The University of the State of New York

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

No. 17-009

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:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, Gail M. Eckstein, Esq., of counsel

The Cuddy Law Firm, PLLC, attorneys for respondents, Andrew Weisfeld, 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 an "amended" decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2016-17 school year was not appropriate and ordered, among other things, placement in an "all-day ABA program." The appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4).[1] 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.

Given the disposition of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, the student was found eligible for services through the Early Intervention Program (EIP) in February 2013(Parent Exs. M at p. 3; N at p. 2). On January 23, 2014, a

[1] In September 2016, Part 279 of the practice regulations were amended, effective January 1, 2017, which are applicable to all appeals served on an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the amendments, as this appeal was served upon the district after January 1, 2017, the amended provisions of Part 279 apply.

Committee on Preschool Special Education (CPSE) convened, determined that the student was eligible for special education as a preschool student with a disability, and recommended that the student attend a 12:1+2 special class placement in an "Approved Special Education Program," two 30-minute sessions of speech-language therapy per week, two 30-minute sessions of occupational therapy (OT) per week, and two 30-minute sessions of physical therapy (PT) per week (Parent Ex. B at pp. 1-2, 5). The CPSE reconvened on June 26, 2014 and changed the recommended program to include placement in an 8:1+2 special class with the same related services (compare Parent Ex. B at p. 2, with Parent Ex. C at p. 1).

The CPSE convened on June 16, 2015, determined that the student remained eligible for special education as a preschool student with a disability, and recommended that the student continue in an 8:1+2 special class placement in an approved special education program (Parent Ex. D at pp. 1, 18, 21). The CPSE also recommended that the student receive services for the 12-month school year and increased the frequency of the student's speech-language therapy and OT to three sessions per week each (id. at p. 18).

On March 3, 2016, a CSE convened to conduct the student's "Turning 5" review, determined the student was eligible for special education as a student with a speech or language impairment, and developed an IEP for the student with an implementation date of September 6, 2016 (Tr. pp. 64-65; Parent Ex. E at pp. 1, 13). The CSE recommended placement in a 12:1+1 special class for ELA, math, social studies, and science in a community school with the following related services on a weekly basis: one session of individual speech-language therapy, two sessions of speech-language therapy in a group of three, one session of individual OT, two sessions of OT in a group of three, and two sessions of PT in a group of three (Parent Ex. E at pp. 9, 13). The CSE also recommended the service of an individual full-time crisis management paraprofessional (id. at p. 10).[2]

The CSE reconvened on March 14, 2016 after the parents toured a particular 12:1+1 classroom in a district public school (Tr. pp. 120-22; Dist. Ex. 1 at p. 3; Parent Ex. F at p. 16). The March 14, 2016 CSE continued the recommendations made in the earlier March 2016 IEP (compare Parent Ex. E at pp. 9-10, with Parent Ex. F at pp. 9-10). The district conducted a psychoeducational evaluation in April 2016 at the parent's request (Parent Ex. AA). By letter dated June 2, 2016, the parent stated her disagreement with the program recommended in the March 2016 IEP, as well as with the April 2016 psychoeducational evaluation report, and requested an independent educational evaluation (IEE) of the student to include assessments in specified areas (Parent Ex. EE). The CSE reconvened again on June 7, 2016 to review the results the psychoeducational evaluation conducted by the district (Tr. pp. 123-24; Parent Ex. G at p. 14). The June 2016 CSE continued the recommendations made in the March 2016 IEPs (compare Parent Ex. E at pp. 9-10, with Parent Ex. F at pp. 9-10, and Parent Ex. G at pp. 9-10).

[2] The hearing record is not clear as to whether the recommendation for an individual full-time crisis management professional was initially made during the March 3 or March 14, 2016 CSE meeting (see Tr. pp. 111-12, 120; Parent Exs. E at p. 10; F at p. 10).

A. Due Process Complaint Notice

By due process complaint notice, dated July 18, 2016, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15, 2015-16, and 2016-17 school years (Parent Ex. A at p. 1). The parents alleged numerous substantive and procedural violations, which broadly included allegations that the district failed to ensure the parents' attendance at every CPSE meeting and denied the parents the opportunity to meaningfully participate in planning the student's educational programs and that the district, CPSE, and/or CSE failed to: conduct timely and comprehensive evaluations; respond to the parent's request for an IEE; ensure attendance of appropriate evaluators, teachers, or providers at CPSE or CSE meetings; appropriately classify the student; accurately identify the student's present levels of performance; develop appropriate annual goals for the student; recommend appropriate behavioral interventions, conduct a functional behavioral assessment (FBA), or develop a behavioral intervention plan (BIP); recommend assistive technology; recommend appropriate related services; recommend a sufficiently supportive class ratio or an otherwise appropriate placement; recommend a 12-month school year in each IEP; and recommend applied behavioral analysis (ABA) methodology (id. at pp. 2-10). Additionally, the parents asserted that the student did not make progress and experienced regression "in many areas" during the school years at issue (id. at pp. 2, 4).

As a proposed resolution, the parents requested that the IHO find that the district denied the student a FAPE for the 2014-15, 2015-16, and 2016-17 school years and order the following: that the district provide the parents with attendance records for all of the student's related service sessions for the three years at issue; that the district fund an IEE including specified assessments; that the CSE reconvene to review the IEE and create an IEP with certain specified content; that the district place the student in an appropriate school that specializes in addressing the needs of students with autism and "severe behavioral needs"; that the district provide transportation to and from the "new educational placement"; that the district provide compensatory education services, including home-based ABA services; and that the district pay the parents' attorney's fees and costs (id. at pp. 10-12).

B. Impartial Hearing Officer Decisions

An impartial hearing convened on September 19, 2016, and concluded on November 28, 2016, after three days of proceedings (Tr. pp. 1-415). During the second hearing date on October 17, 2016, the IHO determined that the parents were entitled to an IEE (Tr. pp. 212-16), and on October 20, 2016 the IHO issued an interim order directing the district to pay for an IEE to include the following assessments: a neuropsychological evaluation, a physical evaluation, an OT evaluation, an FBA and an ABA skills assessment, and a speech-language and alternative augmentative communication evaluation (Oct. 20, 2016 Interim IHO Decision).[3]

[3] The IHO issued an amended interim order on October 25, 2016 with the only change clarifying that the order for a "physical evaluation" was supposed to be an order for a "physical therapy evaluation" (compare Oct. 20, 2016 Interim IHO Decision at p. 2, with Oct. 25, 2016 Interim IHO Decision at p. 2).

By decision dated December 8, 2016, the IHO determined that the district failed to offer the student a FAPE for the 2016-17 school year (Dec. 8, 2016 IHO Decision at pp. 6-8).[4] The IHO found that the district witnesses contradicted themselves and noted that the March 2016 and July 2016 CSEs recommended the 12:1+1 special class, notwithstanding testimony the district school psychologist was aware of the issues "facing the pre-school when the ratio for the pre-school was higher than 12:1:1" and evidence that other district staff believed the student needed a more supportive setting, (id. at pp. 7-8). The IHO found that the parents' witnesses and documentary evidence were generally credible and determined that the district's recommended placement was not appropriate and the district's FBA and BIP for the student were inadequate (id. at p. 8).

Regarding relief, the IHO denied the parents' request that the student be placed at a non-State approved nonpublic school at district expense, reasoning that the parents failed to specify a school or provide testimony regarding its appropriateness (Dec. 8, 2016 IHO Decision at p. 8). The IHO noted that, at the close of the impartial hearing, the district had plans to convene a CSE to recommend a new placement for the student (id.). The IHO ordered the district to provide the student with ten hours of in-school ABA services until the district placed the student in the new program (id.). As to the new educational program and placement for the student, the IHO ordered the CSE to consider the recommendations of the evaluators who conducted the October 2016 neuropsychological evaluation and the November 2016 FBA, develop a new BIP for the student, and recommend a new program for the student that "should entail an ABA program," and "shall" provide for twelve hours of ABA services to be provided in the student's home, "[p]arent training four hours a month[,] twice for each parent," the board certified behavior analyst (BCBA) to oversee the student's home and school program for two hours per month, a 12-month school year program, appropriate assistive technology, the student's related services on an individual basis until the student's behaviors are controlled, a change in the student's eligibility classification to autism, and four 30-minute individual speech-language therapy sessions per week (id. at pp. 8-9). The IHO also ordered the district to provide the student with 120 hours of compensatory ABA services (id. at p. 9).

The IHO issued an "Amended Findings of Fact and Decision," dated January 4, 2017, which included an additional finding of fact and an additional order (Jan. 4, 2017 IHO Decision at pp. 8-9). The IHO's additional finding read as follows: "I further find based on the testimony presented by both the parents' and District's witnesses that the student requires an all-day ABA program, not just an hour or two a day" (id. at p. 8). Under the heading "Amended Order," the IHO also included the following relief: "The District . . . shall provide within three weeks from the receipt of this decision and order an all-day ABA program. If the District fails to provide such a program then the case shall be referred to CBST for a full time ABA program" (id. at p. 9).[5] The

[4] The IHO did not make a determination about whether or not the district offered the student a FAPE for the 2014-15 or 2015-16 school years, notwithstanding that these school years were included in the parents' due process complaint notice and remained at issue during the impartial hearing (see Dec. 8, 2016 IHO Decision at pp. 6-9; Parent Ex. A at p. 1; see, e.g., Tr. pp. 37-56). However, as neither party has identified claims relating to the 2014-15 or 2015-16 school years as issues to be resolved on appeal, they have been deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][4]).

[5] Although not defined in the hearing record in this case, CBST likely refers to the district's central based support team, an entity which facilitates placement in nonpublic schools (see, e.g., Application of a Student with a Disability, Appeal No. 15-054; Application of a Student with a Disability, Appeal No. 15-051).

remainder of the IHO's decision remained unchanged, including the order that "[t]he new program should entail an ABA program" (compare Jan. 4, 2017 IHO Decision at p. 8; with Dec. 8, 2016 IHO Decision at p. 8).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO exceeded his jurisdiction by issuing an "amended" decision which altered the substance of the original decision. The district indicates that it is not appealing the IHO's original December 8, 2016 decision, and has implemented the relief ordered therein. More specifically, the district alleges that a CSE convened on December 9, 2016 and complied with the IHO's December 8, 2016 decision by recommending an educational placement that included the provision of ABA services and staff members trained in ABA methodology, as well as the other relief ordered by the IHO. The district alleges that, if the parents sought a different outcome, rather than seeking relief from the IHO in the form of a clarification or an amended decision, the parents' proper course of action would have been to appeal the IHO's December 8, 2016 decision to an SRO or to file a new due process complaint notice challenging the December 2016 IEP.

The district further objects to the IHO's conduct after the issuance of the December 8, 2016 IHO decision. The district alleges that the IHO engaged in misconduct by inserting himself into post-hearing email communications between the parties. The district alleges that the IHO wrongly assumed facts based on the parents' attorney's emails, specifically regarding the district's compliance with the IHO's original decision and the appropriateness of a public specialized school. The district further alleges that the IHO's language demonstrated a contempt for the district's staff, programs, and schools. Lastly, the district alleges that it was "highly improper" for the IHO to have speculated about potential legal proceedings the parents' attorneys could bring against the district on behalf of teachers or the student's classmates. The district alleges that the IHO's behavior affected the outcome of the impartial hearing and requests a finding of misconduct against the IHO. In support of its arguments, the district submits additional evidence with its request for review, including the student's December 2016 IEP and the aforementioned email correspondence.

In an answer, the parents assert that the IHO acted within his authority to issue a clarification of his original decision, which did not constitute a substantive change to his December 8, 2016 decision. The parents assert that the clarification in the January 4, 2017 IHO decision was warranted "due to Petitioner's failure to appropriately understand the IHO's intent and appropriately implement the Original Decision." The parents also assert that the district's allegations of IHO misconduct are improper as they are outside the permissible scope of an appeal. The parents also dispute the district's characterization of the IHO's conduct and allege that the emails sent by the parents' attorney and the IHO were proper. Attached to their answer, the parents submit an affidavit from the student's mother as additional evidence.

V. Discussion

A. Preliminary Matters – Additional Evidence

Both the district and the parents submit additional evidence with the request for review and the answer, respectively. Generally, documentary evidence not presented at an impartial hearing

may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; 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, all of the additional evidence postdates the December 8, 2016 IHO decision and was, therefore, unavailable at the time of the hearing (Req. for Rev. Exs. 1-2; Answer Ex. A). The December 2016 IEP (offered with the request for review) and the parent's February 23, 2017 Affidavit (offered with the answer) bear solely on the issue of enforcement of the IHO's December 8, 2016 decision and are, therefore, not necessary to render a decision in this matter (Req. for Rev. Ex. 1; Answer Ex. A). Accordingly, I decline to accept these documents as additional evidence. The emails between the parties and the IHO, which date from December 12, 2016 through January 3, 2017, are discussed by both parties extensively in their pleadings and provide background information with respect to the issuance of the IHO's January 4, 2017 decision (see Req. for Rev. Ex. 2). Accordingly, I accept the email correspondence as additional evidence on that basis.

B. Amended Decision – Retaining Jurisdiction

With regard to the parties dispute over the January 4, 2017 decision, an IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of Educ., Appeal No. 08-041). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Correspondence between the parties and the IHO after the IHO issued the December 8, 2016 decision provides some background for the IHO's issuance of the January 4, 2017 decision (see Req. for Rev. Ex. 2). The parents' attorney emailed the IHO on December 12, 2016, requesting "that the IHO clarify and possibly amend the decision to specify a deferral to CBST so that the Student c[ould] be placed in an appropriate ABA program" (id. at pp. 3-4). The parents' attorney also noted that the December 8, 2016 decision had ordered that "[t]he new program should entail an ABA program," that the IHO had directed the CSE to consider the recommendations of the evaluators who conducted the October 2016 neuropsychological evaluation and the November 2016 FBA, and that those evaluation reports both recommended an out-of-district ABA program for the student (id. at p. 3). However, the parents' attorney informed the IHO that the CSE had convened on December 9, 2016 and recommended a district specialized school for the student and

indicated that district specialized schools generally did "not employ an ABA methodological approach" (id.). In response, a representative from the district's impartial hearing representation office informed the IHO and the parents' attorney that the district was investigating whether the December 2016 CSE meeting was held to address the IHO's order (id. at p. 2). The IHO replied to the district and the parents' attorney and suggested that "the CSE reconvene immediately, follow [the] order in [his] decision to avoid this student from continuing to engage in self-injurious conduct [or] injuring other students and faculty" and noted that the district was "on notice as to this student's maladaptive behavior and any additional injury caused by placing this student in a District [specialized school] (6:1 is the best they offer) will be on the decision of the members of the CSE" (id. at pp. 1-2). The parents' attorney sent another e-mail to the IHO on January 3, 2017, reasserting that the district was placing the student "in a [district specialized school] despite [the IHO's] order for an ABA program" and repeating the request "that the decision be amended to explicitly state that the matter be deferred to CBST for placement in a full-day specialized ABA program" (id. at p. 1). Subsequently, the IHO issued the amended decision on January 4, 2017 adding the new factual finding that student required an "all-day ABA program, not just an hour or two a day" and providing for the additional relief that the district provide the student with an "all-day ABA program" within three weeks and that if the district fail[ed] to do so, that it refer the matter to the CBST for a nonpublic school placement (compare Dec. 8, 2016 IHO Decision at pp. 8-9; with Jan. 4, 2017 IHO Decision at pp. 8-9).

Although not explicitly an issue on appeal, the e-mail correspondence discussed above and the pleadings from both parties reflect a significant level of discussion relating to the enforcement of the IHO's December 8, 2016 decision. The district contends on appeal, that it has complied with that December 8, 2016 decision and provided the relief awarded by the IHO. As part of their argument that the January 4, 2017 decision is a clarification of the IHO's intent, rather than an amendment of the December 8, 2016 decision, the parents assert that a clarification was necessary because the district failed to implement the December 8, 2016 decision by failing to provide an all-day ABA program for the student. However, both parties appear to have misconstrued the authority of the IHO and SROs, who do not have the authority to enforce orders (see Educ. Law § 4404[1][a], [2]; see also H.C. v. Colton-Pierrepont Cent. Sch. Dist., 341 Fed. App'x 687, 689-90 [2d Cir. July 20, 2009] [finding that the "enforcement dispute [wa]s purely a matter of determining [the district's] obligation under the settlement agreement" and d[id] not concern the 'identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child'], quoting 20 U.S.C. § 1415[b][6][A]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent enforcement power and granting an injunction requiring the district to implement a final SRO decision]). To the extent that the parents continue to believe that the district failed to implement the December 8, 2016 decision, the parents may file a State complaint against the district through the State complaint process for failure to implement a decision reached through due process or alternatively may seek enforcement through the judicial system (see 34 CFR 300.152 [c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]). Consequently, to the extent that the IHO's January 4, 2017 decision reflected the IHO's attempt to enforce the relief he awarded in his December 8, 2016 decision based on his view that the district failed to implement that relief in the interim was in error. The parties' continued representations

regarding the district's implementation of the December 8, 2016 IHO Decision will not be considered further.

Returning to the crux of the matter at issue, the district is correct in its contention that the IHO did not have authority to issue the January 4, 2017 decision in this matter, especially since the decision was, in essence, a material amendment to the December 8, 2016 decision, which contained substantive changes that altered the outcome of the case by imposing additional obligations on the district as opposed to a correction of a minor error that was merely typographical or clerical in nature. In this case, the IHO was appointed, presided at the impartial hearing, and issued a final written decision on December 8, 2016, which ended his jurisdiction over the matter. The IHO erred when he rendered a second decision with a new factual finding and additional relief (compare Dec. 8, 2016 IHO Decision at pp. 8-9; with Jan. 4, 2017 IHO Decision at pp. 8-9).

The parents contend that the language added to the IHO's January 4, 2017 decision was nonmaterial clarification, not an amendment. The December 8, 2016 IHO Decision ordered the district to provide a program that "should entail an ABA program" (Dec. 8, 2016 IHO Decision at p. 8). The parents contend that a plain interpretation of this language mandated the district to provide an all-day ABA program, and that the IHO's January 4, 2017 decision merely clarified this. Even assuming that the IHO had the authority to "clarify" his decision,[6] review of the IHO's decision does not support the parent's view. The IHO labeled the January 4, 2017 decision as an "AMENDED FINDINGS OF FACT AND DECISION" on the title page, described the added language in the relief section as an "AMENDED ORDER," and included the heading "Hearing Officer's Amended Findings of Fact and Decision" at the top of each page (January 4, 2017 IHO Decision at pp. 1-12). Moreover, the change in the decision was responsive to the email correspondence discussed above, which highlighted a dispute between the parties regarding the substantive aspects of the IHO's original December 8, 2016 decision, rather than simply alerting the IHO to something more routine, such as a typographical mistake that both parties agreed was in error.

Allowing issuance of multiple final decisions with substantive changes would create confusion and throw the due process hearing system envisioned by Congress into disarray, resulting in multiple appeals from multiple final decisions. Accordingly, because the IHO lacked authority to issue an amended decision, the January 4, 2017 decision is vacated (see Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No.

[6] The parent points to no authority that stands for the proposition that an IHO has authority to clarify a final decision. While such a process may be permissible if a state adopted such a procedure and the clarification was issued within a very limited time (see, e.g., T.G. v. Midland Sch. Dist. 7, 848 F. Supp. 2d 902, 930-31 [C.D. Ill. 2012] [discussing Illinois's statute that permits an IHO to retain jurisdiction to provide clarification of a written decision, so long as the request for such clarification by a party is provided in writing within five days of receipt of that decision]), there is no such State law or regulation in this jurisdiction that permits an IHO to issue a clarifying decision. Moreover, even if New York had a process in place whereby a party could request that an IHO clarify, amend, or reconsider a decision, the IHO would still be required to issue the final decision within the 45-day timeline or a properly extended timeline (see Questions and Answers on IDEA Part B Dispute Resolution Procedures, 61 IDELR 232, at p. 46 [OSEP 2013] [indicating that a state could allow motions for reconsideration before issuance of a final decision]). Here, the IHO's deadline to issue a final decision had expired and, in any event, his final decision had been issued prior to the IHO's January 4, 2017 decision (see Jan. 4, 2017 IHO Decision at pp. 2, 9).

11-014; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of the Dep't of Educ., Appeal No. 08-041; Application of the Dep't of Educ., Appeal No. 08-024). The determination to vacate the January 4, 2017 decision leaves the IHO's December 8, 2016 decision undisturbed and fully in effect. The IHO's December 8, 2016 decision has not been appealed by either party at this juncture, and the district has explicitly disavowed appeal of that order in this proceeding and is accordingly bound by the orders therein. The district therefore continues to be required to provide the relief awarded in the IHO's original decision (Dec. 8, 2016 IHO Decision at pp. 8-9).

C. Allegations of Hearing Officer Misconduct

As a final matter, the district alleges that the IHO's communication with the parents, the manner in which he communicated with the district, and the content of those communications warrants a finding that the IHO engaged in misconduct. As discussed above, the IHO's communications directed at the district included a warning that the district was "on notice as to this student's maladaptive behavior and any additional injury caused by placing this student in a District [specialized school] program (6:1 is the best they offer) w[ould] be on the decision of the members of the CSE" (Req. for Rev. Ex. 2 at p. 2). Additionally, the IHO appeared to indicate that the parent's attorneys might be willing to initiate litigation on behalf of district staff who may have been injured by the student and further appeared to imply that the district's failure to implement the IHO's decision placed district staff and other students at risk of injury from the student (id. at pp. 1-2). While the content of the emails between the IHO and the parties may understandably be concerning to the district, who interpreted them as overtly threatening to the district and demeaning of its staff and programs, it is not clear what impact the district may believe the IHO's actions had on the district's rights—apart from the IHO subsequently exceeding his authority by issuing an amended decision, an issue dealt with above. Overall, the IHO's actions do not convince me that it is necessary to refer the matter to the Office of Special Education, which has been designated by the Commissioner of Education to address matters regarding IHO misconduct and incompetence (8 NYCRR 200.21[b][4][iii]).

VI. Conclusion

Given the analysis above, the IHO exceeded his authority by issuing the amended decision, and the January 4, 2017 decision is hereby vacated, leaving the December 8, 2016 decision in effect.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's amended decision dated January 4, 2017 is vacated.

Dated: **Albany, New York**
March 30, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER