The University of the State of New York

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

No. 24-413

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 Brian Gauthier, Esq.

The Law Office of Elisa Hyman, PC, attorneys for respondent, by Elisa Hyman, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined it failed to provide respondent's (the parent's) son an appropriate educational program and services for the 2019-20, 2020-21, and 2021-22 school years and awarded compensatory education services. The appeal must be dismissed.

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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see

20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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

On February 6, 2019, a CPSE convened, found the student eligible for special education services as a preschool student with a disability, and recommended that the student receive ten hours per week of individual special education itinerant teacher (SEIT) services and five 30-minute

sessions per week of individual speech-language therapy for the 12-month 2019-20 school year, in addition to five 30-minute sessions per week for both individual occupational therapy (OT) and individual physical therapy (PT) for the 10-month portion of the 2019-20 school year (see generally Parent Ex. K).[1]

On May 23, 2019, the CPSE reconvened and recommended the same programming as the February 2019 CPSE except that the May 2019 CPSE increased individual PT to five 45-minute sessions per week (compare Parent Ex. L at p. 1, with Parent Ex. K at p. 1).

On July 7, 2020, a CPSE convened, continued to find the student eligible as a preschool student with a disability, and recommended for the 2020-21 school year that the student receive fifteen hours per week of individual SEIT services, five 45-minute sessions per week of individual speech-language therapy, five 30-minute session per week of individual OT, and five 45-minute sessions per week of individual PT for the 12-month period (see Parent Ex. M).

On or about April 28, 2021, an initial CSE convened and determined that the student was eligible for school-aged special education services and recommended he attend a 12:1+(3:1) special class and receive related services of six 30-minute sessions per week of individual speech-language therapy, six 30-minute session per week of individual OT, and six 30-minute sessions per week of individual PT for the 2021-22 school year (see Oct. 2021 Interim IHO Decision at p. 3; Parent Ex. A ¶¶ 43, 46; JJ at ¶¶ 51-57; Z at pp. 15-17).[2]

A. Due Process Complaint Notice

In a due process complaint notice, dated July 1, 2021 the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years (see Parent Ex. A). For the 2019-20 and 2020-21 school years, the parent alleged the district failed to recommend a full-day, 1:1 program, feeding therapy, or nursing services (Parent Ex. ¶¶ 25-27). Additionally, the parent alleged the district failed to implement the student's IEP during portions of the 2019-20 school year (id. ¶¶ 29-30, 33-37). For the 2020-21 school year, the parent alleged the district failed to provide the student a FAPE because the remote related services were not comparable to in-person therapy and the student did not engage in the remote instruction (id. ¶ 41). For the 2021-22 school year, the parent alleged the district failed to appropriately evaluate the student and that the student required a program consisting of 1:1 at-home instruction due to his chronic illnesses (id. ¶¶ 44-45, 48-49). Additionally, the parent raised claims that, based on policies and procedures, the district systemically denied students with chronic health conditions appropriate special education programs and services by "illegally operat[ing] and

[1] During the impartial hearing, the parent entered certain exhibits into evidence to support her pendency position, but marked such pendency exhibits with the same letter and number designations that were used to identify the exhibits entered into evidence in support of the parent's position on the merits (see Tr. pp. 1-7, 225-71, 311-23, 342-46, 392-95). In addition, in hearing record includes duplicative exhibits in that both Pendency Parent Exhibit A and Pendency Parent Exhibit B were again entered into evidence during the merits portion of the hearing (compare Pendency Parent Ex. A, and Pendency Parent Ex. B, with Parent Ex. A, and Parent Ex. M). For purposes of this decision, only the parent exhibits entered during the merits portion of the impartial hearing are cited.

[2] A copy of the April 2021 IEP was not entered into evidence during the impartial hearing and the district's records related to the date of the CSE meeting were slightly unclear due to rescheduling.

administer[ing] home-based instruction through a separate program which [wa]s divorced from the IEP process" (id. ¶¶ 55-57). The parent requested a pendency order based on the student's last agreed-upon placement (id. ¶¶ 137-38).

As relief, the parent requested an order finding the district denied the student a FAPE for all three school years; directing the district to fund various independent educational evaluations; directing the district to provide compensatory education to address the student's loss of skill during the period of time when school buildings were closed due to the COVID-19 pandemic; directing the CSE to develop an IEP with appropriate goals for a 12-month school year consisting of 1:1 full-time home-based instruction, related services of OT, PT, speech-language therapy and feeding therapy (if warranted) for five 45-minute sessions per week each, assistive technology and assistive technology training, and nursing services if insurance stopped providing funding; directing the district to fund compensatory education to be delivered by providers of the parent's choosing; and, if deemed that the student should attend school in-person, directing the district to provide full-day nursing services and special travel accommodations consisting of at least a bus ride of less than 15 minutes and air conditioning (Parent Ex. A ¶ 139).

B. Impartial Hearing and Intervening Events

On October 12, 2021, the parties proceed to a pendency hearing before the IHO who had originally been assigned to the matter (IHO I) (Tr. pp. 1-17). The parties agreed that the student's pendency was based on the July 2020 IEP; however, the parent, through her attorney, argued that nursing services should also be included as part of the student's pendency program (Tr. pp. 10-12). The district argued it had never provided nursing services in the past to the student and that nursing services the student received were provided through the student's insurance (Tr. pp. 12-15). On October 27, 2021, IHO I issued an interim order on pendency ordering the district to provide pendency services based on the July 2020 IEP consisting of SEIT services, speech-language therapy, OT, and PT (Oct. 2021 Interim IHO Decision at p. 6).

The parties then proceeded to six status conferences before a different IHO (the IHO) held between December 27, 2021 and June 29, 2022 and who presided over the remainder of the proceedings (see Tr. pp. 18-147).[3] During the June 29, 2022 status conference, the district's attorney confirmed that the district conceded it denied the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years but would be putting on "an equities case" (Tr. pp. 117-18). The rest of the June 19, 2022 status conference was dedicated to a discussion regarding the parent's attorney's subpoena for documents and calling certain district employees as witnesses (Tr. pp. 119-46).[4] The parent's attorney represented that some of the documents and witnesses requested related to her claims under section 504 of the Rehabilitation Act of 1973 ("section 504") (29 U.S.C.

[3] The second IHO was appointed on December 17, 2021 and remained the IHO for the rest of the matter (see IHO Decision).

[4] On or around October 4, 2021, the parent requested educational records (see Parent Ex. B); however, the actual subpoena discussed at the June 19, 2022 status conference was not included with the hearing record on appeal filed by the district. The district and the IHO are reminded that, among other things, State regulation provides that the hearing record shall include copies of "any subpoenas issued by the impartial hearing officer in the case" (see 8 NYCRR 200.5[j][5][vi][d]; 279.9[a]).

§ 794[a]), whereas the district's attorney argued that section 504 claims were outside the scope of the IHO's jurisdiction (Tr. pp. 137-46). The IHO requested for the parties to submit written briefs on their arguments regarding whether the IHO could issue a decision regarding the district's policies and procedures under section 504 (Tr. pp. 142-44). The IHO gave the district until July 6, 2022 to submit its brief and the parent until one week following July 6, 2022 to file her brief in response (Tr. pp. 143-44). The parties also agreed to extend the hearing timeline date by 60-days (Tr. pp. 145-46).

On September 25, 2023, after almost 15 months of no correspondence between the parties and the IHO, a new attorney for the district sent an email to the parent's attorney and the IHO with a notice of appearance attached (SRO Ex. I at p. 30).[5] According to the email, the matter had been "out of compliance" for 441 days, since July 11, 2022 and there was no prior ruling on the motion submitted by the prior attorney for the district on July 6, 2022 (id.). The new attorney for the district requested that any communication between the IHO and the parent since July 6, 2022 be forwarded to him and for a status conference to be scheduled (id.).

A status conference was held on December 8, 2023; however, the attorney for the district did not appear (Tr. pp. 148-51). In a December 13, 2023 email, the district's attorney reported he did not receive notice of the December 8, 2023 status conference until "barely a day before it was scheduled" (SRO Ex. I at p. 47). The district's attorney reiterated his request for the IHO to rule on the brief submitted on July 6, 2022 and for any correspondence between the parent and the IHO (id. at pp. 47-48). The IHO responded the same day indicating he was allowing the parent time to file an opposition brief to the district's motion filed July 6, 2022 (id. at p. 44). The district's attorney objected to the parent being allowed additional time to respond to the motion (id. at p. 43). The IHO noted the district's objection but allowed the parent's attorney until December 29, 2023 to submit her opposition brief (id.).

On December 14, 2023, the district's attorney emailed the parent's attorney and the IHO alerting them that 18 extension requests had been entered into the impartial hearing system which indicated both parties had consented to the extension of the compliance data for availability of witnesses (SRO Ex. I at p. 42). The district's attorney indicated that at no time did either he or the

[5] The district submits with its request for review a proposed exhibit and requests that it be considered. The proposed exhibit consists of emails between the parties and the IHO relating to the extensions of the compliance date, the district's two motions, and the parent's response to such motions. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; 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 the proposed exhibit includes some communications that should have been included in the hearing record according to State regulation (see 8 NYCRR 200.5[j][5][vi] [requiring, among other things, that the hearing record include "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer"]), and as the exhibit is necessary to render a decision in this matter, the district's proposed exhibit has been considered. As such, the emails will be referred to as SRO Exhibit I and will be cited as "SRO Ex. I."

previous attorney representing the district agree to extensions between June 29, 2022 and December 8, 2023, and accordingly, he was objecting to the extensions (id.).

On December 20, 2023, the district filed a motion to dismiss for failure to prosecute and, in the alternative, for the IHO to recuse himself (Dec. 20, 2023 Mot. to Dismiss; see SRO Ex. I at p. 41). The same day, the parent's attorney requested until January 3, 2024 to be able to respond to the district's motion (SRO Ex. I at p. 41). The parent's attorney also indicated that she would be in contact with the district's corporation counsel in a pending federal case involving the same student and that she planned to file for emergency relief since the motion was in direct contravention to the district's representation in the federal case (id. at p. 1).

On February 5, 2024, the district emailed the parent's attorney and IHO indicating the IHO had not responded to the district's motion to dismiss or its motion filed July 6, 2022 and noted the parent's attorney had not filed briefs in response to either motion (SRO Ex I at pp. 38-39). The district's attorney also requested notice of when the next status conferences would be held (id. at p. 38). On the same day, the parent's attorney emailed her motion for nunc pro tunc extensions and her opposition to the district's motion to dismiss (id. at p. 20). On February 15, 2024, the district again emailed the parent's attorney and IHO asking when the IHO would issue a decision on the district's motions (id. at p. 37). The parent's attorney responded the same day arguing it would be inappropriate for the IHO to consider the district's motion to dismiss because aspects of the matter were currently pending in federal court regarding the student's pendency (id.).

The parties proceeded to a status conference on March 6, 2024 (Tr. pp. 152-83).[6] The IHO determined on the record that, after consideration of the parties' positions, he was "siding with the district" and dismissing the matter without prejudice (Tr. p. 171). The parties had a discussion regarding whether the dismissal would prevent the student from receiving services under pendency (Tr. pp. 171-76). In addition, the parent's attorney argued that, if there was a statute of limitations issue, the dismissal would foreclose the parent from being able to obtain relief for school years outside the statutory timeframe (Tr. p. 178). The IHO disagreed with the parent and further confirmed his decision to dismiss with parent's due process complaint notice without prejudice (Tr. p. 180).

On the same day, March 6, 2024, the parent's attorney emailed the IHO requesting that he consider a motion for reconsideration (SRO Ex. I at p. 99). On March 7, 2024, the parent's attorney emailed the IHO submitting a motion for reconsideration and also stated her position regarding statute of limitations and compensatory education (id. at pp. 85, 99). Following this, the district and the parents exchanged emails detailing their positions regarding the IHO's jurisdiction to hear the matter given that he ruled on the record that the matter would be dismissed (id. at pp. 81-84).

On March 17, 2024, the IHO responded to the parties via email stating he would allow the parties the opportunity to address the issues prior to issuing his written decision on the district's motion to dismiss because the attorney who was present for the parent at the March 6, 2024 status conference was not the attorney of record (SRO Ex. I at p. 80). On March 18, 2024, the district's

[6] For the March 6, 2024 status conference, the attorney who appeared on the parent's behalf was from the law firm representing the parent but was not the same attorney who had previously appeared in the matter (see Tr. pp. 152-83; SRO Ex. I at p. 80).

and the parent's attorneys exchanged emails, in which the district argued that the parent's attorney of record made arguments via email that were identical to those argued by the parent's attorney on March 6, 2024; in addition, both parties further reiterated their positions regarding the dismissal (id. at pp. 76-78).

On March 26, 2024 the parties proceeded to a status conference (Tr. pp. 184-218). The IHO noted that he did grant the district's motion to dismiss because he was under the impression the student would not have been prejudiced but, given the fact that a statute of limitation issue was looming, he opined the decision was premature and a dismissal would be prejudicial to the student (Tr. pp. 186-87). The IHO also stated that he was "partly to blame" for the matter remaining dormant for a period of time and that he should had contacted the parties; however, the IHO noted that the parent's attorney of record had been "adamant about" the concurrent federal matter that she was pursuing on behalf of the student, which supported a finding that the parent never had the intention of abandoning the due process complaint claims in this matter (id.). The district representative argued there was no law or case that allowed for an administrative proceeding to "somehow pause[]" while a federal case concerning the same student proceeded; that the IHO had not ruled on its motion for recusal; and that the district never consented to extensions of the compliance date or received communications from the parent's attorney that she requested such extensions (Tr. pp. 190-92). The parent's attorney opined again that a dismissal for failure to prosecute would not be appropriate because the IHO never gave her notice of such consequence (Tr. pp. 194-95). The district representative responded that the parent's attorney should have known that her nonresponse to its motion to dismiss could result in a dismissal (Tr. pp. 199-200). The IHO indicated that he was going to remain on the matter and the parties picked a date for the impartial hearing to go forward (Tr. pp. 204, 208-16).

The impartial hearing continued on April 29, 2024, and concluded on June 4, 2024 after two days of proceedings devoted to the presentation of evidence (Tr. pp. 219-416). The district confirmed it was not putting on a defense in the matter (Tr. p. 224).

The IHO issued an interim decision, dated August 19, 2024, memorializing his decision to deny the district's motion to dismiss and motion for recusal (see Aug. 2024 Interim IHO Decision).

C. Impartial Hearing Officer Decision

In a final decision dated August 19, 2024, the IHO found the district did not provide the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years by failing to implement the student's IEPs (IHO Decision at pp. 4, 9). The IHO also determined that the district failed to create an IEP that met the student's specific and unique needs (id. at pp. 11-13). The IHO determined the student required nursing assistance throughout the school-day, yet the student's IEPs did not provide such supports (id. at p. 12). Accordingly, the IHO determined the student was entitled to compensatory education under the IDEA and the Education Law, as well as under section 504 (id. at pp. 11, 13). Regarding pendency, the IHO determined that the district failed to provide services the student was entitled to and that, therefore, the student was entitled to pendency compensatory education for the 2022-23 and 2023-24 school years (id. at p. 11). Finally, the IHO noted the district did not dispute any of the allegations in the parent's due process complaint notice and that, therefore, the parent was entitled to the declaratory relief sought (id. at p. 13).

As relief the IHO ordered: (1) for the 2019-20 10-month school year, a bank of 400 periods of SEIT services, 90 hours of speech-language therapy, 90 hours of OT, and 90 hours of PT; (2) for the 2020-21 12-month school year, a bank of 210 periods of SEIT services, 135 hours of speech-language therapy, 135 hours of OT, and 135 hours of PT; (3) for the 2021-22 12-month school year: a bank of 330 periods of SEIT services, 135 hours of speech-language therapy, 135 hours of OT, and 135 hours of PT; (4) for the 2022-23 12-month school year, a bank of 90 periods of SEIT services, 135 hours of speech-language therapy, 135 hours of OT, and 135 hours of PT; and (5) for the 2023-24 12-month school year, a bank of 135 hours of speech-language therapy, 135 hours of OT, and 135 hours of PT (IHO Decision at pp. 14-15). The IHO indicated that the compensatory education award would be less any hours the district could establish it delivered and the student received and that all the services were to be delivered by a service provider of the parent's choosing if the district failed to deliver the services (id.).

Additionally, the IHO declared that the district should have created a 12-month program that included: 20 hours per week of SEIT services with a provider trained in special education teacher services on an itinerant basis who could work on activities of daily living (ADL), communication, motor, cognitive, academic, and functional skills; five 60-minute sessions per week of individual speech-language therapy; five 60-minute sessions per week of individual OT; five 60-minute sessions per week of individual PT; a full time, 1:1 nurse; and a coordinator employed by the district to supervise the administration of the related services and to ensure that the providers and special education teacher were developing and implementing coordinated goals (IHO Decision at p. 15).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer thereto is presumed and, therefore, the allegations and arguments will not be recited here.[7] The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether the IHO erred by issuing eighteen extensions of the compliance date without requests for extensions of time from either party;

2. Whether the IHO erred by denying the district's motion to dismiss; and

3. Whether the IHO erred by issuing a statement declaring what an appropriate program would have been.

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

[7] The district filed a declaration of service stating it served the notice of intention to seek review on the parent on September 12, 2024; however the district failed to file the notice of intention to seek review with the Office of State Review (see 8 NYCRR 279.4[e]; see also 8 NYCRR 279.2).

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 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]).[8]

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

VI. Discussion

A. IHO Conduct and the Impartial Hearing

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 process 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]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and

[8] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

1. Extension of Compliance Date by IHO

According to the hearing record, the IHO issued thirty extensions of the compliance date (see IHO Ex. I). The district argues that the IHO did not have jurisdiction to sua sponte extend the compliance date eighteen times. Further, the district alleges the reasons indicated in each extension were wrong and did not reflect actual communications between parties. The district also alleges the IHO confirmed on the record he took the liberty of entering the extensions based on the conversation the parties had the last time they convened in 2022. The district alleges that the IHO should have issued a decision by August 2022 and that the IHO exceeded his authority by conducting the hearing outside of the compliance period. As relief, the district requests that an SRO reverse the IHO's decision and dismiss the case or, in the alternative, remand the matter to an IHO to issue a termination order.

The parent argues to uphold the IHO's decision in its entirety and claims the IHO was aware there was an overlapping federal court case involving the same student and that, since the goal was to resolve all claims in one action and to keep costs down, the parent's attorney agreed with extending compliance, which had been communicated to the IHO.

Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 CFR 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 CFR 300.515[a]; 8 NYCRR 200.5[j][5][i]). However, extensions may only be granted consistent with regulatory constraints, and the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]).[9] An IHO is explicitly prohibited from "solicit[ing] extension requests or grant[ing] extensions on his or her own behalf or unilaterally issue extensions for any reason" (8 NYCRR 200.5[j][5][i]).

In the instant case, the hearing record reveals that the IHO failed to comply with State and federal guidelines governing the timelines for an impartial hearing and the IHO acknowledged the delays in the proceedings were partially his fault. Moreover, there is no authority for the parent's position that an administrative proceeding should be stayed while a district court proceeding involving the same parties is pending. Ultimately, however, in this matter, the impartial hearing went forward, and the district has not put forth an argument that it was prejudiced by the IHO's conduct or that it was denied due process or an opportunity to defend its provision of a FAPE to the student in this matter.[10] In fact, the district stated during the impartial hearing it was not

[9] State regulation provided for extensions beyond 30 days but for no more than 60 days during the time that "schools [we]re closed pursuant to an Executive order issued by the Governor pursuant to a State of emergency for the COVID-19 crisis" (8 NYCRR 200.5[j][5][i]).

[10] As a general matter, courts have considered whether untimely administrative decisions could be found to compromise a student's substantive right to a FAPE (Jusino v. New York City Dep't of Educ., 2016 WL 9649880,

defending its offer of a FAPE to the student for the 2019-20, 2020-21, and 2021-22 school years (Tr. pp. 117-18, 224). Accordingly, there is no basis to overturn the IHO's decision on the basis that the IHO violated State regulations by entering extensions of the timeline for completing the impartial hearing. While of little consolation, this determination does not condone that the IHO made manifestly untrue statements in his extension orders that the parties had made joint requests for extensions of time and that the reasons were due to the unavailability of the parties' witnesses.

2. Motion to Dismiss

The district also argues that the IHO erred by reversing his decision to dismiss the case.

As noted above, the IHO stated on the record that he intended to dismiss the matter without prejudice, but, before issuing a final decision and after receiving the parent's March 7, 2024 motion to reconsider, the IHO ultimately decided he agreed with the parent (Tr. pp. 180, 187; SRO Ex. I at pp. 85, 99). The parties then proceeded to a status conference and the impartial hearing dates devoted to the merits (see Tr. pp. 184-416).

As cited by the district in its request for review, an IHO lacks the authority to retain jurisdiction and materially alter a final decision on the merits once a due process proceeding has come to a conclusion (see Application of a Student with a Disability, Appeal No. 22-107; Application of a Student with a Disability, Appeal No. 21-067; Application of a Student Suspected of Having a Disability, Appeal No. 19-010; Application of the Dep't of Educ., Appeal No. 17-009; but see Application of a Student with a Disability, Appeal No. 21-152). Here, although the IHO stated on the record at the March 6, 2024 status conference that he was dismissing the parent's due process complaint notice without prejudice (Tr. pp. 171, 180), the IHO did not issue a written decision based thereon as required by the IDEA and implementing regulations (see 20 U.S.C. § 1415[h][4]; 34 CFR 300.512[a][5]; 8 NYCRR 200.5[j][5]). Accordingly, the matter did not come to a conclusion as of March 6, 2024. While the district may be understandably frustrated that the IHO's ultimate determination in this matter was contrary to the IHO's earlier statements on the record, as the IHO did not issue a written decision dismissing the matter, the district's contention that he exceeded his jurisdiction in proceeding with the hearing is without merit.

Based on the forgoing, the evidence in the hearing record does not support the district's contentions that the manner in which the IHO conducted the impartial hearing infringed upon or denied it the right to due process or otherwise hindered its ability to present evidence at the impartial hearing, especially given that the district conceded it denied the student a FAPE for the three school years at issue in this matter.

---

at *6 [E.D.N.Y. Aug. 8, 2016] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45-day deadline, 'relief is warranted only if . . . [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education'"] [alternations in the original], quoting J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]). However, the district does not point to any authority that an IHO's failure to issue a timely decision should result in dismissal of a parent's allegations of a denial of a FAPE.

B. Relief

Notably, although the district appeals the fact that the IHO permitted the hearing to process and did not dismiss the matter after the March 6, 2024 status conference, the district does not allege that the IHO erred in ultimately denying the motion on its merits. In addition, the district has not appealed the IHO's determinations that it failed to develop appropriate IEPs for the student or implement the student's IEPs during the 2019-20, 2020-21, and 2021-22 school years or that it failed to provide services to the student pursuant to pendency during the 2022-23 and 2023-24 school years; nor does the district appeal the IHO's award of compensatory education (see IHO Decision at pp. 9-15). Accordingly, those findings have become final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The only substantive aspect of the IHO's decision at issue on appeal is the final clause of the IHO's order. In particular, the clause at issue reads that "IT IS HEREBY DECLARED" that the district "should have created" a 12-month program for the student that included: 20 hours per week of SEIT services; five 60-minute sessions per week of individual speech-language therapy; five 60-minute sessions per week of individual OT; five 60-minute sessions per week of individual PT; a full time, 1:1 nurse; and a coordinator employed by the district to supervise the administration of the related services and to ensure that the providers and special education teacher were developing and implementing coordinated goals (IHO Decision at p. 15).

On appeal, the district argues the IHO erred by awarding an increase in SEIT services from 15 to 20 hours per week and in awarding a coordinator employed by the district to supervise the administration of related services. The district argues there was no evidence to support the increase in SEIT services or that a coordinator was required to provide the student a FAPE. The district also argues that such an award was prospective relief and was not appropriate for this matter. In her answer, the parent characterizes the IHO's relief in this regard as part of the compensatory award.

Review of the IHO's decision in its entirety reveals that the final clause of the IHO's order was declaratory and not meant to revise the student's 2024-2025 school year programming on a prospective basis or to be provided as part of the award of compensatory education (IHO Decision at p. 15). The IHO's decision does not address a dispute regarding the 2024-25 school year, nor should it have done so as the 2021-22 school year was the final year placed in dispute by the parent in her due process complaint notice (see Parent Exhibit A). In the body of the IHO's decision, under the heading "Declaratory Relief," the IHO noted that the district did not refute the allegations in the due process complaint notice, and merely stated that the parent was entitled to declaratory relief (id. at p. 13). The final paragraph of the decision begins with the phrase "IT IS HEREBY DECLARED" whereas the clauses in which the IHO set forth the compensatory education award were preceded by the phrase "IT IS HEREBY ORDERED that the [district] is directed to provide . . ." (id. at pp. 14-15). Within the clause setting forth the declaratory relief, the IHO did change verb tense in a confusing manner in some of the subparagraphs. For example, as part of the program the district "should have" created, the IHO lists a "[f]ull-time, 1:1 nurse, 10 hours per day to be funded by the [district] should no other source of funding is available" (id. at p. 15). Ultimately, however, taking into account the introductory language and the other relief awarded in the form of compensatory education (along with the different phrasing in the ordering clauses

for that relief), I do not find that the final paragraph setting forth the declaratory relief may reasonably be read to order the CSE or the district to revise the student's subsequent IEPs or programming going forward during the 2024-25. Thus, by the nature of the language used by the IHO in the final paragraph, the IHO made a declaration of what the student's program "should have" been for the school years at issue but did not make a determination as to what the CSE should recommend for the student going forward or what the district should provide the student in addition to or as part of the compensatory education award (id. at pp. 13, 15).[11]

The IHO's compensatory education award was the remediation for past harms, whereas the IHO's declaratory relief was advisory in nature and, therefore, not enforceable as a prospective placement or as a component of the compensatory education award. Generally, a parent's request to prospectively place students in a particular type of program and placement through IEP amendments can, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). This is particularly so when the school year at issue is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP for the following school year, which has not been the subject of a due process proceeding (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

Here, the school years at issue—namely the 2019-20, 2020-21, and 2021-22 school years—have long passed and CSEs should have convened and produced IEPs for the 2022-23, 2023-24, and 2024-25 school years (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). If the parent is or was displeased with the CSEs' recommendations for the student in any subsequent IEP(s), her avenue to obtain appropriate relief is to challenge the IEP(s) in a separate proceeding (see Eley, 2012 WL 3656471, at *11).

As a final matter, to the extent the district points to the lack of an evidentiary basis for the IHO's declaratory findings, given the lack of evidence presented by the district during the impartial hearing, the lack of appeal of the IHO's finding of a denial of a FAPE and award of compensatory education, as well as the passage of time, further findings about what the CSE should or should

[11] While the parent sets forth a different understanding of the order in her answer, for the reasons set forth herein, review of the IHO's decision does not support the parent's view that the declaratory relief was meant to be provided going forward as part of the compensatory award. To the extent the parent felt that the IHO should have awarded a coordinator as part of the compensatory education award, it was incumbent upon the parent to interpose a cross-appeal of the IHO's decision (see 8 NYCRR 279.8[c][2]). As the parent did not do so, the issue is deemed abandoned, and I decline to further discuss whether the IHO should have ordered the district to provide a coordinator as part of the compensatory education awarded (see 8 NYCRR 279.8[c][4]).

not have recommended for the 2019-20, 2020-21, and 2021-22 school years are largely academic at this juncture and, therefore, I find the issue to be moot and decline to further discuss it.[12]

Based on the foregoing, the issues raised by the district do not present a convincing basis to modify the IHO's decision.

As a reminder to both parties, federal and State statutes and regulations concerning the education of students with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer v. Weast, 546 U.S. 49, 53 [2005] [noting that the "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process]; Cerra, 427 F.3d at 192-93). I strongly encourage the parties to work collaboratively to ensure the student receives services going forward.

VII. Conclusion

In summary, although the IHO's conduct failed to comply with certain State and federal procedures governing the impartial hearing, such conduct did not infringe on the parties' right to due process or hinder their ability to present evidence at the impartial hearing on the merits. Further, there is no basis to modify the IHO's declaratory finding. As such, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 10, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] 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 v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428-29 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]). Since the relief at issue is, as discussed above, declaratory in nature, there is little to no benefit that might arise from reviewing the what the student's programming should have been for the 2019-20, 2020-21, and 2021-22 school years (see Alan H. v Hawaii, 2007 WL 2790738, at *6 [D Haw Sept. 24, 2007] ["The mootness doctrine may be invoked to deny a declaratory judgment where the benefits of issuing such a judgment are too slight to justify the decision"]; see also A.A., 2017 WL 2591906, at *6-*9 [noting that "when considering the potential mootness of a claim for declaratory relief, '[t]he question is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of declaratory judgment'"], quoting Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 122 [1974]).