The University of the State of New York

The State Education Department
State Review Officer
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No. 17-057

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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of her son's private tutoring. As explained more fully below, the appeal is sustained in part and the matter must be remanded for further administrative proceedings.[1]

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

[1] In September 2016, Part 279 of the Practice Regulations was amended, which became effective January 1, 2017, and is applicable to all appeals served upon 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 some of the relevant events at issue in this appeal took place before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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

The student has been the subject of two prior administrative appeals (Application of a Student with a Disability, Appeal No. 16-007; Application of a Student with a Disability, Appeal

No. 15-022). Accordingly, the parties' familiarity with the facts and procedural history is presumed and will not be repeated here in detail.

As was the case in prior appeals, the hearing record includes little information regarding the student's educational needs. As noted in Application of a Student with a Disability, Appeal No. 16-007, a CSE convened in November 2013, found the student eligible for special education as a student with autism, and recommended a twelve-month school year program consisting of a 6:1+1 special class placement in a specialized school with a full-time 1:1 crisis management paraprofessional and the related services of one 45-minute session of individual counseling per week, one 45-minute session of group counseling per week, two 45-minute sessions of group speech-language therapy per week, and one session of parent counseling and training per month (see also Parent Ex. A at p. 2).

The parent's concerns appear to stem from an incident that occurred in school on September 8, 2014, during which the parent alleged that a paraprofessional "grabbed and threw [the student] heavily on the floor of the hallway" (Parent Ex. 1 at p. 2). The student did not attend the district school after the September 8, 2014 incident through the time of the impartial hearing (see Tr. pp. 34-35, 48; Parent Ex. A at p. 3). According to the information contained in prior administrative hearing records, the parent sent the district a letter dated September 12, 2014, in which the parent notified the district of the September 8, 2014 incident, informed the district the student would not return to the school, and requested that the district convene a CSE meeting and recommend a nonpublic school placement (see Application of a Student with a Disability, Appeal No. 16-007).

The parent subsequently filed a due process complaint notice, dated September 16, 2014, setting forth assertions pertaining to the alleged incident with the paraprofessional on September 8, 2014, as well as the student's involvement in "too many accidents" from 2010 through 2014, and seeking relief in the form of an appropriate nonpublic school for the student (see Application of a Student with a Disability, Appeal No. 16-007). After an IHO rendered a decision on December 24, 2014, the matter was appealed and, in a decision dated April 2, 2015, an SRO remanded the case to another IHO (Application of a Student with a Disability, Appeal No. 15-022). After remand, in a decision dated December 14, 2015, an IHO dismissed the parent's due process complaint notice because allegations of accidents between 2010 and 2014 were outside of the statute of limitations, were too vague, and/or because the parent's allegations did not pertain to matters related to the identification, evaluation, or educational placement of the student, or the provision of a free appropriate public education (FAPE) to the student and, therefore, did not fall within the jurisdiction of the IHO (Dist. Ex. 1 at pp. 4-7).[2]

A. Due Process Complaint Notice

By due process complaint notice dated March 10, 2017, the parent alleged that the student "could not acquire[] appropriate education [and] treatment" in a district public school (Dist. Ex. 2

[2] On appeal, in a decision issued after the parent's due process complaint notice in the present matter, an SRO dismissed the parent's petition because the parent failed to initiate the appeal in accordance with the timelines prescribed by State regulations governing practice before the Office of State Review but rendered alternative findings agreeing with the IHO's determinations (Application of a Student with a Disability, Appeal No. 16-007).

at p. 3). She further alleged that the student "[has] been accepting private tutoring which [wa]s appropriate," as opposed to "going to public school" (id.). As a remedy, the parent requested an award of reimbursement for the cost of the student's tutoring expenses (id.).

B. Impartial Hearing Officer Decision

On April 26, 2017, the IHO held a prehearing conference; however, a representative from the district did not appear, and the IHO adjourned the matter (Tr. pp. 1-4). On May 16, 2017, the parties proceeded with the impartial hearing, which concluded on June 2, 2017 after two days of proceedings (Tr. pp. 5-61). By decision dated June 15, 2017, the IHO dismissed the parent's due process complaint notice with prejudice (IHO Decision at p. 4). More specifically, regarding the parent's request for private tutoring for the student, the IHO noted that the parent failed to present any evidence with respect to the appropriateness of the actual services provided to the student, other than a handwritten receipt and a contract dated September 9, 2014 (id. at pp. 3, 4). The IHO also concluded that equitable considerations failed to support the parent's request for relief, given that, she withdrew the student from school in September 2014 and refused to accept any other placement option offered by the district, including "home instruction services" (id. at pp. 2, 4).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's decision in its entirety. The parent argues that the IHO acted with bias and violated her rights to procedural due process, citing multiple examples of alleged procedural irregularities in the impartial hearing process pertaining to the resolution period, the prehearing conference, the scheduling of the impartial hearing, and the collection and acceptance of evidence. She further alleges that the IHO "covered for the [district's] violation of [the] IDEA," and "failed to offer [a] fair Decision" addressing "the long-time pains" suffered by the student. With regard to the merits, the parent claims that the IHO erred in failing to rule on the issue of an assault on the student at the hands of a paraprofessional, which the parent argues has never been "solved by any IHO Decision," notwithstanding that it should be within an IHO's jurisdiction to remedy. The parent also alleges that the IHO erred by not giving the parent an opportunity to present evidence that the district failed to offer the student a FAPE or that the private tutoring services the student received were appropriate. Finally, the parent argues the IHO erred in finding that the parent voluntarily withdrew the student from school and intentionally "left out" the parent's testimony from the decision, which indicated that the parent's decision to withdraw the student was not voluntary. As relief, the parent requests that the district be required to reimburse her for the cost of the student's private tutoring.

In an answer, the district generally denies the parent's allegations and requests that the IHO's decision be affirmed in its entirety. The district argues that the parent's claims that relate to the September 2014 incident are barred by the statute of limitations and res judicata. The district also asserts that, to the extent the parent requested various forms of relief in her testimony at the impartial hearing that she does not raise on appeal, those remedies should be deemed waived and are also outside of the jurisdiction of an SRO to award. As to the merits, the district asserts that, while it "does not concede that it failed to provide a FAPE for [the student] during the 2014/2015 school year or any other relevant school year," the IHO should be affirmed with respect to his determinations that the parent failed to establish the appropriateness of the private tutoring services

and that equitable considerations did not favor the parent's request for reimbursement for the costs of the tutoring.

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).

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; see Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 998-1001 [2017] [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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]; 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]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Procedural Matters/Conduct of the Impartial Hearing

Much of the parent's assertions on appeal pertain to procedural matters and the conduct of the impartial hearing and amount to an allegation that the parent was denied due process. State and local educational agencies are required "to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a FAPE by such agencies," including, the rights of parents to participate in the development of an IEP and "to challenge in administrative and court proceedings a proposed IEP with which they disagree" (Burlington, 471 U.S. at 361; see 20 U.S.C. § 1415[a], [b], [f]). Additionally, the IDEA provides parents involved in a complaint the "opportunity for an impartial due process hearing" (20 U.S.C. § 1415[f]). State regulation sets forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). These requirements are outlined below as they apply to each of the parent's specific allegations.

a. Resolution Period

Initially, the parent asserts that the parties agreed to reschedule the resolution session and that the IHO erred by stating that the resolution period expired and by assigning "negative meaning" to such expiration.

The IDEA, as well as State and federal regulations, provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]).

The Second Circuit has described the resolution period as the timeframe within which the district has to remedy any deficiencies in a challenged IEP without penalty (R.E., 694 F.3d at 187). When, at the conclusion of the resolution period, parents "feel their concerns have not been adequately addressed . . . , they can continue with the due process proceeding and seek reimbursement. The adequacy of the IEP will then be judged by its content at the close of the resolution period" (id. at 188). The resolution period allows a "district that inadvertently or in good faith omits a required service from the IEP [to] cure that deficiency during the resolution period without penalty once it receives a due process complaint" (id.).

It is not entirely clear whether the parent's objection to the IHO's decision is based on the IHO's failure to acknowledge that a resolution session took place or based on the IHO's statements regarding the date of the expiration of the resolution session. Here, the parent's due process complaint notice was dated March 10, 2017 (Dist. Ex. 2 at p. 3). The hearing record is unclear as to the exact date that the district received the due process complaint notice; however, it appears that the document was stamped as received by the district's impartial hearing office on March 10, 2017 (id. at p. 4).[3] The resolution session was scheduled to take place on April 5, 2017 (id. at pp. 1-2). The parent alleges that the resolution session was rescheduled to and took place on April 6, 2017, prior to the expiration of the resolution period (Req. for Rev. at p. 1). The district admits in its answer that the resolution session took place (Answer at p. 1). The resolution period expired 30 days from the district's receipt of the due process complaint notice (20 U.S.C. § 1415[f][1][B]; 34 CFR 300.510[b][1]; 8 NYCRR [200.5[j][2][v]). Therefore, although the resolution meeting should have been scheduled within fifteen days from the district's receipt of the due process complaint notice, at the earliest, the resolution period expired on April 9, 2017. The IHO indicated in his decision that the resolution period expired on April 13, 2017 (IHO Decision at p. 1). Regardless of the precise timing or occurrence of these procedural events, the parent does not allege that she suffered any disadvantage or harm based on the IHO's statement of the dates or that anything took place at the resolution session that should have altered the course of the impartial hearing.

Further, there is no support for the parent's interpretation of the IHO decision that he assigned a "negative meaning" to the expiration of the resolution period. Here, the resolution period expired because the parties apparently did not resolve the matter within the timeframe set by regulations and the proper course of action was to proceed with an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]).

b. Prehearing Conference

The parent next argues that the district's failure to appear at a prehearing conference on April 26, 2017 should result in a default judgment against the district.

State regulation provides that an IHO may schedule a prehearing conference with the parties for the purposes of: "(a) simplifying or clarifying the issues; (b) establishing date(s) for the completion of the hearing; (c) identifying evidence to be entered into the record; (d) identifying witnesses expected to provide testimony; and/or (e) addressing other administrative matters as the [IHO] deems necessary to complete a timely hearing" (8 NYCRR 200.5[j[[3][xi][a]-[e]).

Review of the hearing record indicates that, as the parent alleges, the district did not "call in" to the prehearing conference with the IHO on April 26, 2017 (see Tr. pp. 1-2). Nevertheless, while it is understandably frustrating to the parent that the district failed to participate at the conference, there is no authority for the proposition that a district may be penalized for its noncompliance with such a procedural step via a default judgment. On the contrary, authority

[3] The district's notice of the resolution meeting and the IHO both reference that the due process complaint notice was filed on March 13, 2017 (IHO Decision at p. 2; Dist. Ex. 2 at p. 1). There is no explanation in the hearing record for this discrepancy.

specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with procedural requirements relating to the impartial hearing process tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]).[4]

Here, subsequent to the prehearing conference, the impartial hearing continued. Accordingly, the parent's assertions regarding the district's nonattendance at the prehearing conference are dismissed and a default judgment is not warranted.

c. Scheduling of the Impartial Hearing

The parent asserts that the hearing on May 16, 2017 was inappropriately rescheduled from May 19, 2017, for the purpose of frustrating her ability to comply with the 5-day rule. Additionally, the parent alleges that the IHO erred in allowing the hearing to be adjourned on May 16, 2017 to allow the district another opportunity to present evidence. Finally, the parent asserts that the IHO erred in granting the district's May 17, 2017 request for an "Order of Extension," which appears to be related to the district's request for an extension of the decision timeline (see IHO Decision at p. 2).

Initially, unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice]). With respect to scheduling impartial hearings, State regulation requires that the hearing "be conducted at a time and place which is reasonably convenient to the parent and student involved" (8 NYCRR 200.5[j][3][x]). Furthermore, each party "shall have up to one day to present its case unless the [IHO] determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision" (8 NYCRR 200.5[j][3][xiii]).

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[4] Several courts have endorsed the consideration of various factors when making a determination that a party has defaulted, including:

> [T]he amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider how harsh an effect a default judgment might have; or whether the default was caused by a good-faith mistake or by excusable or inexcusable neglect on the part of the defendant.

(Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc., 513 F. Supp. 2d 1, 3 [S.D.N.Y. 2007], quoting Badian v. Brandaid Communications Corp., 2004 WL 1933573, at *2 [S.D.N.Y. Aug. 30, 2004]; see also Belcourt Pub. Sch. Dist. v. Davis, 786 F.3d 653, 661 [8th Cir. 2015]; Wing v. E. River Chinese Rest, 884 F.Supp. 663, 669 [E.D.N.Y. 1995]).

As for the timeline for the impartial hearing, the IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). However, extensions may only be granted consistent with regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

In the present case, there is no evidence in the hearing record that the May 16, 2017 hearing date was rescheduled from a later date (May 19, 2017) for the purposes of sabotaging the parent's ability to present evidence. On the contrary, there is no indication that the five-day rule was ever cited as a basis for excluding any evidence offered by the parent. Further, there is no indication that the parent objected to the scheduling of the hearing on May 16, 2017.

As to the parent's objection to the adjournment of the May 16, 2017 hearing date, the hearing record indicates that the district was not "prepared to proceed" on May 16, 2017 (Tr. p. 12). While, as with the district's failure to appear at the prehearing conference, the parent was understandably frustrated with the district's lack of preparedness, the hearing record does not reflect that the IHO abused his discretion in granting the district's request for an adjournment. Moreover, the district did apparently make use of the hearing date to articulate a motion to dismiss the parent's due process complaint notice and introduce exhibits (Tr. pp. 12-13, 15-16; Dist. Exs. 1-2).

Finally, as to the parent's objection to the extension to the decision timeline, according to the IHO's decision, the district requested an extension to the decision timeline on May 17, 2017 (IHO Decision on p. 2). While the IHO indicated that "[t]he Order of Extension [wa]s part of the hearing record," such documentation was not included in the hearing record submitted to the Office of State Review as required by State regulation (8 NYCRR 200.5[j][5][i], [iv], [vi][c]). Accordingly, it is unknown upon what grounds the extension was requested or whether the extension was granted for the maximum 30 days or for a shorter period of time. The IHO's decision was issued on June 15, 2017. Despite the lack of documentation and the parent's objections at this stage, there is no evidence that the parent suffered any prejudice as a result of the extension (IHO Decision at p. 2).

d. Evidentiary Issues

The parent makes several allegations relating to the IHO's failure to allow her to present evidence. Specifically, the parent asserts that the IHO did not grant the parent's subpoena dated

May 8, 2017. The parent also alleges that the IHO "unreasonably rejected" evidence that the parent sent to the district and the IHO on May 9, 2017, which the parent asserts was timely disclosed within five business days, given that the hearing was originally scheduled for May 19, 2017. The parent also alleges that the evidence disclosed on May 9, 2017 was relevant to her "remedy requests," and to prove that the district failed to offer the student a FAPE and violated the IDEA. Finally, the parent argues that she still had evidence to present and that, therefore, the hearing cannot be deemed "final."

The IDEA provides parents involved in a complaint the "opportunity for an impartial due process hearing" (20 U.S.C. § 1415[f]). State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, any party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Further, State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). An IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

First, with respect to the subpoena, the parent sought information from the district regarding "how much" the United States Department of Education "provide[d] for a disable[d] student as educational fee(s) for a year . . . to study in public school(s)," as well as "private day school(s) and residential school(s)" (Parent Ex. F). The IHO did not sign the parent's subpoena because it was "overly broad," and advised the parent of her right to file a request for that information with the United States Department of Education pursuant to the Freedom of Information Act (FOIA) (Tr. p. 57). The parent has not articulated how the information sought was particularly relevant or material to her claim and the evidence does not support a finding that the IHO abused his discretion in denying the requested subpoena, particularly given the other procedural mechanisms for obtaining the information, as the IHO explained to the parent.

As to the parent's claims that the IHO unfairly excluded evidence, initially, as noted above, there is no indication in the hearing record that the five-day rule was ever cited as a basis for excluding any evidence offered by the parent. A review of the hearing record shows that the IHO excluded the parent's offer of school notes and a referral form, which the parent described as relating to the September 2014 incident, on the basis that any violations arising out of that incident were previously adjudicated through the administrative process and could not be relitigated (Tr. pp. 51-52). As the IHO explained to the parent and as examined further below, based on the previous litigation, the hearing record supports a finding that the IHO acted within his direction to exclude evidence he deemed "to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Further, the IHO received the parent's exhibits A through F into evidence, allowing exhibit A over the district's objection (Tr. pp. 49, 53-57). When asked what other evidence she had, the parent responded "[n]o more" (Tr. p. 57). Under the circumstances, an independent review of the hearing record supports a finding that the parent was able to submit most of the documentary evidence she sought to introduce at the impartial hearing and that the IHO did not abuse his discretion in his evidentiary rulings during the course of the impartial

hearing. As discussed below, ultimately, the hearing record is insufficient and the IHO carries some of the responsibility for this. However, the remedy for such deficiencies is the remand which is ordered below.

e. IHO Bias

Lastly, the parent alleges that the IHO exhibited bias during the impartial hearing and worked in concert with the district to further the denial of a FAPE to the student.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Here, there is no evidence in the hearing record to support the parent's claim that the IHO acted in concert with the district or that the IHO "covered for [and] protected" the district (Req. for Rev. at p. 2). To the extent that parent alleges that the IHO exhibited bias based on the processes followed during the impartial hearing, the parent's specific concerns have already been discussed and do not, either individually or collectively, support a finding that the IHO exhibited bias. Furthermore, the IHO's decision not to grant the district's motion to dismiss and to proceed with the impartial hearing, reflects that the IHO considered the parent's position and afforded her an opportunity to be heard (Tr. pp. 8-9). Additionally, a review of the hearing record suggests that the IHO exhibited some patience in assisting the parent in her evidentiary submissions (Tr. pp 52-58). Finally, to the extent that the parent disagrees with the conclusions reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Application of a Student with a Disability, Appeal No. 13-083).

2. Scope of the Impartial Hearing and Preclusion of Claims or Issues

The parent alleges that the IHO inappropriately avoided ruling on the issue of the September 2014 "assault [on the student by] a school paraprofessional" (Req. for Rev. at p. 3). The parent argues that this issue has never been "solved by any IHO Decision" and that it is within

an IHO's jurisdiction to remedy (id.). The district asserts that the parent's allegations relating to the assault should be barred by the statute of limitations and res judicata.[5]

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).

In addition to res judicata, parties are also limited by the doctrine of collateral estoppel (or issue preclusion), which "precludes parties from litigating 'a legal or factual issue already decided in an earlier proceeding'" (Grenon, 2006 WL 3751450, at *6, quoting Perez, 347 F.3d at 426). To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]).

[5] To the extent the district raises the statute of limitations in its answer as a basis for dismissing the parent's claims, there is no indication that the district raised a statute of limitations defense on the record at any point during the impartial hearing, including as a ground underlying its motion to dismiss the parent's due process complaint notice (see Tr. pp. 8-9). There was some discussion between the IHO and the parent during the impartial hearing about the timeframe of the events underlying the parent's claims, during which the parent referenced "junior high," "senior high," and "2010," and the IHO explained to her that the statute of limitations would not permit claims that arose two years earlier than her due process complaint notice (Tr. p. 14). However, the district never raised the defense. Because the parent's claim is precluded on other grounds discussed herein, it is unnecessary to determine whether or not the district sufficiently preserved the right to assert the defense of statute of limitations (see M.G. v. New York City Bd. of Educ., 15 F. Supp. 3d 296, 306 [S.D.N.Y. 2014] [holding that "[b]ecause the [district] did not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see R.B. v. Dep't of Educ., 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [holding that a statute of limitations defense need not be raised in the district's response to the due process complaint notice but noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level"]; Vultaggio v. Bd. of Educ., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]).

Here, to the extent the parent attempts to reargue claims related to the assault by a paraprofessional, these claims were litigated and decided in a prior impartial hearing (see Dist. Ex. 1).[6] In a December 2015 decision, an IHO dismissed the parent's September 2014 due process complaint notice, in part, because the parent's allegations about the assault did not fall within the jurisdiction of the IHO (id. at pp. 6-7). Additionally, the IHO in the prior proceeding determined that the September 2014 incident "did not make [the] Student's then-present placement inappropriate" (id. at p. 7). The parent's appeal of the IHO's decision was subsequently dismissed as untimely; however, the SRO alternatively determined the IHO was correct in finding that "the incident between the student and a district paraprofessional was not related to the identification, evaluation, or educational placement of the student, or to the provision of a FAPE to the student" and was, accordingly, outside the jurisdiction of an impartial hearing (Application of a Student with a Disability, Appeal No. 16-007).

Generally, "a dismissal for lack of subject matter jurisdiction is not an adjudication of the merits, and hence has no res judicata effect" (K.C., 2017 WL 2417019, at *7, quoting St. Pierre v. Dyer, 208 F.3d 394, 400 [2d Cir. 2000]). However, such a dismissal does preclude re-litigation of the issue it decided (Stengel v. Black, 486 Fed. App'x 181, 183 [2d Cir. June 21, 2012]). In other words, the issue of jurisdiction was fully and fairly litigated in the prior proceeding and the jurisdictional defect underlying the claim has not been overcome (i.e., in this case, by pursuit of the claim in a forum with jurisdiction to decide the issue) (see George v. Stor. Am., 2014 WL 1492484, at *3 [S.D.N.Y. Mar. 6, 2014] [noting that a dismissal based on jurisdiction "is res judicata as to that particular issue in subsequent actions between the parties" and is final regarding the lack of the court's power to act on those claims unless the "jurisdictional defects have been cured"], objections overruled, 2014 WL 1494116 [S.D.N.Y. Apr. 16, 2014]; see also Vink v. Hendrikus Johannes Schijf Rolkan N.V., 839 F.2d 676, 677 [Fed. Cir.1988] ["A dismissal for lack of subject matter jurisdiction . . . is not a disposition on the merits and thus permits a litigant to refile in an appropriate forum]).

Moreover, the IHO in the prior proceeding reached the merits to the extent he had jurisdiction, determining based on a factual analysis that the September 2014 incident did not impact the appropriateness of the student's then-current placement (Dist. Ex. 1 at p. 7). Although, the parent's appeal was dismissed as untimely, the parent had a full opportunity to litigate her claims related to the September 8, 2014 incident during the prior impartial hearing; accordingly, the doctrine of res judicata or collateral estoppel bars consideration of the claims raised in the prior proceeding.

[6] As summarized above, the parent's due process complaint notice broadly alleged that the student "could not acquire[] appropriate education [and] treatment" in a district public school and that she was seeking reimbursement for the costs of the student's tutoring as a result (Dist. Ex. 2 at p. 3). The due process complaint notice did not reference the alleged assault. However, during the impartial hearing, the parent indicated that the case was about the alleged assault (Tr. p. 13, 24). She also elaborated other grounds for her claim, which may still be addressed through the impartial hearing process on remand, including that she did not "see any improvement" in the student in the area of special education "this year" and that her "original purpose" in the present matter was to seek reimbursement of the costs of the tutoring (Tr. pp. 14, 24).

B. Remand

The parent sets forth arguments that, in combination, may be read as an appeal of the merits of the IHO's determinations as to whether the district offered the student a FAPE, whether the private tutoring services received by the student constituted an appropriate unilateral placement, and whether equitable considerations support the parent's request for reimbursement of the cost of the tutoring services. As explained more fully below, a review of the IHO's decision, in conjunction with the evidence in the hearing record, reveals that the IHO erred in failing to make any substantive findings regarding whether the district offered the student a FAPE as alleged by the parent in the March 2017 due process complaint notice.[7] Accordingly, the IHO's decision was not "made on substantive grounds based on a determination of whether the student received a free appropriate public education" as required by State regulation (8 NYCRR 200.5[j][4]). In addition, although the IHO made findings regarding the appropriateness of the educational services selected by the parent and equitable considerations, the IHO's findings consisted of nothing more than conclusory language and, as noted below, were based on an insufficient hearing record. The decision of an IHO is required to "set forth the reasons and the factual basis for the determination" and "reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]).

Accordingly, the matter should be remanded to the IHO to determine on the merits, based upon an adequate hearing record, whether the district offered the student a FAPE and, if not, whether the pirate tutoring services obtained by the parent constituted an appropriate unilateral placement for the student, and whether equitable considerations support the parent's request for reimbursement. To the extent that the hearing record lacks information regarding the program offered by the district and the educational services offered by the parent, the IHO is reminded of his responsibility to ensure that there is an adequate record upon which to render findings and permit meaningful review, including by exercising his authority to "ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3[vii]). More specifically, although the hearing record includes anecdotal evidence of the district's less formal efforts to return the student to a district school or provide home instruction services, there is no information in the hearing record to support a finding that the district made efforts to comply with its obligation to offer the student a FAPE pursuant to the IDEA (see Tr. pp. 35-39). Such information might include invitations to CSE meetings, IEPs, or prior written notices. Additionally, although the hearing record indicates that the parent obtained tutoring services for the student between September 2014 and September 2016, the hearing record does not

[7] While the parent's due process complaint notice lacked detail regarding her claims, the district did not challenge the due process complaint notice on sufficiency grounds (20 U.S.C. § 1415[b][7][B]; 34 CFR 300.508[c]-[d]; 8 NYCRR 200.5[i][2]-[3]). Further, as discussed above, the district failed to appear at the prehearing conference scheduled by the IHO, one purpose of which is to simplify and clarify issues to be determined at an impartial hearing (see 8 NYCRR 200.5[j][3][xi][a]). While the IHO made attempts to understand the scope of the parent's claims during the impartial hearing (e.g., Tr. pp. 13, 24-26), the attempts were largely unsuccessful and the IHO did not further pursue the parties' positions as to what issues the IHO was expected to decide. Accordingly, while I sympathize with the IHO to the extent he was tasked with deciding a fairly broad claim relating to the district's failure to offer the student a FAPE, the fault for that state by the end of the impartial hearing rested to some extent with the district and the IHO, as well as with the parent.

identify whether those services were directed at the student's special education needs (see Parent Exs. B-D). The hearing record in this proceeding (and in prior proceedings) also lacks anything more than a bare description of the student's abilities and needs, which is the basis for determining whether the services offered by the district or the services provided by the parent were appropriate to address the student's special education needs (see Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 39 [Dec. 2010])).[8]

Regarding the IHO's finding that the parent did not prove the appropriateness of the tutoring services provided to the student, the hearing record reflects that the parent attempted to call the student's tutor as a witness but was unable to reach the tutor by telephone on the last day of the hearing (Tr. pp. 57-60). Although it was not available to the IHO at the time he rendered his decision, in Application of a Student with a Disability, Appeal No. 16-007, the SRO indicated that it was unfortunate that the parent was permitted to proceed in the prior administrative proceedings without an interpreter noting the purpose of an interpreter is twofold. As important as the parent's right to be understood during an impartial hearing is the parent's right to understand the proceedings (see 8 NYCRR 200.5[j][3][vi]). The judicial system provides the use of an interpreter in an attempt to protect fundamental rights and facilitate access to the legal process (Yellen v. Baez, 177 Misc. 2d 332, 334 [N.Y.C. Civil Ct. 1997]).[9] In this instance, although the parent chose to present her case in English (Tr. p. 12), it is not clear from the hearing record that she was aware of the legal process to which she was due and, despite multiple conversations off the record on the last day of the hearing, there is no indication in the hearing record that the IHO explained the procedural options available to the parent due to her witness's unavailability (Tr. pp. 59-60; see 8 NYCRR 200.5[j][3][vii] ["the impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process"]).

In summary, the IHO is directed to first address whether the district offered the student a FAPE after the September 2014 incident and, then—if necessary—address whether the parent established the appropriateness of the private tutoring and whether equitable considerations

[8] If the district fails to introduce sufficient evidence regarding the student's special education needs during the remand of this proceeding, the responsibility for such deficiency has been held to lie with the district and not the parent and the IHO should keep this consideration in mind in reviewing the appropriateness of the district's offered program, as well as the appropriateness of the educational services provided by the parent (see A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lay with the district]).

[9] The IDEA requires communications between the local education agency and the parent to be in the native language of the parent and that interpretation services be provided during CSE meetings, in part to ensure that the parent is able to fully comprehend and participate in the process (20 U.S.C. § 1415[b][4], [d][2]; Educ. Law § 4402[3][b][ii][B]; 34 CFR 300.503[c][1][ii]; 8 NYCRR 200.5[a][4]; see also 20 U.S.C. § 1414[b][1]; 34 CFR 300.322[e]; 300.504[d]; 8 NYCRR 200.4[a][2][iv][b][9][i], [ii]; 8 NYCRR 200.4[b][6][xii]; 8 NYCRR 200.4[g][2][ii]; Marple Newtown Sch. Dist. v. Rafael N., 2007 WL 2458076, at *5 [E.D. Pa. Aug. 23, 2007] [upholding an administrative decision which required a school district to provide placement process documentation in a language the parent could understand so the parent could participate in a meaningful way]; Application of a Student with a Disability, Appeal No. 13-047).

weighed against awarding the parent the relief requested, namely, an award of reimbursement for the private tutoring (8 NYCRR 279.10[c]; 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]). It is left to the sound discretion of the IHO to determine what additional evidence is required in order to make the necessary findings of fact and of law relative to whether the district offered the student a FAPE or if the district conceded that it failed to offer the student a FAPE for the time period at issue.[10] Furthermore, as alluded to above, 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 regarding whether the district offered the student a FAPE and, if necessary, to address whether the parent was entitled to the relief requested.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[10] On appeal, the district submitted additional evidence. 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, the evidence provided is not necessary at this juncture; however, the district may offer the evidence at the impartial hearing upon remand.

IT IS ORDERED that the IHO's decision, dated June 15, 2017, is vacated and the matter is remanded to the same IHO who issued the June 15, 2017 decision to determine the merits of the unaddressed issues regarding the provision of a FAPE to the student, as set forth in the parent's March 10, 2017 due process complaint notice or as otherwise clarified by the parties upon remand, and, if necessary, to determine the appropriateness of the educational services provided to the student and whether equitable considerations support the parent's requested relief; and

IT IS FURTHER ORDERED that, if the IHO who issued the June 15, 2017 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**
September 11, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER