



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-105

Application of a STUDENT WITH A DISABILITY, by his parents, 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 Mary H. Park, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined, among other things, that the parents "shall continue to cooperate with [the district] and produce the student for all scheduled evaluations and all future evaluations . . ." The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

A full recitation of the student's educational history is unnecessary due to the disposition of this appeal on procedural grounds. Briefly, the student was initially placed, by the district at Westchester Exceptional Children's School (WECS), a New York State approved nonpublic school, pursuant to the student's September 2, 2015 IEP, where he attended for the 2015-16 school year (Dist. Exs. 9; 13 at p. 1; see 144 at p. 2).

At some point prior to the end of the 2015-16 school year, the parents approached staff at WECS and expressed a desire for a more appropriate placement for the student, because the student's IEP called for the student to be "State tested"; WECS staff agreed with the parents' desire because students attending WECS are "New York State Alternatively (NYSAA) assessed" (see Dist. Ex. 13 at p. 1).

In May 2016, the district contacted the parents to schedule an annual review of the student's program and to develop an IEP for the 2016-17 school year (Dist. Ex. 1 at p. 2). The district informed the parents that the district was required to hold an annual review meeting before the start of the new school year on July 1, 2016 and requested that the parents provide a time and date, between June 6 and June 16, when they would be available to attend (id. at p. 1). The parents refused to consent to "any further process," apparently including participation in a CSE meeting, until the resolution of a separate proceeding (id.).

On June 2, 2016, the CSE sent a notice to the parents indicating that an annual review meeting had been scheduled for the student for June 14, 2016 (Dist. Ex. 2 at p. 1).

The CSE convened on June 14, 2016 to develop the student's IEP for the 2016-17 school year (Dist. Exs. 3 at pp. 3, 16; 7). Minutes of the meeting indicate that the CSE attempted to contact the parents by phone but were unable to reach them (Dist. Ex. 7). The CSE proceeded with the meeting without the parent (see Dist. Exs. 3; 7). The June 2016 CSE recommended placement of the student in a 12-month 8:1+1 special class in a New York State approved nonpublic school, with related services including counseling, occupational therapy (OT), and speech-language therapy (Dist. Ex. 3 at pp. 1, 11-12). The IEP reflected test results from a June 10, 2015 psychoeducational evaluation and indicated that the student would participate in the same State and district-wide assessments of achievement that were administered to general education students (id. at p. 14).

On July 6, 2016, the parents requested a reconvene of the CSE because WECS could not implement the student's IEP (Dist. Ex. 16). On the same day, the district sent the parents a request for a reevaluation of the student, indicating that if new assessments are required, the parents will be asked for consent (Dist. Exs. 14; 15). On August 18, 2016, the district notified the parents that additional assessments were required, which "may include a psychoeducational evaluation, a classroom observation, and other appropriate assessments or evaluations," and sent the parents a request for consent (Dist. Ex. 30 at p. 1).

The hearing record reflects that the district scheduled and rescheduled evaluations of the student in the areas of assistive technology (see Dist. Exs. 11 at p. 5; 12; 36 at p. 1; 43 at pp. 2, 3, 6; 46 at p. 2; 48 at p. 1), academics/psychoeducation (Dist. Ex. 21 at p. 8; 26 at p. 2; 46 at p. 2; 48 at p. 1), social history (Dist. Ex. 21 at pp. 6, 7, 8), and neuropsychology (Dist. Ex. 32 at pp. 1-5).

The hearing record reflects that the parents indicated that they did not want the evaluations conducted (Dist. Exs. 18 at p. 2; 21 at p. 6) and repeatedly either refused consent, requested rescheduling, often with specific conditions, or did not appear with the student for scheduled evaluations (Dist. Exs. 38 at p. 1; 41 at p. 2; 42 at pp. 1-2; 43 at pp. 5, 8; 44 at pp. 1-3; 45 at pp. 1-2; 50 at p. 2).

The CSE convened again on June 16, 2017 to develop the student's IEP for the 2017-18 school year (Dist. Ex. 73 at pp. 1, 15). The IEP indicated that the parents participated at the meeting and reflected the concerns of the parents, noting their opposition to the CSE's recommendation for placement in a specialized school and that the parents "left [the] meeting in anger" (id. at p. 16). The resultant IEP recommended placement of the student in a 12-month 8:1+1 special class in a district specialized school, with related services including counseling, OT, and speech-language therapy (id. at pp. 1, 10, 13, 15, 17). The IEP indicated that the student would

participate in the same State and district-wide assessments of student achievement that were administered to general education students (id. at p. 13).

The CSE convened anew on November 28, 2017 to develop the student's IEP for the 2017-18 school year (Dist. Ex. 119 at pp. 1, 15, 17). Minutes of the meeting indicated that the Parents participated at the meeting and questioned the appropriateness of the recommended district specialized school placement (Dist. Ex. 118 at pp. 1-2; see Dist. Ex. 119 at p. 1-5, 16). The resultant IEP continued to recommend placement of the student in a 12-month 8:1+1 special class in a district specialized school, with related services including counseling, OT, and speech-language therapy (Dist. Ex. 119 at pp. 1, 10, 13, 15, 17). The IEP indicated that the student would participate in the same State and district-wide assessments of student achievement that were administered to general education students (id. at p. 13).

A. Due Process Complaint Notice

By amended due process complaint notice dated July 20, 2018, the district asserted that the student's parents have stated that they will neither consent to, nor produce the student for certain evaluations required to develop an appropriate IEP for the student's 2018-19 school year. The district requested an order to compel the student's parents to provide consent and produce the student for the following evaluations: (1) a psychoeducational evaluation; (2) a social history update; (3) a speech-language assessment; (4) an OT assessment; (5) a physical therapy (PT) assessment; (6) an assistive technology evaluation; (7) a vocational assessment, and; (8) a functional behavioral assessment (FBA) (Dist. Ex. 144).¹

B. Impartial Hearing and Intervening Events

On July 18, 2018, the IHO held a prehearing conference (see generally Tr. pp. 1-17). During the prehearing conference the parents requested that the IHO recuse herself from the proceeding because she had previously recused herself from two prior impartial hearings regarding the student's education (Tr. pp. 2-3). The IHO denied the parents' request for her recusal (id.).

After the prehearing conference, the IHO ruled on a request that the instant matter be consolidated with a separate matter arising from a due process complaint notice initiated by the parents dated July 23, 2018 (IHO Order Denying Consolidation at pp. 1-2). In an interim decision dated July 26, 2018, the IHO denied the parents' request to consolidate the two proceedings (id.).

Reconvening the hearing on August 8, 2018, the IHO discussed the status of the matter and asked the parties what they wanted to submit as documentary evidence (Tr. pp. 18, 20). The district's attorney informed the IHO that the student had recently appeared for two of the evaluations at issue, a social history update and a PT assessment, and that two other evaluations, a neuropsychological exam and a speech language therapy evaluation, were scheduled to take place over the next few weeks (Tr. pp. 25-26; Dist. Ex. 140). The district's attorney stated that because the parents had been "complying with producing the student and appearing for the scheduled evaluations, the [district] may suggest that we adjourn this case until after August 23rd to see if

¹ The original due process complaint notice dated July 2, 2018 was not admitted as an exhibit during the impartial hearing; however, it was submitted as a part of the hearing record on appeal.

they comply, " to which the parents responded that the suggestion was "preposterous" because the case "needs to be dismissed" (Tr. pp. 26-27). The district's attorney stated that he was "not going to dismiss it at this time" and the IHO stated that she was "moving on to the next issue" (Tr. pp. 27-28).

The discussion thereafter turned to the admissibility of the district's documentary evidence (Tr. pp. 28-45). The IHO complained about the volume of the district's submissions, stating at one point that she did not "see why they all have to be put into evidence" and that she did not "carry this kind of stuff around. It's ridiculous." (Tr. p. 29). The parents objected to the admission of the district's first and second exhibits on relevance grounds; however, the district's attorney argued that the documents were relevant because they showed a pattern of behavior regarding the parents' interactions with the district, and the IHO admitted the documents along with the amended due process complaint notice (Tr. pp. 35-45; Dist. Exs. 1-2; 144). During this discussion, the student's father stated on several occasions that he was having difficulties expressing himself as he wished, due to his Tourette Syndrome, apparently exacerbated from the stress of participating in the impartial hearing (Tr. pp. 20, 24, 32-33, 43, 48, 50). On two occasions when the student's father mentioned his disability, the IHO's response was "I don't care." (Tr. pp. 43, 48). The cohesion of the impartial hearing continued to degrade thereafter, with the parents complaining of unfairness and the IHO accusing the parents of trying to "obstruct" the impartial hearing (Tr. pp. 42-44). The hearing transcript reflects that the IHO stated, "Get us security," and the student's mother promptly replied, "We'll leave. We'll leave." (Tr. pp. 49). Although the transcript becomes somewhat difficult to parse, apparently thereafter the parents asked for an "ambulance" and "EMS," gathered the documents they brought to the impartial hearing that they intended to put into evidence, and left the hearing room with the documents and proceeded out of the building (Tr. pp. 49-53).²

After the parents departed from the impartial hearing, the IHO and the district's attorney continued to discuss the matter (Tr. pp. 53-72). The district's attorney continued to assert the relevancy of the documentary evidence submitted on behalf of the district, and the IHO admitted a total of 141 of the district's exhibits, "without going through them individually, because there not here to object to them individually, so there's no point." (Tr. pp. 53-54, 57). The IHO excluded district exhibits 141 through 143 on the grounds that they were produced "belatedly" (Tr. pp. 70-71). The IHO then permitted the district's attorney to make an opening statement asserting the merits of the district's due process complaint notice and request for an order providing consent to evaluate the student and compelling the parents to produce the student for evaluations (Tr. pp. 62-64; see Dist. Ex. 144 at pp. 1, 5). The IHO then stated her intention to issue a decision based upon the district's documentary evidence, and adjourned the proceedings (Tr. pp. 70-71).

C. Impartial Hearing Officer Decision

In a decision dated August 15, 2018, the IHO, in a lengthy footnote, described the August 8, 2018 hearing date from her perspective, and noted, among other things, that the parents' behavior at the hearing was argumentative, that the discussion became heated, that the parents disregarded numerous requests to stop interrupting, and that the student's father became very agitated (IHO Decision at p. 2, n.1). The IHO also noted that voices were raised and security "appeared" in the

² The parents assert that the student's father was taken to a hospital emergency room in Brooklyn where he was treated and released (Req. for Rev. ¶¶ 9, 16-17; see Req. for Rev. Ex. E at pp. 1-5).

hearing room, and that thereafter, the parents "decided to leave the hearing, taking their exhibits with them" before any of the exhibits could be formally admitted into the hearing record (*id.*). The IHO also stated that although three district exhibits were excluded because they were not disclosed in a timely manner, the remaining 141 exhibits were admitted because the parents were no longer present, and no objections were placed on the record (*id.*). The IHO related that after reviewing the district's exhibits, it became apparent to her that had the parents been present and made appropriate objections to the district's exhibits, some of the exhibits would have been excluded based upon relevancy (*id.*).

In the decision, the IHO determined that the present matter concerned only the district's request to compel the parents to produce the student for the remaining evaluations (IHO Decision at pp. 2-3). The IHO noted that although the parents had exhibited a "recent desire to cooperate" with the district as evidenced by the fact that the student attended the social history update appointment, and the PT evaluation, they had not produced the student for the most recent evaluation appointment—an OT evaluation scheduled for August 9, 2018 (*id.* at p. 6). The IHO determined that it was unlikely the parents would produce the student for the remaining evaluations (*id.*). The IHO concluded that, given the parents' "impulsive behavior," and their "reluctance to continue their participation in an appropriate fashion at the impartial hearing," an order requiring the parents to produce the student for the remaining evaluations was required (*id.*). The parents were ordered to continue to cooperate with the district and produce the student for all scheduled and future evaluations (*id.*).

IV. Appeal for State-Level Review

The parents appeal and initially assert that the IHO erred in her conduct of the impartial hearing and that the IHO was and continues to be biased against the parents and is not impartial. The parents assert that the IHO recused herself from prior cases with this student, and should have recused herself in this matter when the parents requested it for the same reason. The parents next assert that they were deprived of an opportunity to submit evidence during the impartial hearing, and have attached multiple documents to their request for review, which they request be considered as additional evidence. The parents also assert that the IHO erred in admitting the district's evidence over their objections.

The parents assert that because the IHO was not and is not impartial, and violated the parents' right to participate in the proceeding, her rulings should be reversed. The parents also assert that the IHO deliberately exacerbated the student's father's Tourette Syndrome symptoms, causing him to need to be taken to an emergency room, and erred in finishing the hearing without the parents being present.

The parents request several rulings and orders from the SRO, including an order "overturning and expunging all rulings and orders" made by the IHO; an order on behalf of the student's "best interest"; an order to exclude the IHO from presiding over future cases concerning the student; an order compelling the CSE to meet to update information, implement academic tutoring, and "refer to CBST for placement in an appropriate NPS"; an order compelling the CSE to provide and schedule all outstanding requested and needed evaluations; and, finally, an order compelling the district and the CSE to cooperate with the parents in completing the "mandatory three year reevaluation process."

In an answer, the district responds to the parents' allegations, admits and denies the parents' factual claims and asserts that the appeal should be dismissed because it is facially deficient in that the parents fail to specify the reasons for challenging the IHO's decision and the grounds for reversal, and fail to include appropriate citations to the hearing record and the IHO's decision. The district also objects to the additional evidence attached to the request for review, arguing that the evidence was available at the time of the hearing and is not necessary for an SRO to make his or her decision.

The district further contends that the IHO was patient, fair and impartial and did not deprive the parents of any due process rights. Rather, the district contends that the IHO attempted to obtain the parents' cooperation at the hearing, and the parents decided to leave on their own.

With respect to evidentiary rulings, the district asserts that the IHO properly excluded three district documents that were violative of the disclosure rule, and that the IHO did not refuse to accept the parents' evidence, the parents decided to leave the hearing and took the exhibits with them.

The district asks that we affirm the IHO in best interests of the student. The district contends that it appears that the parents want what they already have, an order directing the parties to cooperate in performing the required evaluations, and that the district has been doing all it can to get the evaluations completed. Further, the district asserts that reversing the IHO and remanding the matter for additional litigation would merely add delay to the evaluation process.

Lastly, the district requests denial of the parents' requests for an order barring the IHO from presiding over future matters with respect to the student and an order calling for an immediate CSE, because the parents seek things outside the district's due process complaint notice, which was filed to compel consent for evaluation only.

In a reply, the parents respond to the district's procedural arguments and assert that their request for review is not deficient, rather it complies with practice requirements. The parents also assert that the additional evidence submitted with their request for review should be considered in their appeal because it could not be submitted during the impartial hearing, given the medical emergency that occurred, and is necessary for an SRO to render a decision with respect to their claims with respect to the IHO and the conduct of the impartial hearing. The parents also reassert their claims brought in the request for review.

V. Applicable Standards

Prior to evaluating a student, a district must provide the parent with prior written notice that "describes any evaluation procedures [the district] proposes to conduct" (20 U.S.C. §§ 1414[b][1]; 1415[b][3], [c][1]; 34 CFR 300.300[a][1][i]; 300.503[a], [b][1]; 8 NYCRR 200.5[a][1], [2], [5][i]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting a reevaluation (20 U.S.C. § 1414[c][3]; 34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]).³ Federal and State regulations also provide that parental consent is not

³ Consent is defined in federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing

required to conduct a reevaluation if the district can demonstrate that it "made reasonable efforts to obtain such consent," and the student's parent "failed to respond" (34 CFR 300.300[c][2]; see 8 NYCRR 200.5[b][1][i][b]). Federal and State regulations permit the use of consent override procedures, specifically due process, if the parent refuses to consent to a reevaluation (34 CFR 300.300[c][1][ii]; 8 NYCRR 200.4[a][8]; 200.5[b][3]).⁴

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district asserts that the request for review must be dismissed because it does not clearly indicate the reasons for challenging the IHO's decision (8 NYCRR 279.4[a]), and fails to comply with the requirements set forth in 8 NYCRR 279.8(c). State regulations provide that a "request for review shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). Additionally, all pleading must have pages numbered consecutively (8 NYCRR 279.8[a][3]).

Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in relevant part, that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c][1]-[3]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891

to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 CFR 300.9; 8 NYCRR 200.1[1]).

⁴ A school district does not violate its evaluation obligations if it declines to pursue a reevaluation without the parents' consent (34 CFR 300.300[c][1][iii]; 8 NYCRR 200.5[b][3]).

F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Turning to the district's contentions relative to the form and content of the parents' request for review, certainly, the request for review does not provide a "clear and concise statement of the issues presented for review," or "clearly specify the reasons for challenging the impartial hearing officer's decision" as the practice regulations require. Much of the language in the request for review is cluttered by unnecessary and inapplicable legalese, and several of the parents' assertions are difficult to discern (see, e.g., Req. for Rev. ¶¶ 7, 12, 19, 22, 23). However, on balance, it is possible to understand the nature of the parents' claims in the request for review because the request for review identifies the findings, conclusions, and orders to which exceptions are taken as well as the grounds for reversal or modification and the specific relief sought (see, e.g., Req. for Rev. ¶¶ 4-8, 9, 12, 15, 17, 25-26, 28-33). Additionally, the district was able to respond to the parents' allegations in its answer. Further, although the district asserts that the request for review often fails to include citations to the hearing record or the IHO's decision, the request for review frequently cites to specific pages of the hearing record and appropriately cites the additional evidence submitted with the request for review (see, e.g., Req. for Rev. ¶¶ 11-25). As the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result, the parents' request for review will not be dismissed for failure to comply with the practice regulations (see Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015).

2. Additional Evidence

The district objects to the additional evidence submitted by the parents with their request for review, asserting that the material was available at the time of the impartial hearing and is not necessary for an SRO to render a decision with respect to whether the IHO was impartial or otherwise erred in the conduct of the impartial hearing. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

In this case, the parents submit emails relating to prior IHO recusals that they brought to the impartial hearing which were not entered into the hearing record (Req. for Rev. Ex. A). The parents also submit emails relating to the IHO's denial of their request to consolidate this matter with another matter, which is not at issue in this appeal (Req. for Rev. Ex. B). The parents submit emails which they assert relate to their IHO bias claim (Req. for Rev. Ex. C). The parents submit documents and audio recordings of the impartial hearing that they allege relate to their claims concerning the conduct of the impartial hearing (Req. for Rev. Exs. D; E; F; L; M). The parents

submit a copy of the final page of the IHO Decision and emails post-dating the issuance of the IHO Decision that do not relate to any issue raised on appeal (Req. for Rev. Ex. H). The parents submit emails and other documents pre-dating the close of the impartial hearing regarding their cooperation with the evaluation process and the impartial hearing that are relevant to this proceeding generally, but are not related to the procedural matters raised on appeal (Req. for Rev. Ex. I). The parents submit documents relating to other administrative and legal actions taken by the parents that are not relevant to the present matter (Req. for Rev. Ex. J). Additionally, the parents submit emails post-dating the IHO Decision concerning the issuance of the IHO Decision that are not required for an SRO to render a decision in this matter (Req. for Rev. Ex. K).

Therefore, I will accept and consider the parents' submitted additional evidence only to the extent it relates to the IHO bias and conduct of the impartial hearing claims presented by the parents on appeal, the substance of which is discussed below (Req. for Rev. Exhibits A; C; D-F; L, and; M).

B. IHO Bias and Conduct of the Impartial Hearing

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]).

Additionally, 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 free appropriate public education by such agencies," including, the "opportunity for any party to present a complaint. . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (Burlington, 471 U.S. 359, 361 [1985]; 20 U.S.C. § 1415[b][6]; see 20 U.S.C. § 1415 [a], [b], [f]). The IDEA provides parties 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]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]).

It is apparent from the impartial hearing transcript as well as the many emails between the parents and others contained in the hearing record, that the parents presented a considerable

communication challenge for the IHO in attempting to conduct the impartial hearing. Nonetheless, it is also apparent from the hearing transcript, documentary evidence, and the IHO Decision, that the IHO did not successfully navigate these challenges and ultimately rendered a decision without affording the parents the protections of due process required by regulation.

The hearing record indicates that at the outset of the hearing, the dialogue between the parents and IHO appeared strained, which presented significant challenges for the IHO in conducting the hearing. At the July 18, 2018 prehearing conference, the parents referenced an email documenting prior recusals by the IHO in earlier matters pertaining to the student; the parents had sent an email to the impartial hearing office on July 11, 2018 and a second email to the IHO on July 12, 2018 both requesting the IHO recuse herself based on two prior recusals (Tr. p. 3; Req. for Rev. Ex. A at pp. 1-8).⁵ Without indicating that she reviewed the parents' email correspondence, the IHO denied the parents' request stating "I never had your son before" and as the parents attempted to draw the IHO's attention to the documented recusals, the IHO further stated "I'm denying your request and that's the end of it, so let's go on." (Tr. p. 3). During the prehearing conference the student's father also informed the IHO that he has a diagnosis of "Tourette Syndrome" and that there are "communicative aspects" to the disorder (Tr. p. 6; see Req. for Rev. Ex. E at pp. 3-5).

Turning to the parents' claim that the IHO should have recused herself from the matter due to bias and lack of impartiality, although there is insufficient evidence in the hearing record to affirmatively establish bias on the part of the IHO, neither the hearing record nor the IHO Decision sufficiently explain the IHO's decision on the parents' request for recusal. The parents presented the IHO with a written request for recusal prior to the prehearing conference, stating that the IHO had recused herself in two prior matters concerning the student (Tr. pp. 1-4; Req. for Rev. Ex. A).⁶ Copies of the IHO's recusal notices submitted by the parents for consideration on appeal appear to relate to impartial hearings concerning the student and appear to have been sent to the parents by email originating from the district's "Impartial Hearing Office" (Req. for Rev. Ex. A at pp. 1, 3-4). The notices list the IHO's reasons for recusal as "due to unavailability," "due to the parents lack of trust in me," and "because I cannot be impartial in this case," respectively (*id.*). At the prehearing conference the IHO denied the parents' request for her recusal out of hand, and stated that, "I never had your son before, so I am denying your request." (Tr. p. 3). It may be that the IHO was impartial in this matter; however considering the notices presented by the parents indicating that the IHO had expressed an inability to be impartial, prior to denying the parents' recusal request, the IHO should have, at the very least, considered the merits of the request by examining the prior recusals and should have explained her reasoning behind denying the request. The IHO did neither of those things, and this created what was perceived by the parents as an appearance of impropriety, and started the impartial hearing off on a course that eventually led to the parents' due process rights being impeded, necessitating a remand for further proceedings. In an abundance of caution, I will direct that the matter be remanded to a different IHO.

⁵ Additional evidence submitted as exhibits to the parents' request for review is discussed in detail below.

⁶ The evidence submitted by the parents is not entirely clear; two of the recusal notices caption the same case number, but are on different dates and are worded differently, while the third lists "unavailability" as the reason for recusal (Req. for Rev. Ex. A at pp. 1, 3-4).

With respect to the parents' claim that the IHO's conduct of the impartial hearing resulted in a violation of their due process rights, the hearing record supports the parents' contention. As set forth above, State regulations governing the conduct of an impartial hearing provide that the "parents, school authorities, and their respective counsel or representative, shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing" (8 NYCRR 200.5[j][3][xii] [emphasis added]). As discussed above, the relationship between the parents and the IHO did not start off on a good footing, and it is apparent from the hearing record, that as the August 18, 2018 hearing moved forward the relationship worsened (see Tr. pp. 26-53). It may be that the IHO had good reason to request the presence of security personnel as the tensions in the room rose to an unacceptable level (Tr. pp. 38-52). The student's father indicated he was experiencing increasing symptoms of Tourette Syndrome, which he termed "manifestations," and the parents requested medical assistance (Tr. pp. 20, 24, 32-33, 43, 48-53). Although I am unable to conclude, as the parents assert, that the IHO "by design" aggravated the student's father's symptoms, the IHO's reaction to the father's distress did little to improve matters (Tr. pp. 43-50; see Req. for Rev. ¶ 9, 16). The IHO did not find that the student's father's Tourette Syndrome episode was fabricated in any way, and the parents have submitted evidence supporting their claim that the student's father required medical intervention during the hearing (see Req. for Rev. Ex. E).

While the district contends that the parents were not deprived of due process because it was their decision to leave the impartial hearing, the combined circumstances of the IHO's call for security and the student's father's need for medical assistance renders the parents' decision to leave the impartial hearing as something less than voluntary. Therefore, I find that the parents did not have a fair opportunity to present evidence, compel the attendance of witnesses and confront and question all witnesses at the hearing, as State regulations require. Accordingly, the IHO erred in continuing the impartial hearing, accepting the district's proffered evidence, and rendering a decision without further presence from the parents, and denied the parents due process. This constitutes an independent basis for reversing the IHO's decision and remanding the matter to a different IHO for further proceedings.

C. Remedy and Directions upon Remand

The district correctly indicates that some of the requested remedies presented in the parents' request for review fall outside of the confines of this proceeding as they were not raised in the district's due process complaint notice to override the parents' consent for evaluations of the student (Answer ¶ 24, n. 2). For example, the parents' request for an order to reconvene the CSE to develop a new IEP, implement academic tutoring, and refer the student to the "CBST" for placement in a non-public school are all outside of the subject matter of the impartial hearing and are denied on that basis (Req. for Rev. ¶ 31).

The district also correctly points out that there is a glaring inconsistency with the parents' position with regard to conducting the required evaluations as part of the education planning for this student. On the one hand, the parents assert that the district's effort to override the parents' consent and compel them to produce the student for evaluations is "frivolously brought" because there was no need to compel their cooperation as they were already cooperating and had sought the very same evaluations (Req. for Rev. ¶15, 21, 32). The parents expressed the same sentiment during the impartial hearing (Tr. pp. 6-9). On the other hand, the parents have refused to consent

to evaluations, have put up significant obstacles and caveats to scheduling evaluations, and have consistently failed to produce the student for all but a handful of scheduled evaluations (see generally Dist. Exs. 38 at p. 1; 41 at p. 2; 42 at pp. 1-2; 43 at pp. 5, 8; 44 at pp. 1-3; 45 at pp. 1-2; 50 at p. 2). Additionally, during the impartial hearing, after two of the requested evaluations had been conducted with the parents' cooperation, the district's attorney suggested that the hearing should be adjourned until further scheduled evaluations were complete, because that may obviate the need to continue the hearing at all (see Tr. pp. 25-27). The parents rejected this suggestion, seemingly unable to spot an obvious opportunity to acquire the result they claimed they were seeking (Tr. p. 27). Parts of the parents' reply suggest that the parents did not produce the student for evaluations that had been scheduled under mutual agreement during the impartial hearing and instead have "pending IH requests to try and resolve the issues" (Reply ¶ 17). And they now seek an order for the district to cooperate with them in conducting the evaluations (Req. for Rev. ¶¶ 32-33). I decline to issue such an order, in light of my determination to remand the issue for further proceedings below.

As a final note, during the hearing the IHO raised the idea of appointing a guardian ad litem to advocate for the student's interests (see Tr. p. 62). According to State regulations, an impartial hearing officer is empowered to appoint a guardian ad litem to protect the interests of a student "[i]n the event the [IHO] determines that the interests of the parent are opposed to or are inconsistent with those of the student" (8 NYCRR 200.5[j][3][ix]). Upon remand, the IHO assigned to hear this matter may consider whether the parents' interests are inconsistent with those of the student and whether the appointment of a guardian ad litem is needed to protect the interests of the student. If a guardian ad litem is appointed, the IHO will still be required to "ensure that the procedural due process rights afforded to the student's parent[s] ... are preserved throughout the hearing" (8 NYCRR 200.5[j][3][ix]). Lastly, I note that the IHO appointed to hear this matter on remand may wish to reconsider the need for all of the district's exhibits that are currently a part of the hearing record, in light of the IHO's statement that there could have been valid objections to entering some documents into the hearing record, had the parents been present to make objections (IHO Decision at p. 2, n. 1).

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 an 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 a different IHO for further proceedings and determinations on the merits of the district's amended due process complaint notice, 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 August 15, 2019, is vacated; and

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

IT IS FURTHER ORDERED that the district shall appoint a new IHO in accordance with the rotational selection procedure and State regulations.

Dated: Albany, New York
November 5, 2018

STEVEN KROLAK
STATE REVIEW OFFICER