The University of the State of New York

The State Education Department
State Review Officer
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No. 15-091

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

Appearances:
Friedman & Moses, LLP, attorneys for petitioner, Aeri Pang, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, a request for an award of compensatory educational services and which wholly denied a request for independent educational evaluations (IEEs) of the student. For reasons explained more fully below, this 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

In this case, the student has attended the same State-approved nonpublic school since the 2011-12 school year (kindergarten) (see Parent Ex. C at pp. 2-3; see generally Parent Exs. G-I; T-V). On April 25, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Ex. 1 at pp. 1, 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+3 special class placement at the same State-approved nonpublic school the student then-currently attended with the following related services: five 30-minute sessions per week of individual speech-language therapy (id. 1, 10-11; compare Dist. Ex. 1 at p. 11, with Parent Exs. G-I; T-V). The April 2013 CSE also determined that the student required strategies—including "positive behavioral interventions, supports and

other strategies"—to address behaviors that "impede[d] the student's learning or that of others," and included a behavioral intervention plan (BIP) with the April 2013 IEP (Dist. Ex. 1 at p. 3; see Dist. Exs. 3-4). In addition, the April 2013 CSE created annual goals with corresponding short-term objectives to address the student's needs; the CSE recommended special transportation services; and the CSE recommended that the student participate in alternate assessments (see Dist. Ex. 1 at pp. 4-9, 12-14).

On April 7, 2014, the CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (see Dist. Ex. 7 at pp. 1, 12). Continuing to find the student eligible for special education and related services as a student with autism, the April 2014 CSE recommended a 12-month school year program in a 6:1+3 special class placement at the same State-approved nonpublic school the student then-currently attended with the following related services: five 30-minute sessions per week of individual speech-language therapy (id. 1, 7-9; compare Dist. Ex. 7 at p. 9, with Dist. Ex. 1 at p. 11).[1] The April 2014 CSE also determined that the student required strategies—including "positive behavioral interventions, supports and other strategies"—to address behaviors that "impede[d] the student's learning or that of others," and included a BIP with the April 2014 IEP (Dist. Ex. 7 at pp. 2-3; see Dist. Exs. 11-12). In addition, the April 2014 CSE created annual goals with corresponding short-term objectives to address the student's needs; the CSE recommended special transportation services; and the CSE recommended that the student participate in alternate assessments (see Dist. Ex. 7 at pp. 4-7, 10-11).

In November 2014 during the 2014-15 school year, a Board Certified Behavior Analyst (BCBA) observed the student in his home environment (see Parent Ex. D at pp. 1-2, 5; see also Tr. pp. 224-26). The same BCBA attended a February 10, 2015 CSE meeting, which convened to conduct the student's annual review and to develop an IEP for the 2015-16 school year (see Dist. Exs. 17 at pp. 1, 9, 13; 18; Parent Ex. D at p. 5). At the February 2015 CSE meeting, the parent requested that the district provide the student with 10 hours per week of home-based applied behavior analysis (ABA) special education teacher support services (SETSS), and in response, the CSE indicated the need to further evaluate the student (see Parent Exs. C at p. 8; D at pp. 5-6; see also Dist. Ex. 23 at p. 1). In March 2015, the district school psychologist who attended the student's April 2013, April 2014, and February 2015 CSE meetings conducted a classroom observation of the student, and completed a psychoeducational evaluation of the student (see generally Dist. Exs. 22-23; compare Dist. Exs. 2; 8; 18, with Dist. Exs. 22-23). On April 9 and April 20, 2015, the BCBA formally assessed the student (see Parent Ex. D at pp. 6-11). On April 21, 2015, the CSE reconvened to review the student's updated psychoeducational evaluation and classroom observation reports, and at that time, the CSE declined the parent's request for home-based ABA SETSS (see Dist. Ex. 14 at pp. 1, 13; Parent Ex. C at p. 9).[2] In an e-mail dated April 22, 2015, the

[1] The student's eligibility for special education programs and related services as a student with autism for both the 2013-14 school year and the 2014-15 school year is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The BCBA did not attend the April 21, 2015 CSE meeting, and based upon the evidence in the hearing record, the parent did not advise the April 2015 CSE about the BCBA's assessment of the student during April 2015 (see Dist. Ex. 15; Parent Ex. D at p. 6; see also Tr. pp. 215-18, 236-38).

parent requested that the district conduct a speech-language therapy evaluation and an OT evaluation of the student (see Parent Ex. S).

A. Due Process Complaint Notice

By due process complaint notice dated April 24, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 and 2014-15 school years (see Parent Ex. A at pp. 1-2, 5-6). In particular, the parent asserted that the April 2013 IEP and the April 2014 IEP failed to include "1:1 instruction," ABA, "home-based instruction," "parent training at home," "toilet-training" and "feeding therapy," "home[-based] or center-based OT" services, assistive technology, and "peer-reviewed, research-based methods" (id. at pp. 4-6). Next, the parent alleged that the April 2013 CSE and the April 2014 CSE failed to provide the parent with "legally sufficient notice" of CSE meetings and that neither the April 2013 CSE nor the April 2014 CSE was properly composed (id. at pp. 4, 6). The parent further alleged that the April 2013 CSE and the April 2014 CSE impermissibly predetermined the student's "program and placement recommendation[s]" and applied "illegal blanket policies" regarding the "availability" of home-based or center-based related services for students who attended State-approved nonpublic schools (id.). In addition, the parent asserted that the April 2013 CSE and the April 2014 CSE deprived her of the opportunity to participate in the IEP development process (id. at pp. 5-6).

Next, the parent contended that neither the April 2013 CSE nor the April 2014 CSE relied upon "legally sufficient" evaluations to develop the IEPs, and neither CSE reevaluated the student prior to "terminating his OT" (Parent Ex. A at pp. 4-6). With regard to the present levels of performance, the parent asserted that both the April 2013 IEP and the April 2014 IEP included "vague" descriptions, and thus, failed to adequately describe the student's "strengths, weaknesses, and the ways in which his disabilities impact[ed] his ability to make progress in cognitive, developmental, academic and other functional areas" (id. at pp. 5-6). The parent also asserted that the annual goals in the April 2013 IEP and the April 2014 IEP were "vague, not measurable, and not individually tailored" to meet the student's needs (id.). More specifically, the parent alleged that the annual goals in both IEPs failed to "sufficiently address" all of the student's needs, including but not limited to toilet training, activities of daily living (ADL) skills, and behavior (id.). Additionally, the parent contended that the April 2013 IEP and the April 2014 IEP failed to include sufficient related services recommendations to meet the student's needs (id.). Finally with regard to both school years, the parent alleged that the "evaluation, IEP development, and placement processes" did not comply with standards for providing students with autism a FAPE pursuant to State regulation (id.).

Pertaining solely to the 2013-14 school year, the parent asserted that the CSE did not provide her with a "draft IEP before or during the meeting," and she only received a copy of the April 2013 IEP through the mail "after the meeting" (Parent Ex. A at p. 4). With respect to the 2014-15 school year, the parent also alleged that the CSE failed to provide timely notice of the April 2014 CSE meeting (id. at p. 5). More generally, the parent asserted violations of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 [1998]) (section 504), that the district applied "blanket policies" regarding the student's "IEP and placement," the district "substantially changed" the student's placement without reevaluation, the district committed "systemic

violations" of the IDEA and section 504, and the district deprived the student of access to "[S]tate-created educational rights and opportunities based upon his disability" (id. at pp. 6-7).

As relief, the parent indicated that while the student had not been "appropriately and thoroughly evaluated" and had not "received appropriate special education services," compensatory educational services or additional services to remedy the alleged violations should include, "at a minimum," the following: a bank of "1:1 after-school ABA services," a bank of "private 1:1 OT" services at an "enhanced rate" and by a provider of the parent's choosing, and "[a]ssistive [t]echnology" (Parent Ex. A at p. 7). In addition, the parent requested an "interim order" directing the district to fund "comprehensive independent evaluations" of the student (i.e., speech-language, OT, and an evaluation by a BCBA or "PhD") because the parent was "entitled to them" in light of the "deficiencies" in the district's evaluations and pursuant to the IHO's authority to order the same to "inform the hearing process" (id. at pp. 7-8). Next, the parent requested a final order directing the district to provide the following: a "minimum" of 35 hours per week of "1:1 ABA services," home-based speech-language therapy consistent with the results of the "independent" speech-language evaluation, home-based "1:1 OT" services consistent with the results of the "independent" OT evaluation, assistive technology, a 12-month school year program, special education transportation with "limited travel time/short bus run," and a "legally valid IEP that incorporate[d] the services above" (id. at p. 7). The parent also requested "[c]ompensatory education, additional and/or make-up ABA, and related services" for the district's failure to implement the student's pendency (stay-put) services and for the failure to offer the student a FAPE for the 2013-14 and 2014-15 school years (id.).

B. Impartial Hearing Officer Decision

On May 6, 2015, the IHO conducted a prehearing conference; shortly thereafter, the parent prepared an amended due process complaint notice, dated May 19, 2015 (see May 6, 2015 Interim IHO Order at pp. 1, 3; Parent Ex. B at p. 1).[3] On May 21, 2015, the IHO conducted a second prehearing conference, and on June 29, 2015, the parties completed the impartial hearing (see May 21, 2015 Interim IHO Order at pp. 1, 3; Tr. pp. 1-353). In a decision dated July 29, 2015, the IHO found both the April 2014 IEP and the February 2015 IEP "invalid" because the student's then-current special education teacher at the State-approved nonpublic school (special education teacher)—who attended the April 2014 CSE meeting and the February 2015 CSE meeting—did

[3] In addition to reasserting, verbatim, all of the allegations as set forth in the April 2015 due process complaint notice, the parent added the following new information and allegations to the May 2015 amended due process complaint notice: the BCBA who observed the student recommended 35 hours per week of "after-school ABA" for the student, as well as "parent training;" the BCBA recommended a "formal" functional behavioral assessment (FBA) and a "formal" BIP to be implemented across settings--including "school, home and community"—as part of a home-based ABA program; the student's behavior "regressed" during the 2014-15 school year, and he became "more aggressive at home and at school;" the parent requested home-based ABA services at a CSE meeting; the CSE denied the parent's request for home-based ABA services; the district failed to evaluate the student since 2011; and the district's updated psychoeducational evaluation and classroom observation of the student were "cursory, not in-depth, and failed to provide an accurate profile" of the student (compare Parent Ex. A at pp. 3-6, with Parent Ex. B at pp. 3-7). With regard to the 2014-15 school year, the parent no longer alleged that the district failed to reevaluate the student prior to "terminating his OT" (compare Parent Ex. A at pp. 5-6, with Parent Ex. B at pp. 5-6). For relief, the parent reiterated her requests as set forth in the April 2015 due process complaint notice, and she added a request for the completion of an FBA and a BIP by a "PhD or a BCBA" (compare Parent Ex. A at pp. 7-8, with Parent Ex. B at pp. 8-9).

not, according to the IHO, "participat[e]" at these particular CSE meetings as contemplated by State regulation (IHO Decision at pp. 6-8). The IHO also found that while the parent and the special education teacher testified that the "current program" was appropriate for the student, the evidence indicated that the student made "little if [any] progress" and his "behaviors such as biting his wrist and aggression [were] increasing" (id. at p. 8). Therefore, in light of the foregoing, the IHO ordered the "neighboring school district" to convene a CSE meeting prior to August 30, 2015 to create the student's IEP for the 2015-16 school year (id.).

Turning to the parent's request for compensatory educational services and IEEs, the IHO declined to award "interim relief before or at the [impartial] hearing" because the hearing record lacked any evidence upon which to base such an award (IHO Decision at p. 8). With regard to the request for home-based ABA services, the IHO indicated that the BCBA's "assessment and school observation [of the student] dated April 9, 20, 2015" post-dated the CSE meetings and the BCBA did not review any of the student's psychoeducational evaluations, functional behavioral assessments (FBAs), or BIPs (id.). Consequently, the IHO concluded that the BCBA's report was "not credible" (id.). However, based upon the special education teacher's testimony and recommendation, the IHO ordered the district to provide the student with two hours per day of "after school . . . ABA services" (id.). Concerning the request for parent counseling and training, the IHO determined that the State-approved nonpublic school offered this service during the 2013-14 school year, but due to "construction" at the site, the State-approved nonpublic school did not offer parent counseling and training services during the 2014-15 school year (id. at p. 9). Given that State regulation required districts to provide this service to parents of students with autism to "perform appropriate follow-up intervention activities at home," the IHO ordered the district to provide a "total of 12 hours" of parent counseling and training to the parent prior to December 2015 "in addition" to the parent counseling and training services the parent "should receive" for the 2015-16 school year (id.).

Next, the IHO addressed the parent's request for additional speech-language therapy services (see IHO Decision at p. 9). Initially, the IHO noted that the hearing record included yearly speech-language therapy progress reports beginning in 2012, which presented the "student's evaluation as to [r]eceptive [l]anguage, [e]xpressive [l]anguage and [r]ecommendations" (id.). The IHO also noted that since 2012, the student received five 30-minute sessions per week of individual speech-language therapy services; the student exhibited "limited cognitive functioning;" and prior to using an "iPad" to communicate, the student used a "PECS communication system" (id.).[4] In light of the foregoing, the IHO concluded that neither the evidence nor the testimony supported an "increase in speech services," and thus, denied the parent's request (id.).

Thereafter, the IHO rejected the parent's "brief claims" that the district "'never conducted'" a speech-language evaluation or an OT evaluation of the student, and failed to conduct a psychoeducational evaluation of the student since 2011 (IHO Decision at p. 9). Rather, the IHO found that the district most recently completed a psychoeducational evaluation of the student in May 2015, and determined that the parent's argument "without merit" (id.).

[4] As indicated in the hearing record, "PECS" refers to a "picture exchange communication system" (Parent Ex. BB at p. 2).

Turning next to the topic of OT, the IHO noted that the respective CSEs recommended that the student receive three 30-minute sessions per week of individual OT in both a June 2011 IEP and a June 2012 IEP (see IHO Decision at p. 10). However, the IHO also found that neither the April 2013 IEP nor the April 2014 IEP included a recommendation for OT services (id.). The IHO further noted that the evidence in the hearing record did not include an OT evaluation of the student, and the parent testified that the State-approved nonpublic school the student attended did not provide OT services (id.). Then, without further explanation, the IHO ordered the district to complete an OT evaluation of the student no later than August 15, 2015 (id.). In a similar fashion, the IHO ordered the district to complete an assistive technology evaluation of the student no later than August 15, 2015 after noting that the student "communicate[d] through the iPAD (sic) on a TalkBoard application" provided by the parent (id.).

Finally, the IHO found it "unnecessary" to address the parent's request for a 12-month school year program, as the student currently received the same (see IHO Decision at p. 10). Next, the IHO declined to determine the parent's request for special education transportation, noting that the hearing record failed to contain any evidence upon which to make such determination (id.). Similarly, the IHO found that the hearing record lacked evidence to support the parent's request for compensatory education services to redress the district's failure to implement pendency services for the 2013-14 and 2014-15 school years (id.). Additionally, the IHO found that the parent failed to specify the compensatory educational services she requested or identify the "period to compensate" and "what service" to compensate (id.). Turning next to the parent's request for IEEs, the IHO concluded that the hearing record lacked sufficient evidence to establish that the parent disagreed with "any evaluation conducted" by the district, and therefore, the IHO denied the parent's request (id. at pp. 10-11). The IHO then concluded that the hearing record did not support the "additional arguments in the parent's brief" and furthermore, that "[a]ll other claims were abandoned and therefore denied" (id. at p. 11). In sum, the IHO ordered the "neighboring school district" to convene a CSE meeting consistent with the decision and with the transcript of the impartial hearing, and the IHO ordered the district to provide the student with two hours per day of "after school . . . ABA services," to provide the parent with 12 hours of parent counseling and training prior to December 2015 (in addition to the parent counseling and training the parent should receive during the 2014-15 school year), and to conduct an OT evaluation and an assistive technology evaluation of the student prior to August 15, 2015 (id.).

IV. Appeal for State-Level Review

The parent appeals, and initially asserts that the IHO failed to address the request for "interim relief," the IHO improperly limited the parent's evidence and did not allow the parent to make a "complete record," and the IHO refused to admit evidence relevant to issues in the due

process complaint notice.[5] The parent further asserts that while the IHO properly concluded that both the April 2014 IEP and the February 2015 IEP were "invalid," the IHO failed to decide and failed to address issues regarding whether the district offered the student a FAPE for the 2013-14 school year. Moreover, the parent contends that—based upon the issues unaddressed by the IHO, including but not limited to the district's failure to evaluate the student, the district's failure to develop adequate annual goals and transition goals, and the failure to include information in both IEPs pertaining to the student's ability to generalize or function at home—the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years. In addition, the parent asserts that the CSEs were not properly composed. The parent alleges that the IHO improperly determined that the BCBA's report was "not credible." The parent also alleges that the IHO misallocated or shifted the burden of proof to the parent on several issues, including but not limited to the parent's requested relief. Next, the parent contends that the IHO failed to find that the district impermissibly predetermined the student's programs and placements and applied "blanket policies that set service delivery by rules or other administrative criteria" in violation of the IDEA and section 504. The parent contends that the IHO failed to decide the section 504 allegations raised in the due process complaint notices, and the IHO improperly denied the "'additional arguments'" in the parent's brief as unsupported by the evidence in the hearing record. The parent also argues that the IHO improperly denied any and all remaining claims as "'abandoned'" by the parent. As a final matter, the parent alleges that the IHO's conduct during the impartial hearing raised "serious concerns" about the IHO's ability to "conduct a fair hearing."

With respect to the relief awarded by the IHO, the parent contends that two hours per day of "after-school ABA services" was not sufficient to address the student's severe needs, and the IHO should have awarded 35 hours per week of home-based ABA services. In addition, the parent asserts that the IHO should have awarded 104 hours of parent counseling and training as relief for the district's failure to provide this service during the 2014-15 school year, and furthermore, the IHO erred in failing to award any parent counseling and training services to redress the failure to provide this service during the 2013-14 school year. The parent further asserts that the IHO erred by failing to award the following relief: assistive technology, the parent's requested IEEs (an FBA and a BIP by a BCBA, an OT evaluation, and a speech-language evaluation), and compensatory educational services (home-based ABA services, OT services, and speech-language therapy services). The parent also argues that the district's March 2015 psychoeducational evaluation of

[5] To this end, the parent submits the precluded evidence as additional documentary evidence for consideration on appeal; the district objects to the consideration of these documents (see generally Pet. Exs. C-M; Answer ¶¶ 29-30). The parent also submits copies of both the parent's and the district's respective closing memoranda provided to the IHO, as well as a copy of the IHO's prehearing conference order, as additional documentary evidence for consideration on appeal (see generally Pet. Exs. A-B; "PHO"). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the district submitted copies of the IHO's prehearing conference orders and copies of the parties' closing memoranda to the Office of State Review as part of the administrative hearing record; therefore, I will exercise my discretion and decline to accept or consider the duplicative exhibits proffered by the parent (see generally Pet. Exs. A-B; "PHO"). Given that this matter must be remanded to the IHO for further administrative proceedings, I also decline to decide at this time whether the parent's remaining additional documentary evidence is required in order to render a decision on appeal (see Pet. Exs. C-M).

the student was not sufficient, and the IHO improperly remanded the matter to a CSE to craft an award of compensatory educational services. For relief on appeal, the parent seeks the following: findings that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years, findings that the parent prevailed on "all of the allegations" in the due process complaint notice, an award of compensatory educational services as set forth in the petition, modifications to the student's IEP to include the "service set forth" in the petition, an award directing the district to fund the requested IEEs "via direct payment at a reasonable market rate," and additional assistive technology as set forth in the petition.

In an answer, the district responds to the parent's allegations and generally argues that the IHO properly denied the parent's requests for additional speech-language therapy services and IEEs, and further, that the IHO did not conduct herself inappropriately at the impartial hearing. The district also argues that although the IHO did not address the parent's section 504 claims, an SRO does not have jurisdiction over such claims, and therefore, the section 504 claims must be dismissed. Next, the district asserts that contrary to the parent's request for assistive technology, the student is not entitled to a publicly funded iPad.[6] The district also asserts that the parent is not entitled to 104 hours of parent counseling and training services because the failure to recommend this service in both the April 2013 IEP and the April 2014 IEP did not result in a failure to offer the student a FAPE.[7]

In a cross-appeal, the district contends that the IHO erred in finding that the April 2014 IEP and the February 2015 IEP were "invalid," and as a result, the parent is not entitled to any award of compensatory educational services. The district further contends that the IHO exceeded her jurisdiction to the extent that the IHO concluded that the district failed to offer the student a FAPE for the 2015-16 school year because the parent did not raise any allegations in the due process complaint notice pertaining to the 2015-16 school year and the district did not agree to expand the scope of the impartial hearing. Next, the district argues that the April 2014 IEP offered the student a FAPE, and although the IHO did not address issues related to the April 2013 IEP, the district contends the April 2013 IEP offered the student a FAPE for the 2013-14 school year. Finally, the district argues that the IHO erred in directing the district to provide the student with home-based ABA services and the parent is not entitled to 35 hours per week of home-based ABA or 60 minutes per week of parent counseling and training services. The district also argues that the IHO erred in directing the district to conduct an OT evaluation of the student.

In an answer to the cross-appeal, the parent responds to the district's allegations and continues to argue that, based upon issues unaddressed by the IHO, the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years. The parent admits, however, that—as correctly noted by the district—the due process complaint notices did not include any allegations pertaining to the 2015-16 school year. Notwithstanding this admission, the parent alleges that the February 2015 IEP "relates to the recommendations for the 2014-15 school year." In addition, the

[6] The district did agree to implement the IHO's directive to conduct an assistive technology evaluation of the student and to review this evaluation report to determine whether the student required a "particular communication device to address any communication needs" (Answer ¶ 36).

[7] The district noted that it has already implemented the IHO's directive to provide the parent with 12 hours of parent counseling and training services prior to December 2015 (see Answer ¶ 37).

parent continues to argue that the IHO erred in the relief awarded and in favor of the relief requested in the petition.

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, 180-83, 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]). 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 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 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]).

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—Scope of Impartial Hearing and Unaddressed Issues

Before turning to the parent's appeal and the district's cross-appeal, I must first determine which claims are properly before me. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 2014 WL 2748756, at *1-*2 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this case, a review of the evidence in the hearing record reveals that the IHO exceeded her jurisdiction by sua sponte raising and relying upon an issue concerning the participation of the student's special education teacher in the development of both the April 2014 IEP and the February 2015 IEP—an issue the parent did not raise in either the April 2015 due process complaint notice or in the May 2015 amended due process complaint notice—as the sole basis upon which to conclude that both the April 2014 IEP and the February 2015 IEP were "invalid" (see Tr. pp. 1-351; Dist. Exs. 1-25; Parent Exs. A-Z; AA-KK; MM; WW-YY; compare Parent Ex. A at pp. 1-8, and Parent Ex. B at pp. 1-9, with IHO Decision at pp. 7-8).[8] Consequently, the IHO's findings that the April 2014 IEP and the February 2015 IEP were "invalid" must be vacated.

Turning next to the parent's appeal, the parent contends that the IHO failed to decide and failed to address issues regarding whether the district offered the student a FAPE for the 2013-14 school year. The parent further contends that issues alleged in the due process complaint notices—but not addressed by the IHO—would result in findings that the district failed to offer the student a FAPE for both the 2013-14 and 2014-15 school years. In its cross-appeal, the district argues that the IHO exceeded her jurisdiction to the extent that the IHO concluded that the district failed to offer the student a FAPE for the 2015-16 school year because the parent did not raise any allegations in the due process complaint notice pertaining to the 2015-16 school year and the district did not agree to expand the scope of the impartial hearing. In addition, the district responded to the parent's allegations in the petition by generally arguing in the answer that the district offered the student a FAPE for both the 2013-14 and 2014-15 school years. A review of the IHO's decision in conjunction with the evidence in the hearing record reveals that the IHO failed to address any of the numerous issues alleged by the parent in either the April 2015 due process complaint notice or alleged in the May 2015 amended due process complaint notice, and in particular, the IHO failed to render any findings related to the 2013-14 school year, as alleged by the parent (compare IHO Decision at pp. 2-11, with Parent Ex. A at pp. 1-8, and Parent Ex. B at pp. 1-9).

Accordingly, and notwithstanding the parent's appeal of the IHO's decision, the matter should be remanded to the IHO for a determination on the merits of the remaining issues set forth in the parent's April 2015 due process complaint notice and in the May 2015 amended due process complaint notice, which have yet to be addressed by the IHO (see Educ. Law § 4404[2]; F.B. v.

[8] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when 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 at 250-51; see N.K., 961 F. Supp. 2d at 585; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [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]), a review of the hearing record reveals that the issue raised sua sponte by the IHO during the impartial hearing occurred after the district's attorney completed his cross-examination of a parent witness (see Tr. pp. 160-63). Here, the district did not initially elicit testimony regarding this issue or attempt to obtain a strategic advantage to defeat a claim raised in the due process complaint notices; therefore, the district did not "open the door" to these issues under the holding of M.H. (see A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *6). A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, and although the parent amended the original due process complaint notice, the parent did not seek to further amend the due process complaint notice to include this as an issue for the district to defend or for the IHO to resolve (see Tr. pp. 1-351; Dist. Exs. 1-25; Parent Exs. A-Z; AA-KK; MM; WW-YY).

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 this instance, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved based upon the parent's April 2015 due process complaint notice and the May 2015 amended due process complaint notice—including whether the parent alleged issues related to the 2015-16 school year and if so, which IEP the parent challenged pertaining to the 2015-16 school year (see 8 NYCRR 200.5[j][3][xi][a]).[9] Moreover, while it is generally 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, it is strongly suggested that the parties submit any newly acquired evaluative information into the hearing record (for example, the OT evaluation ordered by the IHO to be completed by August 15, 2015 and the assistive technology evaluation of the student the district agreed to conduct) to further develop the hearing record.[10,11]

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 issues set forth in the parent's April 2015 due process complaint notice and in the May 2015 amended due process complaint notice, 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 July 29, 2015 decision to determine the merits of the unaddressed issues set forth in the parent's May 2015 amended due process complaint notice; and,

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[9] This is particularly important since the parent, as relief, seeks modifications to the student's IEP to include the "service set forth" in the petition—relief that cannot be granted unless the parent challenged an IEP for the 2015-16 school year.

[10] In addition, while a CSE would not apply the same standard to determine whether a student required home-based ABA services pursuant to the IDEA, it may be helpful to develop the hearing record regarding the State-approved nonpublic school's previous attempts to assist the parent in securing home-based ABA services via Medicaid, and the reasons for the denial of such services, to better inform the CSE process moving forward with this student (see Tr. pp. 273-74).

[11] It is also strongly suggested that the IHO and the parties determine whether additional evidence is required in light of the fact that the district entered two identical affidavits as direct witness testimony for two different witnesses (compare Dist. Ex. 24 at pp. 1-11, with Dist. Ex. 25 at pp. 1-11).

IT IS FURTHER ORDERED that, if the IHO who issued the July 29, 2015 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**
December 8, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER