The University of the State of New York

The State Education Department
State Review Officer
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No. 14-147

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondent, Karen Newman, 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. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for the costs of the student's tuition at the Aaron School for the 2013-14 school year. As explained more fully below, the matter must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

During the 2011-12 (seventh grade) and 2012-13 (eighth grade) school years, the student attended the Aaron School (see Tr. pp. 200-01, 205).[1][2] On March 7, 2013, the CSE convened to

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

[2] The parent executed an enrollment contract with the Aaron School on February 27, 2013 for the student's attendance during the 2013-14 school year (see Parent Exs. D at pp. 1-4; E).

conduct the student's annual review and to develop an IEP for the 2013-14 school year (ninth grade) (see Dist. Exs. 1 at pp. 1, 12; 2 at p. 1). Finding that the student remained eligible for special education and related services as a student with an other health impairment, the March 2013 CSE recommended a 15:1 special class placement at a community school for instruction in mathematics, English language arts (ELA), sciences, and social studies (see Dist. Exs. 1 at pp. 1, 8, 11).[3] The March 2013 CSE also recommended related services consisting of two 30-minute sessions per week of counseling in a small group, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of speech-language therapy in a small group (see id. at pp. 8-9). In addition, the March 2013 CSE created annual goals to address the student's identified needs, recommended testing accommodations, and developed a coordinated set of transition activities (see id. at pp. 4-8, 10).

By letter dated May 6, 2013, the parent informed the district that she received a "placement notice" and visited the assigned public school site (Parent Ex. A at p. 2). According to the parent, 690 students attended the assigned public school site, the assigned public school site did not provide "special education classes throughout the day," the student would not attend a "small class of 15:1" for at "least four periods a day," and the assigned public school site lacked an "OT provider" (id.). Based upon these concerns, the parent indicated that she could not accept the "placement" (id.).

By final notice of recommendation (FNR) dated August 15, 2013, the district summarized the special education and related services recommended in the March 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 Dist. Ex. 3).[4]

By letter dated August 16, 2013, the parent initially repeated her concerns about the assigned public school site as set forth in the May 6, 2013 letter to the district, and further indicated that she did not receive either a "response" to the May 6, 2013 letter or a "placement offer for the 2013-2014 school year" (Parent Ex. B at p. 1). In addition, the parent indicated that she intended to continue the student's placement at the Aaron School and seek tuition reimbursement; however, if she received a "placement offer" prior to the beginning of the school year, she would "make arrangements to visit" the assigned public school site and would inform the district of her "findings" (id.).

By letter dated September 20, 2013, the parent informed the district that she visited the assigned public school site identified in the August 2013 FNR (see Parent Ex. C at p. 3). Initially, the parent repeated her concerns about the assigned public school site as set forth in the May 6, 2013 letter to the district (compare Parent Ex. C at p. 3, with Parent Ex. A at p. 2). Next, the parent described the assigned public school site identified in the August 2013 FNR as "huge," and noted that it shared a "gym and cafeteria" with another school, the student would be with the "general population for lunch and gym," the students at the assigned public school were "street-

[3] The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[4] The August 2013 FNR identified a different assigned public school site than the parent previously visited (compare Dist. Ex. 3, with Parent Ex. A at p. 2).

wise," the administration had a "difficult" time controlling some of the students' inappropriate language, and there was reportedly two fights that took place at the assigned public school site the previous year (see Parent Ex. C at p. 3). In addition, the parent alleged that the assigned public school site did not utilize "individual behavior charts" and students with a "wide range of classifications" attended the assigned public school site, some of the students exhibited behavior issues, and the assigned public school site did not use specific methodologies (id.). As such, the parent could not accept the "placement offered," and she notified the district of her intentions to continue the student's placement at the Aaron School and to seek tuition reimbursement for the costs of the student's tuition at the Aaron School for the 2013-14 school year (id.).

A. Due Process Complaint Notice

By due process complaint notice dated November 15, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see District Ex. 7 at pp. 1-2). The parent asserted that the March 2013 CSE was not properly composed due to the absence of a regular education teacher and the absence of a special education teacher who would be responsible for implementing the student's March 2013 IEP (id. at p. 1). The parent further alleged that the March 2013 CSE meeting "process" failed to "comply with appropriate CSE procedure," and the March 2013 CSE failed to review "proper documentation" (id.).

With respect to the March 2013 IEP, the parent asserted that it did not accurately reflect the student's "learning issues and academic levels," and failed to include annual goals to "improve [the student's] memory" (Dist. Ex. 7 at p. 1). Next, the parent alleged that she had "serious concerns" about the 15:1 special class placement in a "public school," and it would not provide the student with sufficient "teacher support" (id.). In addition, the parent indicated that the student, at that time, was "not ready" for a 15:1 special class placement in a "public school" (id.). The parent further alleged that the March 2013 CSE recommended a 15:1 special class placement due to the unavailability of a "non public school that could meet his needs" (id. at pp. 1-2).

Next, the parent asserted that she visited the assigned public school site identified in a "placement notice dated April 12, 2013," met with the principal, and she then repeated the concerns about the assigned public school site set forth in the May 6, 2013 letter to the district (compare Dist. Ex. 7 at pp. 1-2, with Parent Ex. A at p. 2). Similarly, the parent repeated the concerns about the assigned public school site identified in the August 2013 FNR as set forth in the September 20, 2013 letter, and further asserted that the assigned public school site could not implement the March 2013 IEP (compare Dist. Ex. 7 at p. 2, with Parent Ex. C at p. 3).

Next, the parent indicated that although the "box for no language waiver" was "checked" on the March 2013 IEP, the "narrative section" of the March 2013 IEP "clearly" stated that the student needed a language waiver (Dist. Ex. 7 at p. 2). The parent asserted that without an "appropriate IEP and placement," she had "no choice but to continue [the student's] placement at the Aaron School" (Dist. Ex. 7 at p. 2). As relief, the parent requested reimbursement for the costs of the student's tuition at the Aaron School for the 2013-14 school year and for the district to provide transportation and related services (id.).

B. Impartial Hearing Officer Decision

On March 10, 2014, the IHO conducted a prehearing conference, which the district failed to attend (see Tr. pp. 1-7). On March 18, 2014, the parties proceeded to an impartial hearing, which concluded on July 25, 2014 after four days of proceedings (see Tr. pp. 8-561; July 25, 2014 Tr. pp. 410-529). By decision dated August 21, 2014, the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 school year, the student's unilateral placement at the Aaron School was appropriate, and equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 3-14).

Initially, the IHO found that because the parent "never seriously considered placing [the student] into the large public school setting that the [district] offered as a placement site," the district only needed to defend its "IEP alone"—therefore, the IHO noted that he would not "deem the placement as not being appropriate" as argued by the parent (IHO Decision at pp. 5-10).[5] Next, the IHO described the student's needs based upon the evaluative information and testimonial evidence in the hearing record, and ultimately, while the IHO found that the 15:1 special class placement with related services "ma[d]e sense," the IHO concluded that he was "just not convinced that it would work" and that it was unclear what information the March 2013 CSE relied upon to determine that a 15:1 special class placement "would have been sufficient" (id. at pp. 10-13).

Turning next to the parent's unilateral placement, the IHO found that the Aaron School was appropriate because it provided the student with the "type of individualized approach" he required (IHO Decision at pp. 13-14). Finally, the IHO found that based upon the evidence in the hearing record, equitable considerations did not preclude relief in this matter; therefore, the IHO directed the district to reimburse the parent for the costs of the student's tuition at the Aaron School for the 2013-14 school year (id.).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that it failed to offer the student a FAPE for the 2013-14 school year.[6] Initially, the district argues that the IHO erred in finding that it was not clear what information the March 2013 relied upon to determine that a 15:1 special class placement "would have been 'sufficient.'" In addition, the district contends that the 15:1 special class placement with related services was appropriate for the student. Moreover, the district alleges that the parent's remaining allegations in the due process complaint not otherwise addressed by the IHO did not result in a failure to offer the student a FAPE for the 2013-14 school year. Specifically, the district asserts that although a regular education teacher did not attend the March 2013 CSE meeting, this absence did not rise to the level of a failure to

[5] It appears from the IHO's decision that the IHO's references to the "assigned public school site" were to the assigned public school site identified in the August 2013 FNR (see IHO Decision at p. 9; see also Dist. Ex. 7 at p. 2).

[6] The district affirmatively asserts that it does not appeal the IHO's findings that the Aaron School was an appropriate unilateral placement for the student or that equitable considerations weighed in favor of the parent's request for relief; thus, the IHO's determinations are final and binding upon the parties and will not be discussed in this decision (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see IHO Decision at pp. 12-14).

offer the student a FAPE. The district also argues that the annual goals in the March 2013 IEP addressed the student's needs and specifically addressed the student's difficulties with memory. Next, the district contends that the parent's assertion that there was no special education teacher at the March 2013 CSE who would be responsible for implementing the student's March 2013 IEP was without merit. The district further argues that the March 2013 CSE followed proper procedures and appropriately reviewed proper documentation to develop the March 2013 IEP. Finally, the district asserts that the parent's contentions regarding how the March 2013 IEP would have been implemented at the assigned public school site were "wholly speculative."

In an answer, the parent generally responds to the district's allegations with admissions, denials, or various combinations of the same. With respect to the district's allegations pertaining to issues in the parent's due process complaint notice that the IHO did not address, the parent denies the particular assertions made by the district (compare Pet. ¶¶ 36-47, with Answer ¶¶ 36-47). In addition, the parent affirmatively argues to uphold the IHO's decision that the district failed to offer the student a FAPE for the 2013-14 school year. As relief, the parent seeks to uphold the IHO's decision in its entirety.

In response to the parent's pleading the district alleges that while captioned as an "Answer," the parent cross-appeals much of the IHO's decision, and thus, the district considered the pleading as an "Answer and Cross-Appeal" and responds accordingly. In addition, the district rejects the parent's contention that it failed to offer the student a FAPE for the 2013-14 school year. The district further asserts that the March 2013 CSE considered, but rejected, the parent's request to place the student in a State-approved nonpublic school and that the parent actively participated at the March 2013 CSE meeting and was not deprived of the opportunity to participate in the development of the student's IEP. The district also argues that the parent's assertions that the March 2013 CSE failed to consider a 1:1 paraprofessional and failed to recommend parent counseling and training would not result in a denial of FAPE for the 2013-14 school year.

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]; 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. 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).

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

The district contends that particular issues alleged by the parent in the due process complaint notice but not addressed by the IHO would not alternatively result in a finding that the district failed to offer the student a FAPE for the 2013-14 school year. As indicated above, the parent generally responds to the allegations by denying them in the answer. However, the parent also continues to argue in the answer that different conclusions should be drawn from the evidence in the hearing record and/or that the unaddressed issues would also result in a finding that the district failed to offer the student a FAPE (see Answer ¶¶ 37-41, 44-47). A review of the IHO's decision in conjunction with the evidence in the hearing record reveals that the IHO failed to address numerous issues alleged by the parent in the November 15, 2013 due process complaint notice (compare IHO Decision at pp. 10-14, with Dist. Ex. 7 at p. 1).

Accordingly, the matter should be remanded to the IHO for a determination on the merits of the remaining issues set forth in the parent's November 15, 2013 due process complaint notice—and as set forth above in section III.A.—which have yet to be addressed by the IHO (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]. In addition to the issues the IHO must address on remand, the IHO should clarify and/or determine whether, as the district asserts in its answer to the cross-appeal, the parent's due process complaint notice properly included issues pertaining to the March 2013 CSE's failure to consider a 1:1 paraprofessional or failure to recommend parent counseling and training as a basis upon which to

conclude the district failed to offer the student a FAPE for the 2013-14 school year in the first instance (C.F. v. New York City Dep't of Educ., 2014 WL 814884, at *8 [Mar. 4, 2014]).[7] It is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to each of the unaddressed issues. Furthermore, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the remaining issues (see 8 NYCRR 200.5[j][3][xi][a]). Based on the foregoing, I decline to review the merits of the IHO's decision at this time. However, if either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf., D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

VII. Conclusion

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the remaining claims set forth in the parent's November 15, 2013 due process complaint notice and identified herein, which have yet to be addressed. At this time, it is therefore unnecessary to address the parties' remaining contentions in light of the determinations above.

IT IS ORDERED that the matter be remanded to the same IHO who issued the August 21, 2014 decision to determine the merits of the unaddressed issues set forth in the parent's November 15, 2013 due process complaint notice; and,

IT IS FURTHER ORDERED that, if the IHO who issued the August 21, 2014 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

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

CAROL H. HAUGE
STATE REVIEW OFFICER

[7] If the IHO determines such claims were not raised in the due process complaint, the parties should explain—and the IHO should determine—whether the issues nevertheless should be heard because this is a case in which the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, 250-51 [2d Cir. 2012]; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]).