The University of the State of New York

The State Education Department
State Review Officer
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No. 18-036

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:
The Law Offices of Elisa Hyman, P.C., attorneys for petitioner, by Elisa Hyman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2013-14 through 2017-18 school years were appropriate. The appeal must be sustained in part and remanded for further administrative proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student in this case has received diagnoses of Crohn's disease, inflammatory bowel disease, migraines, and obstructive sleep apnea (Parent Exs. G at p. 5; J at pp. 2, 4; Dist. Exs. 85-86; 88). In addition, the student has experienced anxiety and chronic fatigue (Parent Ex. J at pp. 3-4). Based upon a standardized assessment conducted in 2017, the student's cognitive skills fell within the average to very superior range and his math, reading, and writing scores fell within the average to above average range (Parent Ex. G at pp. 1-2).

According to facts recounted by the parent, the student was determined to be eligible for special education sometime in the spring of 2012 (Parent Ex. A at pp. 4-5). The student attended a district public high school beginning in the 2013-14 school year (ninth grade) (Parent Ex. OOO; see Tr. pp. 45-48; Parent Exs. HH; NN; PPP). On November 12, 2013, a CSE convened for the

student's annual review, continued to find the student eligible for special education as a student with an other health impairment, and recommended five periods per week of direct special education teacher support services (SETSS) in a group "Across Curriculum" and one 40-minute session per week of counseling services in a group (Parent Ex. C at pp. 1, 6). With regard to school attendance, during the 2013-14 school year, the student was present 141 days, absent 23 days, and late 88 days (Dist. Ex. 98).

On November 12, 2014, a CSE convened to conduct an annual review of the student's IEP (Parent Ex. D). In terms of special education programming, the November 2014 CSE recommended that the student receive four sessions per week of direct SETSS in a group for social studies and one session per week of direct SETSS on an individual basis in the areas of writing, organization, and analysis (id. at p. 5). The student's November 2014 IEP included supports for organization, a coordinated set of post-secondary transition activities, and annual goals related to organization and self-advocacy (id. at pp. 2, 4, 6-7). During the 2014-15 school year, the student was present 128 days, absent 40 days, and late 120 days (id.).

On November 9, 2015, a CSE convened to conduct the student's triennial review (Parent Ex. E; see generally Dist. Exs. 60; 66; 67; 68; 69). The November 2015 CSE recommended that the student receive four periods per week of SETSS in a group for English language arts (ELA) (Parent Ex. E at p. 5). The IEP included accommodations and modifications related to organization, attention, and study skills, as well as annual goals related to organization and career pursuits and a coordinated set of post-secondary transition activities (id. at pp. 3-5, 7-8). The November 2015 IEP indicated the student had "stomach issues" that prevented him from attending school consistently (id. at p. 2). To address concerns regarding absenteeism, a district guidance counselor offered to provide the student with home instruction in early 2016 (see Parent Ex. DDDDD at p. 1). In an email dated March 14, 2016, the parent indicated that because home instruction would require the student to stay at home and not attend school, it would be "detrimental for [the student's] mental health" (Dist. Ex. 14 at p. 6). The student did not participate in home instruction during the 2015-16 school year (Dist. Exs. 25 at p. 1; 84 at p. 2). In an email dated May 10, 2016, the guidance counselor once again recommended home instruction for the student for summer 2016 to assist him in completing course work and gaining course credits (see Dist. Ex. 16 at p. 3). During the 2015-16 school year, the student was present 38 days, absent 127 days, and late 20 days (Dist. Ex. 98).

For the 2016-17 school year, the student repeated the eleventh grade (Parent Ex. GGGGG at p. 2). On November 9, 2016, a CSE convened for the student's annual review and recommended five sessions per week of direct SETSS in a group for ELA (Parent Ex. F at p. 7). The IEP indicated the student had been diagnosed with Crohn's disease and had been "absent excessively" (id. at p. 2). The IEP included accommodations and modifications, annual goals related to attendance, and a coordinated set of post-secondary transition activities (id. at pp. 2, 4-5, 9). For the 2016-17 school year, the student was present 35 days, absent 128 days, and late 23 days (Dist. Ex. 98). During the 2016-17 school year, the student's teachers reported that it was difficult to assess the student's performance due to his absences (Dist. Ex. 72 at pp. 1-2; 77; 78).

To address the student's continuing chronic absenteeism, the district again recommended that the student attend home instruction from approximately December 2016 through January 2017

(Parent Ex. DDDDD at pp. 1-3; see Tr. pp. 442-43).[1] The student did not participate in home instruction (id. at p. 1).

In June 2017, the district conducted a psychoeducational evaluation of the student at the parent's request due to her concerns regarding the student's academic performance (Dist. Ex. 83 at p. 1). The June 2017 psychoeducational evaluation results were consistent with previous testing of the student regarding his performance on standardized tests measuring cognitive skills and academic achievement, with intellectual functioning in the average to very superior range and reading, math, and writing skills in the average to above range (id. at pp. 5-6). The district also completed a social history at the parent's request (Dist. Ex. 84 at pp. 1-2).

In August 2017, the CSE convened to conduct the student's annual review and to develop an IEP for the 2017-18 school year (Parent Ex. G; Dist. Exs. 92; 93). The August 2017 CSE recommended 10 sessions per week of indirect SETSS in math and five sessions per week of direct SETSS in math on an individual basis (id. at p. 9). The August 2017 IEP noted "extended absences" negatively affected the student's participation and progress in the general education curriculum (id. at p. 6). According to the August 2017 IEP, the student had earned 32 credits out of 51.5 credits attempted (id. at p. 2).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated August 31, 2017, the parent requested an "emergency" impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 through 2017-18 school years on approximately 68 specified bases, and "violated every provision of" section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]) and the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) (see Parent Ex. A at pp. 1, 30-33). Due to the disposition of this appeal, the 41-page complaint, containing 338 enumerated paragraphs (with subparagraphs to the third degree), need not be discussed in detail herein. Some of the enumerated paragraphs appear to have been offered as historical background, some contained legal argument, some

[1] The New York State Education Department has in recent years begun to examine and collect data on the issue of chronic absenteeism, which takes into account absences for all reasons and is described as excused and unexcused absences for ten percent or more of enrolled school days ("Chronic Absenteeism Reports Now Available in SIRS," Office of Student Support Services [May 2, 2016], available at http://www.p12.nysed.gov/sss/documents/ FINALchronicabsenteeismmemo_May2_2-16.pdf; see "Verification and Certification of 2016-17 School Year Chronic Absenteeism Data in the Student Information Repository System (SIRS)," Office of Student Support Services [May 16, 2017], available at http://www.p12.nysed.gov/sss/ChronicAbsenteeism1617.html). A review of the hearing record reflects the student was chronically absent from school beginning in the 2013-14 school year and continuing after the filing of the due process complaint notices at issue (Parent Ex. PPP at pp. 1-2; Dist. Ex. 98). The hearing record further indicates that the student's absenteeism—due to his anxiety and medical conditions—negatively affected his school performance from the beginning of the 2014-15 school year through fall 2017 (Parent Exs. G at pp. 3-4, 6; J at pp. 2-4; FFF at pp. 3-10, 11; PPP at pp. 1-2; Dist. Ex. 98).

[2] The hearing record reflects that from the 2013-14 school year through the first semester of the 2017-18 school year, the student's grades declined, and the number of incompletes he received increased (Parent Exs. III; JJJ; KKK; LLL; MMM; NNN; OOO).

contained allegations of fact but did not clearly indicate whether the parent believed the alleged fact is a violation constituting the nature of the problem, some contained clear allegations of fact which, if true, implicated specific violations of the IDEA, section 504 and/or the ADA, and some paragraphs proposed various forms of relief.

The clearest allegations asserted that over the course of the years in question, the district failed to: adequately evaluate all of the areas of suspected disability and educational need; identify medical issues/conditions that had negative effects upon the student's educational experience; include the requisite members of the CSE at each CSE meeting; allow the parent to participate in the decision making process; appropriately describe the student's needs in his IEPs; create appropriate annual goals; offer appropriate special education and related services in the student's IEPs; offer services tailored to the student's individual needs; offer necessary accommodations in the student's IEPs; offer appropriate post-secondary transition services; provide documents and notices to the parents that were called for by the IDEA; implement the IEPs and/or attempt to implement IEP services at appropriate times/locations; and reconvene the CSE and modify the student's IEPs due to changes in the student's circumstances and/or needs. Among the forms of relief sought by the parent were compensatory education including SETSS ,[3] evaluation of the student, student records, modifications to the student's records, including his grades, and modifications to his accommodations and special education programing.

B. Second Due Process Complaint Notice and Federal Court Action

On October 3, 2017, the parent filed a due process complaint notice concerning the 2017-18 school year (see Parent Ex. NN). In her complaint, the parent asserted that the district denied the student a FAPE on approximately 40 specified bases and "violated every provision of" section 504 and the ADA (id. at pp. 1-4). The parent again requested an "emergency" impartial hearing (id.). Due to the disposition of this appeal, it is not necessary to specify the multitude of assertions and requests for relief enumerated by the parent. While there was some overlap with the first due process complaint notice, the allegations in the second due process complaint focused on events that occurred after the first due process complaint, alleged similar violations, and sought similar relief.

On October 5, 2017, the parent filed a complaint in United States District Court for the Southern District of New York alleging that the district failed to offer the student a FAPE and violations of section 504 and the ADA (see J.Z. v. New York City Dep't of Educ., 281 F. Supp. 3d 352 [S.D.N.Y. 2017]).

[3] The hearing record lacks any meaningful description of the term SETSS. I have warned parties and IHO's in the past that this is not a term used in the State's continuum of educational services and judicial notice cannot be taken of the term (see Application of a Student with a Disability, Appeal No. 17-103; Application of a Student with a Disability, Appeal No. 17-034; Application of a Student with a Disability, Appeal No. 16-056; Application of a Student with a Disability, Appeal No. 16-054). Counsel for the parties do not appear to share a common understanding of the term in this case either, and the one witness called by the district appeared largely unfamiliar with the service (Tr. pp. 62-63, 561). As this is a significant component of the services of the student's disputed IEPs and the relief sought by the parent, the record should be developed with regard to the contours of this service as proposed by the district and any modifications that the parent is seeking going forward.

On October 6, 2017, the IHO held the first of five prehearing conferences (Parent Ex. EEE at pp. 10-13). The parent requested an expedited hearing, which the IHO denied (id. at pp. 16-18). The IHO also determined that she did not have jurisdiction to hear the parent's claims for damages under section 504 and the ADA (id. at p. 17). An October 19, 2017 prehearing conference focused on the parties' positions regarding the student's pendency placement (Tr. pp. 97-162). On November 21, 2017, the IHO found that the student's pendency placement consisted of the services described in the August 2017 IEP (Nov. 21, 2017 IHO Interim Decision). By interim decision dated December 14, 2017, the IHO consolidated the August 2017 and October 2017 due process complaint notices (Dec. 14, 2017 IHO Interim Decision; see Tr. pp. 170-72; Req. for Rev. Ex. A at pp. 12-13).[4]

On November 13, 2017, the parent filed an order to show cause for a preliminary injunction in district court (J.Z., 281 F. Supp. 3d at 352). On December 5, 2017, the district court denied the parent's request for injunctive relief (J.Z., 281 F. Supp. 3d at 359-65). Initially, the court found that the majority of the parent's claims and requests for relief fell "within the purview" of the due process proceeding and that the parent was required to exhaust her claims through the administrative hearing process (id. at pp. 361-63). The court also addressed the parent's request for injunctive relief and contention that exhaustion should be excused due to delays in the impartial hearing process, including the IHO's delay in holding a "resolution session" and the IHO's failure to timely issue a decision (id. at 363-65). The court noted that the IHO delayed the impartial hearing process based on the district's request in response to the parent's motion for injunctive relief, and held that "[w]hile there has been a delay of over two months in holding the resolution session from the date of [the parent's] initial [due process complaint notice], there has been an extension made and granted for arguably appropriate reasons," and therefore taking "'some form of equitable action prior to the revised deadline . . . might only prolong the resolution of this case, which is long overdue, by interfering with the administrative scheme provided for by the IDEA'" (id. at 363-64, quoting Murphy v. Arlington Cent. Sch. Dist., 1999 WL 1140872, at *4 [S.D.N.Y. Dec. 13, 1999]). The court held that the parent's "requests need to be addressed by the IHO expeditiously, thoroughly, and encompassing each of the requested reliefs sought by [the parent]. The IHO's declination of jurisdiction over federal claims should in no way prevent her from considering the whole range of requested relief, as such falls within her powers under the IDEA" (id. at p. 365).

C. Impartial Hearing Officer Decision

On January 19, 2018, the parties reconvened the impartial hearing for the purpose of entering exhibits into evidence (Tr. pp. 215-397). The hearing continued on February 2, 2018, and February 5, 2018 before concluding on February 7, 2018 (Tr. pp. 398-1045). One witness testified during the impartial hearing, with the majority of the testimony during hearing consisting of counsel for the parent's cross-examination of the witness (Tr. pp. 459-932).

In a decision dated February 21, 2018, the IHO acknowledged that neither party had completed its presentation of evidence (IHO Decision at p. 6). However, the IHO, noting that she had reviewed all of the voluminous documentary, testimonial, and recorded evidence, determined

[4] The interim decision consolidating the two cases is misdated "November 15, 2013" (Dec. 14, 2017 IHO Interim Decision at p. 3).

that she had on adequate record basis on which to render a decision (id. at pp. 6-7). Rather than addressing the individual claims raised by the parent in her due process complaint, the IHO determined that the parent's claims were largely centered around her allegations that the district had failed to appropriately address the student's inability to attend school as a result of his health concerns (id. at pp. 8-27). The IHO found that the district had not denied the student a FAPE for the 2014-15 through 2016-17 school years, and that the hearing record was not complete enough to make a determination regarding the basis for the student's difficulty in attending school during the 2017-18 school year "and how best to address it moving forward" (id.). Accordingly, the IHO directed the district to conduct medical and psychiatric evaluations of the student to determine the causes of his absenteeism and thereafter reconvene the CSE to determine "how to address the student's needs" and "develop an appropriate [IEP] for him to complete his education" (id. at pp. 27-29). The IHO denied each of the parent's requests for relief (id. at p. 28).

IV. Appeal for State-Level Review

The parent appeals. Due to the nature of the decision on appeal, it is not necessary to describe in detail the specific claims on the merits that are asserted by the parent. Generally, the parent's contentions broadly challenge the manner in which the IHO conducted the impartial hearing, assert violations of the parent's right to due process, challenge the IHO's findings that the district offered the student a FAPE for the 2014-15, 2015-16, and 2016-17 school years, assert the IHO failed to rule on the majority of issues found in the parent's due process complaint notices, and object to the IHO's failure to assert jurisdiction over the parent's section 504 and ADA claims. The parent attaches five documents to her request for review for consideration by an SRO on appeal as additional evidence (Req. for Rev. Exs. A-E). The parent requests declaratory and compensatory relief, as well as amendment of the student's grades and independent educational evaluations.

The district answers, asserting that the IHO correctly determined that the hearing record contained sufficient evidence for her to render a decision and that it offered the student a FAPE for the 2014-15, 2015-16, and the 2016-17 school years. The district next contends that it was reasonable for the IHO not to award the requested relief because of her limited jurisdiction under the IDEA and asserts that the IHO properly declined to adjudicate the parent's section 504 and ADA claims. The district also asserts that the SRO should decline to accept the additional evidence submitted by the parent, asserting that most of the documents are emails preceding the school years at issue or are duplicative, and therefore are not necessary to a determination in this matter. Finally, the district asserts that if the SRO determines that the hearing record did not include sufficient evidence on which to render determinations on the issues raised, the SRO should remand the case to the IHO to allow the parties to fully develop the record.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [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"]; Rowley, 458 U.S. at 192).

The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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 Matter—Additional Evidence

The district objects to the parent's inclusion of exhibits with the request for review. 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]). After reviewing the additional evidence, only the document marked as SRO A is necessary as additional evidence to render a decision (Req. for Rev. Ex. A). Upon remand, the parent may offer the

[5] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

remainder of the documents, and the IHO will determine what documents are relevant to her determination on the issues raised in the parent's due process complaint notices.

B. Right to Present Evidence

The IDEA requires State and local educational agencies "to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education (FAPE) by such agencies" (20 U.S.C. § 1415[a]), including the right of parents "to challenge in administrative and court proceedings a proposed IEP with which they disagree" (Burlington, 471 U.S. 359, 361 [1985]; see 20 U.S.C. § 1415[b], [f]). Federal and State regulations set forth the procedures for conducting an impartial hearing and address the minimum due process requirements that shall be afforded to both parties (34 CFR 300.512; 8 NYCRR 200.5[j]). Among other 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]; see 34 CFR 300.512[a][2]). Furthermore, State regulation provides that each party "shall have up to one day to present its case unless the impartial hearing officer 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]).

In this case, the district called one witness; however, for reasons discussed further below, neither party was afforded an opportunity to complete its presentation of evidence and thus both parties were deprived of their right to due process. Accordingly, this matter must be remanded for further administrative proceedings (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]).

The parent additionally asserts the IHO failed to make determinations on multiple issues raised in her due process complaint notices.[6] A review of the IHO's decision shows that the parent is correct (compare Parent Ex. A, and Parent Ex. NN, with IHO Decision). As the matter must be remanded to permit the parties to present evidence, on remand, the IHO should address all issues raised in the due process complaint notices that require adjudication. I remind the parties that it is each party's responsibility to assist the IHO by identifying the issues that must be addressed. The IHO is responsible for ensuring the orderly, efficient conduct of the impartial hearing and is afforded broad discretion in doing so.

C. Conduct of the Impartial Hearing

The parent makes several assertions relating to the overall conduct of the impartial hearing process, including that the IHO erred in refusing to assert jurisdiction over her section 504 and ADA claims, and that the IHO delayed the impartial hearing by failing to "schedule a regular

[6] The parent is cautioned that if the matter were not being remanded, the general statements of error in her request for review are not sufficient to raise for review each of the claims asserted in her due process complaint notices (see 8 NYCRR 279.4[a]; 279.8[c]). By way of example, setting forth as a single issue that "The 2015, 2016 and 2017 IEPs Were Substantively Invalid" does not present for review each of the subordinate claims raised in the parent's due process complaint notices.

hearing date" for five months, improperly extending the decision timeline, and not conducting full-day hearings.

1. Jurisdictional Issues

Initially, I will address the parent's claim that the IHO improperly refused to address her section 504 and ADA claims. School districts are required to have policies and practices in place to implement the provisions of section 504 and to provide the opportunity for an impartial hearing and a review procedure; districts may elect to satisfy the section 504 hearing requirement by using the IDEA impartial hearing procedures (see 34 CFR 104.36). In this case, a review of the IHO's decision indicates that she determined she lacked the jurisdiction to award damages under the statutes, not that she did not have the jurisdiction to adjudicate the claims under the statutes, and that the IHO affirmatively found that the district did not discriminate against the student on the basis of his disability (see IHO Decision at pp. 4, 8-9, 14, 17, 26). Furthermore, a State Review Officer lacks jurisdiction to consider the parents' challenge to the IHO's denial of their section 504 claim. In New York, the review procedure under section 504 does not include State-level review by an SRO, whose jurisdiction is limited to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]; see 34 CFR 104.36). As courts have recognized, the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO has no jurisdiction to review any portion of a parent's claims or an IHO's findings regarding section 504 or the ADA and, to the extent such claims are asserted in this proceeding, they will not be further addressed in this decision.

2. Impartial Hearing Timeline

The parent asserts that the IHO failed to schedule a hearing date until January 2018, almost five months after the first due process complaint notice was filed, improperly extended the decision timeline, and failed to conduct full-day hearings.[7] Although the matter must be remanded to the IHO, a description of the course of the impartial hearing may illuminate areas in which the parties and the IHO can find inefficiencies in their approach that can be remedied.

The hearing record does not reflect whether the parties convened a resolution meeting or when the resolution period expired. The hearing record does include correspondence between

[7] To the extent the request for review challenges the IHO's denial of the parent's request for an expedited hearing, State regulations define an expedited due process hearing as "an impartial hearing conducted in an expedited manner" which is available only under limited circumstances (see 8 NYCRR 201.11[a]). Accordingly, to the extent the IHO found the parent's due process complaint notice did not require an expedited hearing as defined by State regulations, she was correct (Parent Ex. EEE at pp. 16-18). However, the parent's request was also based on her concern that the student had not accumulated sufficient credits to graduate and the IHO acknowledged that the district court indicated the matter should be resolved expeditiously (see, e.g., Tr. pp. 956-57, 1036, 1038-39).

counsel for the parent and various attorneys for the district, dated between September 1, 2017 and October 2, 2017, referring to the parent's intention to seek an injunction absent a resolution of her concerns, as well as the parties' negotiations related to claims raised in the August 2017 due process complaint notice (Parent Ex. DDD at pp. 28-43, 47-50, 60-67, 69-70). By email to the IHO dated September 19, 2017, counsel for the parent "follow[ed] up on [the] request for emergency relief" in the due process complaint notice and requested an opportunity to "appear to address these emergency issues" (Parent Exs. DDD at pp. 78-79; EEE at pp. 2-4). By email dated September 27, 2017, the IHO requested an update regarding "the status of the resolution" and offered to schedule a prehearing conference (Parent Ex. EEE at p. 7). Counsel for the parent replied on October 2, 2017, and "request[ed] that the matter be scheduled as it remains an emergency" (id. at p. 9). In response, the IHO scheduled a prehearing conference for October 6, 2017 (id. at p. 10). On October 3, 2017, the parent filed a due process complaint notice relating to the 2017-18 school year (id.; Parent Ex. NN). At a prehearing conference held on October 6, 2017, the parties discussed the scope of the hearing and the issues to be resolved (Parent Ex. EEE at pp. 17-18). The parties continued the prehearing conference on October 12, 2017, at which the parties discussed the number of credits the student had accumulated toward graduation (Tr. pp. 1-50). The parties also discussed the parent's request for certain accommodations as "emergency interim" relief, and the need to schedule a pendency hearing (Tr. pp. 50-95). An October 19, 2017 prehearing conference focused on the parties' positions regarding the student's pendency placement (Tr. pp. 97-148). The parties also discussed the parent's request for consolidation of her complaints and the need for another prehearing conference, the parent requested that the conference be held after she had filed a motion for a preliminary injunction in the federal court action; however, the parent also indicated that she did not want to extend the timeline for the hearing (Tr. pp. 148-61; see Tr. p. 93).

Approximately three and a half weeks later, the parent filed an order to show cause for a preliminary injunction in district court on November 13, 2017 (J.Z., 281 F. Supp. 3d at 352). The IHO convened a due process proceeding with counsel for the district the following day, and indicated that counsel for the parent had "filed in court for a temporary restraining order . . ., and she is awaiting a decision on her order to show cause" (Tr. pp. 163-69). By email dated November 29, 2017, the IHO wrote to the parties and indicated her understanding "that the parties are awaiting a decision in federal court on this matter," noted that the "compliance date" had expired, and requested that the parties "provide [her] with the status" (Req. for Rev. Ex. A at p. 2).[8] The district responded and requested an extension of the timelines (id.). Counsel for the parent responded by email dated November 30, 2017 and requested "an emergency phone conference" to clarify the issues for the impartial hearing, as well as "dates for the hearing" (id. at p. 3). The parent also requested consolidation of her due process complaints (id.). The IHO responded and indicated that she had "extended the compliance date upon the understanding that the parties agree that a decision in federal court may guide how the parties proceed in the instant matter" (id. at pp. 3-4).

On December 5, 2017, the district court denied the parent's request for injunctive relief (J.Z., 281 F. Supp. 3d at 359-65). By email dated December 7, 2017, counsel for the parent informed the IHO of the court's ruling, requested consolidation of the parent's due process complaints, and provided 20 dates in December and January on which she was available to convene

[8] The parties apparently use the phrase "compliance date" to refer to the date by which the IHO was required to render a decision (see 34 CFR 300.515[a], [c]; 8 NYCRR 200.5[j][5]).

the impartial hearing (Req. for Rev. Ex. A at pp. 5-6). Counsel also identified possible witnesses she planned to call at the impartial hearing (id. at p. 6). The parties thereafter scheduled another prehearing conference for December 14, 2017 (id. at pp. 7-10).

On December 14, 2017, the parties convened a prehearing conference, at which they discussed the scope of the impartial hearing and scheduled hearing dates (Tr. pp. 170-214). Counsel for the parent also provided an "update" regarding "some of the more urgent issues" discussed at the prior prehearing conferences, including the status of the student's credit accumulation and pendency (Tr. pp. 173-82). The parties also discussed the number of witnesses they planned to call, as well as the number of hearing days they anticipated they would need to present testimony, with both parties indicating they would require no more than two or three days (Tr. pp. 198-201).

By email dated January 11, 2018, counsel for the district indicated that she was "unable to confirm my witness's availability" for the next scheduled hearing date, and proposed using that hearing date to review the parties' evidentiary disclosures and to present opening statements, reserving testimony for the following scheduled hearing date (Req. for Rev. Ex. A at p. 16). The IHO granted the district's application over parental objection (id. at pp. 16-17).

At a hearing convened on January 19, 2018, the parties marked and placed exhibits into evidence and addressed other administrative matters (Tr. pp. 215-397). The parties also discussed the compliance date, and counsel for the parent indicated that she was unwilling to join in a request for an extension based on the emergent nature of the student's situation (Tr. pp. 383-88). The IHO indicated that the issue could be discussed at the next hearing date, but that if counsel for the parent did not agree to extend the compliance date, it had the effect of requesting the IHO to issue a decision "based on what I have" (Tr. pp. 388-95). The IHO noted the volume of documentary evidence offered by the parent, the number of witnesses she requested, and that counsel had agreed to schedule hearing dates into March (Tr. pp. 388-89). Counsel for the parent objected, indicating that she would prefer to schedule additional hearing dates, rather than have the IHO render a decision without the presentation of evidence (Tr. pp. 392-93). The IHO responded, "you have the dates that were available" (Tr. p. 393).

On February 2, 2018, the impartial hearing reconvened, at which time the district presented the student's guidance counselor as a witness (Tr. pp. 398-525). The parent began cross-examination of the witness on that date (Tr. pp. 459-519). At the conclusion of the hearing date, counsel for the parent reported that she had engaged in discussions with counsel for the district related to whether they could reach a stipulation regarding her consenting to an extension of the compliance date without waiving her right to assert emergency circumstances in the federal court action (Tr. pp. 520-22).

The impartial hearing reconvened on February 5, 2018, at which time counsel for the parent resumed her cross-examination of the student's guidance counselor (Tr. pp. 527-748). Cross-examination resumed on the next hearing date, February 7, 2018 (Tr. pp. 754-932). At the conclusion of testimony, the parties discussed the pending compliance date (Tr. pp. 932-1044). Counsel for the parent expressed optimism that the parties could reach a stipulation regarding her agreeing to an extension without prejudicing her ability to claim emergency circumstances in federal court (Tr. pp. 933-36). Counsel for the district requested an extension, to which the IHO responded that unless counsel for the parent consented, "If you're going to complain about the

hearing officer not giving you a timely decision, then I'm going to give you a timely decision" (Tr. pp. 935-36). The IHO indicated that because the district court "was very, very clear that they wanted a quick decision, . . . If we are getting extensions and it's timely, then I don't have a problem. But if you're not consenting, I am going to give you a decision" (Tr. pp. 939-40). Counsel for the parent requested interim relief, asserting that the student was in an emergency situation and would be unable to graduate from high school because of the district's application of unlawful policies, which the IHO denied (Tr. pp. 940-55, 1042-43). Counsel also objected that there were no further scheduled hearing dates prior to March (Tr. pp. 945-46). Counsel asserted that she wanted "access to a due process hearing," to which the IHO responded, "Then you have to request an extension. You have to consent" (Tr. p. 956). When counsel expressed her concern that extending the hearing would "definitively" prevent the student from graduating, the IHO stated "Then you're asking for a decision" (Tr. pp. 956-57). Counsel asked for "a hearing on different days [to] try to fit the evidence in," to which the IHO responded, "I've given you the days I have" (Tr. p. 957). Toward the end of the hearing, counsel for the parent requested clarification of the IHO's position regarding the proposed stipulation with the district; the IHO responded that if counsel did not consent to an extension, or entered an agreement with the district that allowed her to seek injunctive relief in federal court on the basis that the IHO had not timely issued a decision, the IHO was going to issue a decision on the record in front of her (Tr. pp. 1034-44). Counsel again stated that she wanted an "opportunity to exercise our due process rights," to which the IHO responded that, "your opportunity to exercise due process right[s] demands more than 30 days when you spend 3 days with one witness . . . You might have to extend" (Tr. pp. 1037-38).

After the final hearing date, counsel for the parent, by email dated February 8, 2018, indicated that she was "in active discussions/negotiations" with the district and was "working to provide a response to the question of the compliance date" (Req. for Rev. Ex. A at pp. 29-30). In response, the IHO stated that "any agreement" the parent entered into with the district "may not resolve the issue of a timely decision being requested not only by the parent but by the federal judge," and noted that "given the difficulty scheduling, the voluminous amount of documentary evidence and the length of witness testimony," it was unlikely the parties would be able to complete their presentation of evidence with one extension of time (id. at p. 30). Counsel for the parent requested the opportunity to make a written submission, which was granted by the IHO (id. at p. 31). By email dated February 13, 2018, counsel for the district requested "an extension of the compliance date to allow the parties to continue to prepare and present [their] case[s] in accordance with due process considerations" (id. at p. 32). That day, the IHO responded, indicating that her decision was due on February 20, 2018, and that her "intention [was] to issue a decision," based in part on her review of the district court decision, which she felt was "clear that the expectation is to issue a timely decision" (id. at p. 33). Counsel for the parent indicated that she was prepared to consent to an extension, to which the IHO responded that she intended to issue a decision in accordance with the timelines, as the "parent would be rightly aggrieved" by the delay that would be required to complete the impartial hearing and the district court "issued a strong directive to proceed expeditiously" (id. at p. 34). Counsel for the parent responded that she would "agree to an extension . . . for the purpose of requesting a conference with the Court for guidance," and expressed concern that issuance of a decision without completing the presentation of evidence would cause further delay by way of appeals and litigation in court (id. at pp. 36-37). Counsel for the parent reported to the IHO, by email dated February 16, 2018, that the district court declined to intervene (id. at p. 39).

As related above, it appears that the parties had difficulty scheduling hearing dates primarily due to the availability of counsel and the IHO (see, e.g., Tr. pp. 201-10, 392, 396). However, State regulations do not permit extensions of the timelines on the basis of unavailability; rather, counsel availability is not a permissible basis for extensions to be granted absent "a compelling reason or a specific showing of substantial hardship" (8 NYCRR 200.5[j][5][iii]). Furthermore, the regulations require that an IHO may not accept appointment unless he or she is available to initiate the hearing within 14 days and render a decision within 45 days of the expiration of the resolution period (see 8 NYCRR 200.5[j][3][i][b]; [j][3][iii]; [j][5]).

Finally, the parent asserts that the IHO did not schedule full hearing days.[9] IHOs retain broad discretion in scheduling hearing dates, including the length of the day, as long as the time and place chosen is "reasonably convenient to the parent and student involved" (8 NYCRR 200.5[j][3][x]). The regulations do not require that impartial hearings must take place during school hours, or that they take place when school is in session.

D. Guidance on Remand

This matter is remanded to the IHO for development of an appropriate hearing record and FAPE determinations made on that record. On remand the parties and the IHO are reminded that procedural and substantive issues subsequent to those raised in the due process complaint notices are not properly before the IHO, and those issues may need to be addressed in a separate proceeding. As the parties and IHO have experienced difficulty in completing the impartial hearing in accordance with the timelines set forth in regulation, the following guidance is offered in hopes that it may assist them in resolving the matter as expeditiously as possible. Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "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. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]).

1. Prehearing Conference

Given that the impartial hearing was initially requested in August 2017 and the testimony of only one witness has been taken, the IHO may find it helpful to schedule a conference with the parties to set forth her expectations regarding the manner in which the impartial hearing will proceed, and to schedule dates for completion of the impartial hearing. State regulations provide 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

[9] Review of the hearing transcripts shows that the February 2, 2018 hearing commenced at 12:42 p.m. and ended at 3:14 p.m., the February 5, 2018 hearing commenced at 10:24 a.m. and ended at 3:20 p.m., and the February 7, 2018 hearing commenced at 10:44 a.m. and ended at 4:58 p.m. (Tr. pp. 398, 525, 527, 752, 754, 1044).

complete a timely hearing" (8 NYCRR 200.5[j][3][xi]). In this case, review of the record shows that upwards of five hearing days were devoted to prehearing conferences that ultimately diverted time away from the issues set forth in the parent's due process complaint notices, in favor of a rolling discussion of present-day concerns about the timing of the student's graduation (see Tr. pp. 1-397; Parent Ex. EEE at pp. 17-18).[10] On remand, it could be advantageous to hold a prehearing conference to clarify the specific issues that need to be addressed and concentrate on limiting further presentation of evidence to that necessary to address the parent's claims related to a denial of a FAPE raised in her due process complaint notices.[11] The parties should focus on confining the prehearing conference discussion to that of FAPE as it relates to the school years at issue in the due process complaint notices, and not on issues that post-date the issues contained in the due process compliant notices (see Parent Exs. A; NN).

The parties are reminded that IHOs are provided with broad discretion in the conduct of the impartial hearing. In particular, State regulations require that the IHO "may receive any oral, documentary or tangible evidence except that the impartial hearing officer shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Similarly, the IHO "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][d]) and "may limit the number of additional witnesses to avoid unduly repetitious testimony" (8 NYCRR 200.5[j][3][xii][e]). Where, as here, a significant number of witnesses were anticipated to be called, the IHO should formally require witness lists as part of the parties' 5 business day disclosures that include the name, role/position, address, phone number, and general thrust of each witness's anticipated testimony.[12]

2. Scheduling Impartial Hearing Dates

The IDEA and State and federal regulations provide that prior to the opportunity for an impartial hearing, the district shall convene a meeting with the parents and the relevant members of the CSE, to provide the parents an opportunity to discuss their due process complaint notice and the district an opportunity to resolve the complaint (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). If the district is unable to resolve the complaint within 30 days from receipt of the due process complaint notice, 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]). State

[10] While I can understand that is a legitimate area of concern for the parent, an impartial hearing must address and is limited to matters that are contained in the due process complaint. Updates of the student's current status (no more than a matter of minutes) may be helpful to the IHO especially when pondering the issue of equitable relief.

[11] It may be helpful to the IHO to require counsel for the district to submit a "marked copy" of the parent's due process complaints, in which the district indicates whether it denies, admits, or denies knowledge or information sufficient to form a belief about the truth of a particular allegation (e.g. "D," "A," or "DKI"), as it would help clarify with greater precision where the parties share common views versus the most critical areas where evidence is needed to complete the hearing.

[12] Each party has the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing (8 NYCRR 200.5[j][3][xii] [emphasis added]; see 34 CFR 300.512[a][3]). There is no exclusion from this rule for testimonial evidence. An impartial hearing is not to be used as an expedition in discovery.

regulations require the IHO to commence the impartial hearing within 14 days of the expiration of the resolution period (8 NYCRR 200.5[j][3][iii][b]).

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]).[13] Before granting a request for an extension, the IHO is required to consider the cumulative impact of: whether the delay will adversely affect the student's educational interest; whether each party has been afforded a fair opportunity to present its case in accordance with the requirements of due process; any adverse consequences likely to be suffered by a party in the event of delay; and whether there has been a delay caused by the actions of one of the parties (8 NYCRR 200.5[j][5][ii]). "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]).

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 impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable" (8 NYCRR 200.5[j][3][xiii]).

Furthermore, as noted above, State regulations do not restrict IHOs with respect to scheduling hearings on days and at times when school is not in session. The primary goal of the impartial hearing system under the IDEA is to ensure the timely resolution of disagreements and, while federal and State regulations provide that impartial hearings must be "conducted at a time and place that is reasonably convenient to the parents and child involved" (34 CFR 300.515[d]; 8 NYCRR 200.5[j][3][x]), the hearing record also reflects that, with the IHO's permission, the parent

[13] The hearing record contains two documents entitled "Case Follow-Up Sheet," indicating that the IHO granted extension requests on December 14, 2017, and January 18, 2018. According to these documents, each request was made by both parties on the basis of "Availability of Witnesses." Although the district requested an extension at the November 29, 2017 impartial hearing date, after being informed by the IHO that the "compliance date has expired" (Req. for Rev. Ex. A at p. 2), the hearing record does not contain separate documentation of that extension having been granted. However, the IHO's decision indicates that "extensions were granted to allow the federal court an opportunity to rule on the parent's request for injunctive relief" (IHO Decision at p. 5). With regard to the extension granted in January 2018, the IHO indicated that she had "the authority to extend the decision date at the request of the parties for good cause," and indicated that "the parties had entered into evidence close to two hundred exhibits and had scheduled hearing dates well into March" (id. at p. 6). None of the extension documentation in the hearing record reflects that the IHO properly considered and weighed the factors set forth in regulation (8 NYCRR 200.5[j][5][i], [ii]).

did not attend the impartial hearing over the district's objection (Req. for Rev. Ex. A at pp. 15, 17, 25-27; see Tr. pp. 1, 97, 163, 170, 215, 398, 527, 754). The IHO should consider whether it is necessary to schedule hearing dates outside of business hours, or on non-school days, or in locations other than those commonly utilized by the district, in order to comply with her regulatory obligation to timely issue a decision. In addition, to ensure the prompt completion of the impartial hearing, it may be necessary for the IHO to issue subpoenas requiring witnesses to be available outside of standard school hours (see 8 NYCRR 200.5[j][3][iv]). Telephone testimony (and presumably video testimony such as Skype) is explicitly authorized by State regulations to ease scheduling difficulties (8 NYCRR 200.5[j][xii][c]). Additionally, the IHO may order that direct testimony be completed by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination (8 NYCRR 200.5[j][xii][g]).[14]

During the impartial hearing, the district indicated that it intended to call one to three witnesses, and that it would require a maximum of two hearing dates to present its case (Tr. p. 198). The parent indicated that she would call between seven and ten witnesses, some of whom may overlap with the district witnesses, and would require a maximum of three hearing dates (Tr. pp. 198-201). However, counsel for the parent spent approximately eight hours conducting cross-examination of one witness, with much of the testimony relating to the witness's awareness of district policies, rather than how the application of those policies related to the provision of a FAPE to the student (Tr. pp. 459-932). The Eighth Circuit has stated that so long as a party is afforded the rights prescribed by the IDEA, it is permissible for IHOs to limit the presentation of evidence (B.S. v. Anoka Hennepin Public Schools, 799 F.3d 1217, 1220-22 [8th Cir. 2015]). A number of district courts have similarly found it permissible for IHOs to limit testimony, with one noting that "IHOs, like judges, have the inherent authority to manage hearings to avoid needless waste and delay. They should exercise control where necessary to manage the proceedings and eliminate unnecessary costs and redundancy, including imposing reasonable time limits where appropriate" (L.S. v. Bd. of Educ. of Lansing Sch. Dist. 158, 2015 WL 3647759, at *3-*5 [N.D. Ill. June 11, 2015] [finding no violation of due process where the IHO appropriately encouraged counsel to focus on testimony relevant to the issues, suggested the use of affidavits, and granted the number of hearing dates requested]; T.M. v. Dist. of Columbia, 75 F. Supp. 3d 233, 246-47 [D.D.C. 2014] [finding that when "the time period noticed for the hearing was drawing to a close, the HO's approach to limit plaintiffs' cross-examination time was a reasonable one"]; Sch. Bd. of Norfolk

[14] Prepared direct testimony is routinely used in a variety of highly technical administrative proceedings. For example, in proceedings before the State Public Service Commission, prepared direct testimony is drafted in a question and answer format with a deadline for submission set in a prehearing order by an administrative law judge (see, e.g., Prepared Testimony of Richard H. Powell before the Public Service Commission, located at http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/60ef17bcf10237408525769600 6d4a8a/$FILE/Powell%20Testimony.pdf. Such prepared testimony is disclosed to the opposing party and presiding judge in advance of the hearing date, and a schedule may also be set to address written objections to the testimony in advance. When the witness is sworn at the in-person hearing (or via telephone), a copy of the testimony and an affidavit attesting to the veracity of the pre-filed testimony may be presented and admitted into evidence. The witness may be made available for cross-examination immediately thereafter. This approach can contribute significantly to the efficiency of the hearing and cut down on needless, wasteful, scheduling conflicts. Despite the provision in State regulation that explicitly authorizes this technique in IDEA proceedings, which have even tighter scheduling constraints than utility rate proceedings, the approach remains woefully underutilized in the IDEA cases where it is needed most— the complex proceedings brought by seasoned practitioners that are most likely in need of a ruling on the merits by IHOs.

v. Brown, 769 F. Supp. 2d 928, 937-38 [E.D. Va. 2010] [holding that "at the very minimum, a proper hearing must allow both parties to present their case" and finding it consistent with due process for an IHO to permit the parties to exceed preset time limitations for direct and cross examination, "to allow the parties to fully present their case"]). The United States Education Department's Office of Special Education Programs (OSEP) has noted that "hearing officers have authority to determine procedural matters not specifically addressed in Part B [of the IDEA] and its implementing regulations, consistent with a party's enumerated rights and general due process requirements. States also have some flexibility in establishing rules for conducting due process hearings, as long as the State's rules are consistent with Part B and the requirements of due process" (Letter to Kane, 65 IDELR 20 [OSEP 2015]). OSEP found that a state guideline requiring impartial hearings to be concluded within three hearing days of six hours each did not violate the IDEA because the guideline permitted IHOs to extend the limitation as necessary (id.). Similarly, OSEP has noted that "Part B does not mandate a specific number of days for conducting a due process hearing. This determination must be made on a case by case basis at the discretion of the hearing officer. A hearing officer may limit the number of days of a hearing (e.g. by excluding redundant or irrelevant evidence or by denying a request for an extension) so long as the parties are provided the hearing rights required by Part B" (Letter to Kerr, 22 IDELR 364 [OSEP 1994]). State regulations, as noted above, provide that each party "shall have up to one day to present its case unless the impartial hearing officer 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]), and the IHO may limit the number of witnesses and the examination of a witness that the IHO finds to be irrelevant, immaterial, or unduly repetitious (8 NYCRR 200.5[j][3][xii][d], [e]). Accordingly, State regulations are consistent with both OSEP guidance and relevant caselaw, and as part of the prehearing conference suggested above, the IHO may wish to consider whether the parties should be given a specific limitation of time in which they are permitted to present evidence.[15]

Finally, both parties are represented by counsel. Counsel for the parent requested that the district make another attorney available to try to case because of lead counsel's lack of availability, which the IHO denied (Tr. pp. 206-07). When lead counsel is unavailable, the IHO is not prohibited by State regulations from requiring that alternate counsel be made available to represent either party at the impartial hearing, and should consider whether it is necessary to complete the hearing in a timely fashion. The IHO is mandated by State regulation to require counsel for the district to set forth either "a compelling reason or a specific showing of substantial hardship" before granting an extension of time as a result of a lack of availability based on counsel's "scheduling conflicts" (8 NYCRR 200.5[j][5][iii]).

VII. Conclusion

Based on the above, I find that the IHO did not conduct the impartial hearing in a manner consistent with due process (34 CFR 300.514[b][ii]). The IHO failed to provide both parties a sufficient opportunity to present evidence in accordance with their right to due process, and the IHO's determinations must be annulled. The matter is remanded to the IHO for further proceedings

[15] Because of the IHO's determination that any exhibits not stipulated to would need to be offered into evidence through a witness, it may be necessary to permit additional hearing days for admission of evidence relevant and material to the issues raised in the parent's due process complaint notices (see Tr. pp. 284-300).

and determinations on the merits of the parent's due process complaint notices, in accordance with the body of this decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated February 21, 2018, which found that the district offered the student a FAPE for the 2014-15 through 2016-17 school years is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings in accordance with this decision; and

IT IS FURTHER ORDERED that in the event the IHO who issued the February 21, 2018 decision is not available, the district shall appoint a new IHO in accordance with the rotational selection procedure and State regulations.

Dated: **Albany, New York**
May 18, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER