have standing to pursue a due process complaint under the IDEA. Accordingly, since the XXXXX Law Firm had no right or authority to bring due process complaint notice, the per diem IHO's decision is vacated in its entirety and the due process complaint notice is dismissed.

B. Baum Proceeding

Regarding the district's argument that the decision the parents appeal is not a final decision and only an interim order, the district is correct that State regulation provides that "[a]ppeals from an impartial hearing officer's ruling, decision, or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to . . . Education Law [§ 4404]" (8 NYCRR 279.10[d]). Instead, "in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision, or refusal to decide an issue" (id.).

Therefore, since the IHO has not issued an interim decision regarding pendency or a final determination that may be appealed, the parent's appeal must be dismissed as premature (see 8 NYCRR 279.10[d]; Application of a Student with a Disability; Appeal No. 10-030; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 99-52]).

While State regulation does not permit the undersigned to review or modify the IHO's interim decision at this juncture, given disposition of the XXXXX proceeding, I will ensure the IHO in the Baum proceeding receives a copy of this decision, and I leave it to the IHO's discretion

[15] The December 2023 Order was obtained by the parents through a Freedom of Information Law (FOIL) request because it was not generally available to the public (24-304 Req. for Rev. at p. 2; see 24-304 Parent Ex. C). The December 2023 order is now available at: https://www.nyc.gov/assets/oath/downloads/pdf/2023-12-28-order.pdf.

[16] The child has not reached the age of majority and it would be impermissible for an attorney to enter into a retainer agreement with a child without the authority of the parent or another entity with the authority to act in loco parentis. Stars of Israel would not have such authority.

as to whether she should revisit her interim decision given that, at this point, the parents have not been provided an opportunity to be heard with respect to their allegations that the November 2022 IEP was inappropriate. The IHO would have the authority to do so in light of subsequent events provided a final decision in the Baum proceeding has not been issued. Alternatively, the IHO's dismissal of the claims without prejudice in the interim decision could be appealed after the IHO issues a final decision in the matter, or the parents have the option to refile a due process complaint notice and initiate a new impartial hearing pertaining to the FAPE claims with respect to the November 2022 IEP.

VII. Conclusion

Lastly, I note that yesterday afternoon, on the eve of issuance of this decision, Ms. XXXXX filed a letter dated August 21, 2024 with the Office of State Review under the XXXXX appeal number, stating that she represents the parent, asserting that the parent has informed her that she did not receive the district's appeal, requesting copies of the district's appeal papers in this matter, and arguing that the district's appeal should be dismissed. I do not accept Ms. XXXXX's unsworn representations to this tribunal which, at the very least, are woefully noncompliant with the pleading requirements of Part 279 with respect to both form and timeliness. All requests in the August 21, 2024 are denied, and a copy of this decision will be mailed directly to the parents as well as the attorney she stated under oath that the parents retained, the Baum Firm. The district's compliance with the procedures in Part 279 for initiating the proceeding in Appeal No. 24-310 is not in doubt in any way and, based upon the parent's sworn testimony that Ms. XXXXX did not represent her or have authorization to commence a due process hearing on her behalf, the district was wise to personally serve the parents in this matter in compliance with 8 NYCRR 279.4(c).

Regarding Appeal No. 24-304, as the IHO in the Baum proceeding has not issued a final decision, the parents' appeal therefrom must be dismissed as premature.

As to Appeal No. 24-310, as I find that the parent did not authorize the XXXXX Firm to bring that matter to a due process hearing, the per diem IHO decision in the XXXXX proceeding is vacated, and the due process complaint notice is dismissed in its entirety.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IN 24-304 IS DISMISSED.

THE APPEAL IN 24-310 IS SUSTAINED.

IT IS ORDERED that the IHO decision dated June 13, 2024 in Appeal No. 24-310 (XXXXX proceeding) is vacated in its entirety.

Dated: **Albany, New York**
August 22, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER