The University of the State of New York

The State Education Department
State Review Officer
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No. 14-090

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:
Susan Luger Associates, Inc., Special Education Advocates for petitioner, Lawrence D. Weinberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Seton Foundation for Learning (Seton) for the 2013-14 school year. 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]). 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

During the 2012-13 school year (kindergarten), the student attended Seton (see Parent Ex. E at p. 1; see also Tr. pp. 23, 64).[1] On April 26, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 year (first grade) (see Parent Ex. B at pp. 1, 11-12, 14). Finding that the student remained eligible for special education and related services as a student with autism, the April 2013 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school with the following related services: one 30-minute session per week of counseling in a small group, four 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical

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

therapy (PT), five 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual speech-language therapy (id. at pp. 1, 11-12).[2] The April 2013 CSE also recommended two 45-minute sessions per year of parent counseling and training (id. at p. 12). In addition, the April 2013 CSE recommended that the student participate in adapted physical education and alternate assessments (see id. at pp. 11, 13).

By letter dated June 13, 2013, the parents indicated that at the April 2013 CSE meeting, they expressed "concern" that the "recommendations" were not appropriate to meet the student's needs (Parent Ex. C at p. 1). In addition, the parents "hop[ed] to receive" a final notice of recommendation (FNR) by June 15, 2013, to schedule a visit to the assigned public school site to determine whether the "recommended program/placement" could appropriately address the student's "unique special education needs" (id.). While the parents remained willing to "consider any program/placement" that the district recommended, they informed the district that they "signed a contract" with Seton to "hold a seat" for the student's attendance during the 2013-14 school year (id.). The parents also indicated that if the district failed to offer an appropriate "placement/program" to the student in a "timely manner," they would have "no choice" but to unilaterally place the student at Seton for the 2013-14 school year and to seek tuition reimbursement from the district (id.).

By FNR dated June 14, 2013, the district summarized the special education and related services recommended in the April 2013 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Parent Ex. D at p. 1).

On June 25, 2013, the parents visited the assigned public school site, and in a letter dated June 26, 2012, rejected it because the lunchroom was too large, the classroom was "too compact," the therapy rooms were "too small" and were used "simultaneously" by multiple students, and during the visit, there was "no discussion about the educational program" (Parent Ex. C at p. 4). Based upon these concerns, the parents indicated that they could not accept the "placement," and therefore, they would unilaterally enroll the student at Seton for the 2013-14 school year and seek reimbursement for the student's tuition at Seton (id.).

On June 26, 2013, the parents executed an enrollment contract with Seton for the student's attendance during the 2013-14 school year (see Parent Ex. U at pp. 3-4).

A. Due Process Complaint Notice

By due process complaint notice dated August 26, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. A at p. 2). Initially, the parents alleged that the April 2013 CSE ignored their "concern (disagreement)" with the recommended "program" expressed at the April 2013 CSE meeting, which deprived them of the opportunity to meaningfully participate in the review (id.). Next, the parents alleged that both the April 2013 CSE meeting and the April 2013 IEP were substantively and procedurally "flawed" for the following reasons: the April 2013 CSE did not

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

develop "[m]any" of the annual goals at the CSE meeting, which deprived them of the opportunity to meaningfully participate in the development of the annual goals; the annual goals for speech-language therapy, OT and PT were drafted prior to the April 2013 CSE meeting and discussed at the CSE meeting, but no related service providers attended the April 2013 CSE meeting; the April 2013 IEP failed to sufficiently identify the student's present levels of performance and to include "corresponding goals;" the annual goals were not reasonably calculated to enable the student to receive educational benefits; and the April 2013 IEP—including the statements of annual goals, academic performance, management needs and social/emotional performance (behavior)—did not meet or address all of the student's unique needs (id. at pp. 3-4).[3] Further, the parents asserted that the April 2013 CSE failed to conduct a classroom observation of the student; the April 2013 CSE members attending via telephone did not have access to "reports;" the April 2013 CSE failed to "present reports to the parents" prior to the meeting; and the April 2013 CSE denied the parents' requests at the meeting for a "crisis [p]ara[professional]," a 45-minute bus ride, and a sensory gym (id. at p. 4).[4]

The parents also alleged that the April 2013 CSE was not properly composed because neither the special education teacher nor the district representative met the applicable regulatory criteria, and the April 2013 CSE failed to include an additional parent member (see Parent Ex. A at p. 4). In addition, the parents asserted that the April 2013 CSE could not provide the parents with any information about the "proposed program," and failed to recommend an "appropriate program," impermissibly engaged in predetermination, failed to follow the "continuum of services," and that neither the evaluative information nor the opinions of professionals who worked with the student supported the recommendations (id. at 4-5).

As to the assigned public school site, the parents asserted that it was not appropriate because the student could not receive individual services in a separate location; the lunchroom served as a "multi purpose room" and could not accommodate "all" of the students at the same time; the "school environment" was too noisy given the student's sensory needs; the building—including the classroom and therapy rooms—was small; the school site could not implement the student's adapted physical education requirements in the IEP; the school site lacked a computer lab, library, sensory gym, sports programs, and a functional kitchen; the school site did not use teaching methodologies "shown to be successful" for the student; during the visit, there was no discussion regarding the "educational program;" the student would not be functionally grouped in the classroom; and the classroom lacked sufficient adult supervision (see Parent Ex. A at pp. 5-7). The parents also expressed concern about the assigned public school site's rotation of paraprofessionals on a weekly basis, and the inability to implement the student's related services included in the IEP (id. at p. 7).

Finally, the parents asserted that Seton was an appropriate unilateral placement, the student made progress at Seton, and equitable considerations did not otherwise preclude relief in this matter (see Parent Ex. A at p. 7). As relief, the parents requested reimbursement for the costs of

[3] The parents set forth these particular allegations in paragraph "8" in the due process complaint notice (see Parent Ex. A at pp. 3-4).

[4] The parents also set forth these particular allegations in paragraph "8" in the due process complaint notice (see Parent Ex. A at pp. 3-4).

the student's tuition at Seton for the 2013-14 school year, in addition to reimbursement for any costs, fees, and door-to-door transportation (id. at p. 8).

B. Impartial Hearing Officer Decision

On October 4, 2013, the parties proceeded to an impartial hearing, which concluded on April 29, 2014 following four days of proceedings (see Tr. pp. 1-78).[5] In a decision dated May 15, 2014, the IHO concluded that the district offered the student a FAPE for the 2013-14 school year, and, thus, denied the parents' requested relief (see IHO Decision at pp. 6-8).

Before turning to the parents' arguments, the IHO set forth the procedural history of the case (see IHO Decision at pp. 2-6). With regard to issues in the due process complaint notice, the IHO found that the annual goals in the April 2013 IEP—including the annual goals for speech-language therapy, PT, and OT— were "similar" in substance to the student's "goals" at Seton (see IHO Decision at pp. 6-7). Further, the IHO concluded that, contrary to the parents' assertion, the IDEA did not require districts to draft annual goals in the parents' presence (id. at p. 6). Further, upon review of the "present levels of academic achievement, functional performance, and learning characteristics" section of the April 2013 IEP, the IHO found that, contrary to the parents' allegation, the April 2013 IEP sufficiently identified the student's present levels of functional performance (id. at p. 7).

Next, the IHO found "no merit" to the remaining allegations specified in paragraph "number 8" of the due process complaint notice (IHO Decision at p. 7). In addition, the IHO concluded that the April 2013 CSE was properly composed; however, even if the April 2013 CSE was not properly composed, it did not result in a failure to offer the student a FAPE (id. at pp. 7-8). Comparing the April 2013 IEP to Seton's "program," the IHO was not persuaded by the parents' argument that the April 2013 IEP was "substantively inadequate" (id. at p. 8). To this end, the IHO found that Seton's "program" was "almost identical with the district's recommendation in the IEP providing for additional services" (id.). The IHO also noted that in the November 2012 neuropsychological evaluation report, the evaluator opined that the student's 6:1+1 "classroom placement allow[ed] for an appropriate level of support" (id.). Finally, with respect to the alleged inadequacy of the "school building," the IHO noted that "[e]ducational placement" referred to the recommended "education program" and not the "'bricks and mortar' of the specific school" (id.).

IV. Appeal for State-Level Review

The parents appeal and contend that the IHO erred in finding that the district offered the student a FAPE for the 2013-14 school year. Initially, the parents allege that the IHO misstated the evidence in the hearing record and engaged in "multiple acts of misconduct and prevented the parents from developing a record." Next, the parents assert that the IHO failed to address "numerous" issues raised in the due process complaint notice. The parents also assert that the

[5] In an order on pendency dated October 29, 2013, an IHO found that Seton constituted the student's pendency (stay-put) placement (see Interim IHO Decision at p. 2). The same IHO attempted to conduct a prehearing conference on October 7, 2013; however, neither party appeared (see Tr. pp. 7-10). For reasons not disclosed, the IHO who issued the pendency determination did not continue with the impartial hearing, and the IHO who resumed the proceedings issued the final decision on the merits in this case (see IHO Decision at p. 2; compare Interim IHO Decision at p. 2, with IHO Decision at pp. 2, 8).

IHO's decision "merely" restated the IEP. Further, the parents allege that the IHO failed to "examine substantively any other documents" to determine whether the April 2013 IEP was appropriate, and the IHO's decision included "numerous conclusory statements" without citations to the hearing record. In addition, the parents assert that the IHO improperly characterized the information within the November 2012 neuropsychological evaluation report.. The parents also note that the April 2013 IEP did not indicate whether applied behavioral analysis (ABA) or "1:1 ABA would be continued," the IHO failed to address the student's sensory needs in the decision, it was unclear whether the assigned public school site could implement the student's IEP, and the FNR did not include a recommendation for adapted physical education. The parents also assert that the IHO's conduct during the impartial hearing was improper, and request that the case be remanded to a different IHO for further fact-finding on the merits.

In an answer, the district responds to the parents' allegations, and argues to uphold the IHO's finding that the district offered the student a FAPE for the 2013-14 school year. The district also asserts that the parents now raise two issues on appeal that they did not raise in the due process complaint notice, namely whether the assigned public school could implement the April 2013 IEP and whether the FNR failed to include a "provision for adapted physical education;" therefore, these issues are beyond the permissible scope of review. Alternatively, the district argues that it had no obligation to establish that the assigned public school site could implement the April 2013 IEP, and the omission of adapted physical education in the FNR—as a procedural inadequacy—did not result in a failure to offer the student a FAPE. Further, the district asserts that, although the impartial hearing was not a "model of perfection" it sufficiently comported with due process. Finally, the district asserts that the parents' allegations regarding the IHO's conduct do not support a finding of misconduct.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; Pawling 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Unaddressed Issues and Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. A party appealing from an IHO's decision must "clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and orders to which exceptions are taken" and this includes clearly identifying which particular issues the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4[a]). In the petition, the parents recite, nearly verbatim, allegations from paragraphs numbered "8" and "9" of the due process complaint notice, and assert that the IHO erred in failing to address "numerous deficiencies in the program" and "numerous procedural and substantive attacks on the IEP" (Pet. ¶¶ 14, 25-26; compare Pet. ¶ 14, with Parent Ex. A at pp. 3-4). However, although the parents' petition includes these general statements challenging the IHO's decision, such statements, alone—and without more specifically identifying which issues the IHO failed to address or asserting any legal or factual arguments or further explanation regarding how and why those unaddressed issues would rise to the level of a denial of a FAPE—are insufficient to resurrect any issues in the parents' August 2013 due process complaint notice that the IHO did not address for a determination in this appeal. Under these circumstances, it is not this SRO's role to research and construct the appealing party's arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing

the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]).

Thus, while the entire hearing record has been carefully reviewed to consider those claims that the parents have specifically identified in the petition (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]), I will not sift through the parents' August 2013 due process complaint notice, the hearing record, and the IHO's decision for the purpose of asserting claims on the parents' behalf. Therefore, I find the petition insufficient with respect to those issues that the parents have not taken the care to identify in the petition (8 NYCRR 279.4[a]; see Application of the Dep't of Educ., Appeal No. 13-219; Application of a Student with a Disability, Appeal No. 12-032); Application of the Dep't of Educ., Appeal No. 12-022; Application of the Dep't of Educ., Appeal No. 11-127). Based on the foregoing, I decline to review any issues that the parents do not otherwise identify and advance on appeal.

Finally, the IHO also made the following adverse findings against the parents: the April 2013 CSE was properly composed; the present levels of performance in the April 2013 IEP sufficiently identified the student's present levels of functional performance; and the annual goals in the April 2013 IEP—including the annual goals related to speech-language therapy, OT, and PT, as well as the development of the annual goals—were appropriate (see IHO Decision at pp. 6-8). In addition, the IHO found "no merit to the other claims" the parents raised in "number 8" of the due process complaint notice, which constitutes an adverse finding to the parents (id. at p. 7; see Application of the Dep't of Educ., Appeal No. 12-086). A party who fails to obtain a favorable ruling with respect to an issue decided by an IHO is bound by that ruling unless a party asserts an appeal or a cross-appeal (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 [S.D.N.Y. Nov. 27, 2012] [finding that "parties contesting the validity of an IEP may cross-appeal an IHO's adverse particular findings even if they obtained all of their requested relief;" see also Parochial Bus. Sys., Inc. v. Bd. Of Educ., 60 N.Y.2d 539, 545-47 [1983]).[6] Based upon the foregoing, I find that the parents elected not to appeal the adverse findings of the IHO identified above, and thereby waived their right to pursue those issues; consequently, I lack the jurisdiction to review them (see Parochial Bus. Sys., Inc., 60 N.Y.2d at 545-47; J.F., 2012 WL 5984915, at *9; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[6] While this case concerns whether a respondent must cross-appeal an adverse finding rendered by an IHO, recently two district court decisions reviewed the scope of a respondent's right to cross-appeal issues that were not addressed by the IHO (J.F., 2012 WL 5984915, at *9-*10 [concluding that there was no adverse finding for the parents to cross-appeal, and therefore under the circumstances of that case, the parents were not aggrieved by the IHO's failure to decide an issue]; see also D.N. v. New York City Dep't of Educ., 2012 WL 6101918 [S.D.N.Y. Dec. 10, 2012] [notice of appeal filed Jan. 3, 2013] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]).

B. IHO Conduct and the Impartial Hearing

Initially, the parents assert that the IHO failed to disclose a "potential conflict" and failed to recuse herself when the "potential conflict came to light." In response, the district asserts that no actual conflict existed that required the IHO's recusal. An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations, and the legal interpretations of the IDEA and its implementing regulations; and must be possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Here, the parents argue that the IHO's professional relationship with a district employee "cast doubt on [the IHO's] capacity to act impartially." However, the parents acknowledge that they have no information regarding the employee's "precise role" in this case. Moreover, the parents fail to identify any evidence sufficient to demonstrate that the IHO's alleged professional relationship with the employee affected her ability to remain impartial. Rather, a review of the evidence in the hearing record establishes that although the IHO copied or included this employee on e-mails that the IHO sent to the parents, no evidence exists to either establish that an actual conflict existed or that the IHO's alleged professional relationship interfered with her ability to act impartially; therefore, the parents' contention must be dismissed (see Parent Exs. W; X at pp. 1-2; BB at pp. 1-2; CC).

Next, the parents allege that the IHO failed to "document extensions" as required by regulations. A review of the evidence in the hearing record, however, establishes that the IHO, in full compliance with State regulation, documented each extension request made by the parents that occurred after she was assigned to the case on March 6, 2014, and she also detailed therein her reasons for denying those requests (see 8 NYCRR 200.5[j][5][i]; IHO Exs. I at pp. 1-2; II at pp. 1-3; IV; VI at pp. at 5-6). Accordingly, the evidence in the hearing record refutes the parents' contention.

The parents also contend, without further elaboration, that the IHO failed to "put the pendency order into evidence." Although the hearing record reveals that the IHO did not enter the pendency decision into evidence at the impartial hearing, it was nonetheless provided to this office as part of the administrative record. As a reminder to both parties and to the IHO, State regulation provides that the "record shall include copies of," among other things, "all written orders, rulings or decisions issued in the case" (see 8 NYCRR 200.5[j][5][vi][c]). Here, the parents do not allege any prejudice that resulted from this omission—nor is any prejudice discernible from the hearing record—especially since it is undisputed that the district continued to fund the student's pendency placement at Seton pursuant to the pendency decision (see Interim IHO Decision at p. 2). Therefore, the parents' contention must be dismissed.

Next, the parents allege that the IHO's prehearing order—which required the parties to present direct testimony by affidavit—although "bathed in regulation," was "illegal" and denied the parents the opportunity to present evidence. In response, the district contends that the IHO was permitted to require testimony by affidavit in lieu of direct testimony. As correctly noted in the IHO's March 24, 2014 prehearing order, State regulation allows an IHO to "take direct

testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination" (8 NYCRR 200.5[j][3][xii][f]; IHO Ex. I at p. 1). In this case, the IHO's prehearing order also allowed for the presentation of "[a]dditional direct examination that [was] not repetitive or irrelevant," and for both parties to submit a list of all witnesses to the IHO who needed to verbally testify at the impartial hearing, along with a summary of the expected testimony, and the necessity to present the testimony verbally (IHO Ex. I at p. 1). Initially, after the IHO issued the prehearing order, the parents did not object to such requirement; rather, the parents requested an adjournment "due to the unavailability of witnesses to participate in the request for affidavit testimony" (Parent Ex. X at p. 1; see IHO Ex. I at pp. 1-2). The IHO thereafter denied the parents' request for an adjournment, and the parents then requested that the IHO recuse herself and sought an adjournment based upon the "unavailability of witnesses" (IHO Decision at p. 3; see IHO Ex. II at pp. 1- 2).[7] In this case, a review of the evidence in the hearing record establishes that the parents' first objection to the IHO's prehearing order and its provision for direct testimony by affidavits did not occur until after the date the IHO required submission of such affidavits (see Parent Ex. CC at p. 4; IHO Ex. I at pp. 1-2).

Contrary to the parents' argument, a review of the hearing record does not support a conclusion that the IHO's prehearing order directing the use of affidavits for direct testimony violated either the IDEA or State regulation, or otherwise compromised the parents' ability to communicate with their attorney or meaningfully participate in the impartial hearing. Moreover, based on the above, the evidence establishes that the IHO's prehearing order requiring the presentation of direct testimony by affidavit was within the sound discretion of the IHO, and did not violate the parents' due process rights. Contrary to the parents' assertion, if anything, the IHO's order providing for testimony by affidavit, in addition to live direct testimony if needed, only served to enhance the parents' opportunity to thoughtfully prepare testimony by affidavit outside the confines of an in-person hearing. Consequently, the parents' assertions must be dismissed.

The parents also assert that the IHO erred in denying their request to independently record the impartial hearing. Initially, neither State nor federal law speaks to the issue of whether a party is entitled to record an impartial hearing on their own recording device. Regardless, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). An IHO is authorized to administer oaths and to issue subpoenas in connection with the administrative proceeding (8 NYCRR 200.5[j][3][iv]). An IHO may ask questions of attorneys or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]). The parents, school authorities, and their respective attorneys or representatives, shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses at the impartial hearing (8 NYCRR 200.5[j][3][xii]). The IHO may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination (8 NYCRR 200.5[j][3][xii][f]). In this case, at the April 11,

[7] It does not appear that the parents' second request for an adjournment was submitted as evidence in the hearing record; however, the IHO's decision otherwise sets forth the contents of the parents' second request (see IHO Decision at p. 3).

2014 impartial hearing, the parents requested to independently record the impartial hearing on their own recording device; the IHO denied the parents' request, noting the presence of a company employed to record the impartial hearing (see Tr. pp. 14-15). The IHO thereafter directed the parents' to turn off their recording device, and affirmatively stated on the record that she would direct the recording company "never to turn off that tape recorder" so as to capture the entirety of the impartial hearing (Tr. pp. 15-19). As the IHO is charged with the responsibility of maintaining the order and integrity of the impartial hearing process, and the IHO's directive to the parents to turn off their recording device was reasonable, the parents were obligated to comply with this reasonable directive (see Application of a Student with a Disability, Appeal No. 12-076).

Next, the parents assert that the IHO accepted the district witnesses' direct testimony by affidavits without providing the parents with an opportunity to cross-examine those witnesses. A review of the evidence in the hearing record establishes, however, that although the district sought to enter two affidavits into evidence, the IHO found that the district's submission of the affidavits on April 29, 2014 failed to comply with the prehearing order; therefore, the IHO marked the district's affidavits for identification only and specifically stated that she was not "going to allow them into evidence" (Tr. pp. 52-59). The exhibit list included with the transcript of the April 29, 2014 impartial hearing also reflects that the IHO marked the district's two affidavits for identification only and that they were not entered into evidence (see Tr. pp. 23-26). However, the IHO mistakenly identified the district's two affidavits on the "documentation entered into the record" section of the IHO's decision (IHO Decision at pp. 10-11). Nevertheless, at no point in the IHO's decision did she cite to the district's affidavits in support of any fact or conclusion (see IHO Decision at pp. 1-8). Thus, as a whole, the evidence in the hearing record establishes that, although the IHO erroneously included the district's affidavits in the list of "documentation entered into the record," she did not otherwise consider the district's affidavits nor did she enter them into evidence at the impartial hearing. Accordingly, because the district's affidavits were never entered into evidence, the parents were not deprived of the opportunity to cross-examine the affiants and the parents' contentions must be dismissed.

The parents also contend that the IHO improperly "changed her mind after issuing orders without application by either party." A review of the evidence in the hearing record establishes that after the parents repeatedly failed to comply with the IHO's reasonable directive to turn off their recording device, the IHO dismissed the parents' due process complaint notice with prejudice, and then, three days later, sua sponte reconsidered and reversed the dismissal as an improper remedy (see Tr. p. 21; IHO Ex. V at p.1-2). Although not procedurally proper, a review of the evidence in the hearing record establishes that neither party was prejudiced by this procedural irregularity since both parties appeared on April 29, 2014 and conducted the impartial hearing (see Tr. pp. 23-78; IHO Ex. V at p. 4; Parent Ex. CC At pp. 3-4). Notably, the parents appeared with counsel, submitted exhibits, and presented live witness testimony (see Tr. pp. 30-52, 63-77; IHO Ex. V at p. 4). Thus, under these circumstances, the parents' challenges to the IHO's sua sponte reconsideration must be dismissed.

Finally, the parents argue that the IHO "forced" them to seek new counsel when she denied their request for an adjournment. However, a review of the evidence in the hearing record demonstrates that the IHO permissibly denied the parents' requests for extensions in accordance with State regulations, which provide that, absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations,

a lack of availability resulting from the parties' and/or representatives' scheduling conflicts" (8 NYCRR 200.5[j][5][iii]). The evidence in the hearing record demonstrates that the parents requested three extensions, each based upon witness availability and the unavailability of the parents' attorney—although the parties had previously agreed to the first impartial hearing date scheduled for April 11, 2014 (see IHO Decision at p. 2-3; Parent Exs. Q at p. 1-2; X at p. 1; IHO Exs. II at pp. 1-3; IV). Accordingly, based upon the plain language of State regulations, it was well within the IHO's discretion to deny the parents' requests for an extension under these circumstances.

Therefore, based upon the foregoing, the evidence in the hearing record does not support the parents' contentions that either the IHO's conduct or the conduct of the IHO infringed upon or denied the parents' right to due process or otherwise hindered their ability to present evidence at the impartial hearing.

C. April 2013 IEP

Generally, the parents assert that the IHO erred in finding that the November 2012 neuropsychological evaluation report supported the April 2013 CSE's recommendation of a 6:1+1 special class placement and that the April 2013 IEP was substantively adequate. The district rejects these contentions. In this case, regardless of the IHO's interpretation of a particular recommendation in the November 2012 neuropsychological evaluation report, a review of the evidence in the hearing record establishes that the April 2013 IEP—including the 6:1+1 special class placement, together with the recommended supports and related services—offered the student a FAPE for the 2013-14 school year, and thus, there is no reason to disturb the IHO's conclusions.

According to State regulation, a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). In reaching the decision to recommend a 6:1+1 special class placement, a review of the evidence in the hearing record reveals that the April 2013 CSE considered the following evaluative information to identify the student's needs: a February 2013 Seton quarterly progress report, an April 2013 classroom teacher/student evaluation report, an April 2013 speech-language therapy, an undated PT progress report, and an undated OT progress report (see Dist. Exs. 2-5; Parent Ex. G at pp. 1-4). In addition, the April 2013 CSE relied upon the evaluative information to provide a detailed and comprehensive overview of the student's strengths and needs across a variety of areas in the April 2013 IEP (compare Parent Ex. B at pp. 1-3, with Dist. Ex. 2 at pp. 1-3, and Dist. Ex. 3 at pp. 1-2, and Dist. Ex. 4 at pp. 1-2, and Dist. Ex. 5 at pp. 1-3, and Parent Ex. G at pp. 1-4). A review of the evidence in the hearing record also reveals that in reaching the decision to recommend a 6:1+1 special class placement, the April 2013 CSE considered and rejected various special class placements—including an 8:1+1, a 12:1+1, and a 12:1+4—in a specialized school (see Parent Ex. B at p. 17).

In this case, the student exhibited significant cognitive, academic, language, social, physical, and self-care delays (see Dist. Exs. 2 at pp. 1-3; 3 at pp. 1-2; 4 at pp. 1-2; 5 at pp. 1-3; Parent Ex. G at pp. 1-4). Moreover, the evaluative information relied upon by the April 2013 CSE reflected the student's frequent need for redirection, prompts, and reinforcements to remain

focused and to complete tasks (see Dist. Exs. 2 at p. 2; 3 at p. 1; 4 at p. 2; 5 at p. 2; Parent Ex. G at pp. 1-4). In light of the student's needs, the April 2013 CSE recommended the following: differentiated instruction; and a "highly structured, specialized class (program) in a specialized school . . . to help him address his academic, social/emotional, speech/language/communication, and health/physical development with adapted physical education" (Parent Ex. B at p. 3). In addition, the April 2013 recommended the following additional strategies as management needs: "discrete trials, prompting, constant redirection to task, frequent reinforcers and breaks," and "preferential seating within the classroom to increase attention to task" (id.). Finally, the April 2013 IEP noted that the student's "low level of cognitive, adaptive functioning and language preclude[d]" the student's participation in a general education setting at that time, and the student required a special class in a specialized school with a 6:1+1 ratio to accommodate his needs (id. at p. 14).

To address the student's needs related to physical/motor difficulties, language and communication delays, and social interaction skills, the April 2013 CSE also recommended counseling, OT, PT, and speech-language therapy (see Parent Ex. B at pp. 16-17). Additionally, the April 2013 CSE created annual goals with corresponding short-term objectives targeting the student's ability to process sensory information and self-regulate levels of arousal and behavior; improve his visual motor skills; improve his ambulation, balance, and coordination of dynamic activities; improve his muscle strength and muscle tone; follow directions; answer questions and make comments about key details in text with multisensory cues; describe familiar people, places, and events with appropriate articulation; answer social questions; improve his handwriting skills; improve his participation in games and activities; improve his reading, mathematics, and writing skills; demonstrate appropriate play skills with peers and improve peer relations; improve his toileting and activities of daily living (ADL) skills; and improve his safety awareness skills (id. at pp. 4-11).

Based on the foregoing, the evidence in the hearing record supports the IHO's conclusion that the April 2013 IEP—including the 6:1+1 special class placement together with the recommended supports and related services—offered the student a FAPE for the 2013-14 school year.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Seton was appropriate or whether equitable considerations supported the parents' request for relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 26, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER