The University of the State of New York

The State Education Department
State Review Officer
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No. 19-002

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:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, by H. Jeffrey Marcus, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which failed to address her request to be reimbursed for, or for respondent (the district) to directly fund, the costs of the student's tuition at the Happy Hour 4 Kids School (HH4K) for the 2018-19 school year. The parent also appeals that portion of the IHO's decision calculating an award of compensatory educational services. The district cross-appeals the IHO's calculation of compensatory educational services. For reasons explained below, the appeal must be sustained in part, the cross-appeal must be sustained in part, and the matter must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

In this case, the student attended a nonpublic school—Gersh Academy—for the 2015-16 school year (see Parent Ex. K at p. 2).[1] At that time, the student attended a classroom with six students due to his "limited socialization skills" (id.). As part of an updated evaluation of the student conducted in June 2016 (June 2016 evaluation report), the parent expressed concerns about the student's progress at Gersh, and noted that the student "may not [have] be[en] receiving the appropriate support" at Gersh (id.). According to the June 2016 evaluation report, the student received applied behavioral analysis (ABA) services at Gersh; however, Gersh had "reportedly not been able to provide this service as individually and intensively" as the student required (id.).

In July 2016, the student began attending HH4K, and in August 2016, the parent sought an impartial hearing with respect to the special education and related services the district recommended for the student for the 2016-17 school year (see Parent Exs. A at p. 2; H at p. 1).[2] In a final decision dated January 13, 2017 (January 2017 decision)—which found that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year—the district was ordered to reimburse the parent for the tuition costs she expended for the student's attendance at HH4K for the 2016-17 school year, to "directly pay" HH4K for the remaining costs of the student's tuition not paid by the parent, to "continue to provide" the student with 7.5 hours per week of special education itinerant teacher (SEIT) services, and to reconvene a CSE meeting to "make these corrections" to the student's IEP in order to "conform" with the final

[1] The Commissioner of Education has not approved Gersh Academy as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Given the student's date of birth he would, chronologically, have been considered a kindergarten student during the 2015-16 school year (see Parent Ex. K at pp. 1-2).

[2] The Commissioner of Education has not approved HH4K as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

decision and to "reconsider the amount of time the [student] ha[d] to spend on the bus to and from" HH4K (Admin. Hr'g Ex. 6B at pp. 6, 8).[3, 4]

On or about February 16, 2017, a CSE reconvened pursuant to the directives set forth in the January 2017 decision (see IHO Ex. iii at p. 5). According to the parent, the CSE developed an IEP "responsive to the January 2017 [d]ecision and orders" but claimed that the district "never issued a school location letter and/or provided a placement capable of implementing the February 2017 IEP" (id.).[5]

A. Initial Due Process Complaint Notice

By due process complaint notice dated June 20, 2017 (June 2017 due process complaint notice), the parent alleged that the district failed to offer the student a FAPE for the 2017-18 school

[3] As a reminder to both parties and the IHO, the administrative hearing record submitted to the Office of State Review in connection with this appeal was incomplete and in disarray, in part, because it included several documents that were not formally entered into evidence as either a parent exhibit, a district exhibit, or an IHO exhibit. For example, the hearing record transcripts reveal that the parties and the IHO formally entered parent exhibits A, C, E through L, and N through Q (with exhibit N being subsequently withdrawn as noted at Tr. pp. 16, 55) into the hearing record as evidence when the parties met on September 12, 2018 for an impartial hearing (see Tr. pp. 15-16; see generally Tr. pp. 1-128). Yet when the district submitted the hearing record to the Office of State Review, the second amended certification separately identified a total of 24 documents as constituting the hearing record and collectively captured the parent's exhibits entered into evidence on September 12, 2018 as one of those 24 total documents. A review of the IHO's decision in this case reveals that, according to the IHO's documentation, the hearing record consisted of parent exhibits A through H (8 documents) and the parties' closing statements (3 documents) entered as IHO Exhibits i, ii, and iii (see IHO Decision at p. 10). However, the IHO's decision did not accurately reflect the parent exhibits formally entered into the hearing record on September 12, 2018 (compare Tr. pp. 15-16, with IHO Decision at p. 10). The administrative hearing record submitted to the Office of State Review also originally failed to include documents—notably, the parties' closing statements to the IHO (see generally IHO Exs. i-iii)—which the IHO specifically identified as having been entered into evidence as part of the hearing record (see IHO Decision at p. 10). For ease of reference, those documents submitted as part of the administrative hearing record that were not formally entered into the hearing record as evidence will be referred to in citations as administrative hearing record exhibits (Admin. Hr'g Ex.) and will thereafter reflect the number assigned to such document in the district's second amended certification accompanying the administrative hearing record provided to the Office of State Review. For example, the citation in the body of this decision immediately preceding this footnote—"Admin. Hr'g Ex. 6B"—refers to the document identified as number 6 on the second amended certification (titled "Motion for Amended Pendency Order and Attachments") and, more specifically, to pages within an attachment to that document labeled as exhibit B. For those documents formally entered into the hearing record as evidence on September 12, 2018—here, parent exhibits A, C, E through L, and O through Q; and IHO exhibits i, ii, and iii—citations thereto will reference such exhibits as designated by the parent and the IHO (i.e., "Parent Ex. A" or "IHO Ex. ii").

[4] At the time of the January 2017 decision, the district had been providing the student with 7.5 hours per week of SEIT services based upon an interim order of pendency issued as part of the impartial hearing proceedings related to the 2016-17 school year (see Admin. Hr'g Ex. 6B at p. 3). According to the hearing record, the pendency order was based on the student's "prior preschool IEP" (developed March 2015 during the 2014-15 school year) (id.; see Admin. Hr'g Ex. 6D at pp. 1, 17). The hearing record failed to include a copy of this pendency order (see generally Tr. pp. 1-128; Parent Exs. A; C; E-L; O-Q; IHO Exs. i-iii; Admin. Hr'g Exs. 2-6; 9-14; 16-18; 1[a]-3[a]).

[5] The hearing record did not include a copy of the February 2017 IEP (see generally Tr. pp. 1-128; Parent Exs. A; C; E-L; O-Q; IHO Exs. i-iii; Admin. Hr'g Exs. 2-6; 9-14; 16-18; 1[a]-3[a]).

year (see generally Parent Ex. A). According to the parent, although the February 2017 CSE "agreed to the following IEP recommendations: 12 month placement in a specialized non-public school that include[d] ABA with a 1:1 ABA trained paraprofessional and intensive related services," the CSE had not "located a placement capable of providing [the student] with all of the supports the CSE agreed were necessary" (id. at p. 3). Next, the parent requested a pendency order in the event that the district failed to "honor its obligation to implement pendency" (id.). The parent indicated that the student's pendency placement and services arose from the unappealed January 2017 decision, which ordered the district to fund the student's "placement at HH4K" and "7.5 hours of SEIT instruction for the purposes of after school ABA" (id.).

As relief, the parent requested a finding that the "above noted failings and violations" deprived the student of a FAPE for the 2017-18 school year and that the "above noted violations significantly impeded [her] procedural and substantive rights under the IDEA" (Parent Ex. A at p. 3). The parent also requested an order directing the district to pay the student's tuition costs at HH4K for the 2017-18 school year, to "fund after school ABA services at an enhanced rate for 7.5 hours per week," an award of compensatory educational services for "any ABA hours the [district] fail[ed] to implement under their pendency obligation," and reimbursement for any transportation costs she had incurred for the student's attendance at HH4K for the 2017-18 school year (id. at pp. 3-4).

B. Interim IHO Decision

On June 30, 2017, the parties proceeded to an impartial hearing and presented their respective positions regarding the student's pendency placement and services (see Tr. pp. 1-7). At that time, the parent clarified that she was "not requesting pendency in transportation" because she transported the student to HH4K, but she continued to seek funding for the costs of tuition at HH4K and for the "7.5 hours of SEIT" services per week (Tr. pp. 3-4). The district did not contest the parent's request for pendency (see Tr. pp. 2-6).

On July 27, 2017, the parties met again for the impartial hearing, but neither party presented any testimonial or documentary evidence (see Tr. pp. 8-13). At that time, the parties revealed to the IHO that they were at the "very beginning stages" of possibly settling the matter, and scheduled the next impartial hearing date for September 25, 2017 (Tr. pp. 9-11).

In an interim decision on pendency, dated July 27, 2017, the IHO ordered the following: the district "shall continue to compensate [HH4K] for [the student's] tuition upon receipt of an invoice on a monthly basis and within [30] days of receipt of that invoice" and the district "shall continue to provide 7.5 hours of SEIT services per week" (Parent Ex. C at p. 3).

C. Additional Due Process Complaint Notices and Consolidation of Cases

Subsequent to the July 2017 interim pendency order, the parties did not meet on the next scheduled impartial hearing date on September 25, 2017; instead, the IHO granted numerous

extensions requested either by both parties, the district alone, or the parent alone, up through May 15, 2018 (see Admin. Hr'g Ex. 9 at pp. 1-10).[6]

In a due process complaint notice dated June 15, 2018 (June 2018 due process complaint notice), the parent alleged that the district failed to offer the student a FAPE for the 2018-19 school year (see generally Parent Ex. O). In the June 2018 due process complaint notice the parent essentially repeated, nearly verbatim, the information set forth in the June 2017 due process complaint notice (compare Parent Ex. O at pp. 1-3, with Parent Ex. A at pp. 1-3). However, the June 2018 due process complaint notice included an allegation that the district failed to conduct the student's "long overdue" triennial evaluations (Parent Ex. O at p. 2). With regard to pendency, the parent requested the same placement and services as requested in the June 2017 due process complaint notice, but added that because the student had been "granted [round-trip] transportation" to HH4K through the previously unappealed January 2017 decision, the pendency placement and services should include transportation (compare Parent Ex. O at pp. 1-3, with Parent Ex. A at p. 3).

As relief—and similar to the language recited in the June 2017 due process complaint notice—the parent requested a finding that the "above noted failings and violations" deprived the student of a FAPE for the 2018-19 school year and that the "above noted violations significantly impeded [her] procedural and substantive rights under the IDEA" (compare Parent Ex. O at p. 3, with Parent Ex. A at p. 3). The parent also requested an order directing the district to pay the student's tuition costs at HH4K for the 2018-19 school year and to "fund after school ABA services at an enhanced rate for 7.5 hours per week," an award of compensatory educational services for "any ABA hours the [district] fail[ed] to implement under their pendency obligation," and reimbursement for any transportation costs incurred by the parent (compare Parent Ex. O at p. 3, with Parent Ex. A at pp. 3-4). In addition, the parent sought reimbursement for the costs of a neuropsychological evaluation (see Parent Ex. O at p. 3).

In decisions dated June 22, 2018, the IHO consolidated the parent's June 2017 and June 2018 due process complaint notices (see Admin. Hr'g Exs. 3-4).[7] Next, the IHO granted the parent's request for an extension (see Admin. Hr'g Ex. 9 at pp. 11-12).

Shortly thereafter, in a due process complaint notice dated July 27, 2018 (July 2018 due process complaint notice), the parent alleged that the district failed to offer the student a FAPE for the 2018-19 school year (see generally Parent Ex. P). In the July 2018 due process complaint

[6] It also appears that in or around April 2018, the parent—through a "Motion for Amended Pendency Order"—requested that the IHO issue an order "compelling the [district] to transport" the student to HH4K as part of his pendency placement and services (Admin. Hr'g Ex. 6 at p. 1). The IHO issued a decision, dated April 6, 2018, denying the parent's request because, according to the IHO, the January 2017 decision, which the parties and the IHO had relied upon as forming the basis for the student's pendency placement and services, "did not order transportation" (Admin. Hr'g Ex. 5).

[7] The administrative hearing record includes two decisions dated June 22, 2018 consolidating the two due process complaint notices: the first decision, captioned "Order Granting & Denying Consolidation"; and the second decision, captioned "Order Denying Consolidation" (Admin. Hr'g Exs. 3-4). Notwithstanding the confusing nature of the captions, both decisions are identical in content and granted the consolidation (compare Admin. Hr'g Ex. 3, with Admin. Hr'g Ex. 4).

notice, the parent essentially repeated, nearly verbatim, the information set forth in the June 2018 and June 2017 due process complaint notices (compare Parent Ex. P at pp. 1-4, with Parent Ex. O at pp. 1-3, and Parent Ex. A at pp. 1-3). However, the July 2018 due process complaint notice expanded upon the previously asserted allegation that the district failed to conduct the student's triennial evaluations (compare Parent Ex. P at p. 2, with Parent Ex. O at p. 2). Specifically, the parent noted that this violation "alone" resulted in a failure to offer the student a FAPE because the CSE "failed to assure it had all of the necessary information to draft an appropriate IEP and inform the providers who would subsequently work with [the student]" (Parent Ex. P at p. 2). The parent further noted that "this significantly impeded [her] opportunity to participate in the decision making process" (id.).

Next, the parent asserted for the first time that, at the February 2017 CSE meeting convened to amend the student's IEP consistent with the January 2017 decision, all of the CSE members "agreed" that ABA was a "critical component" of the student's program, "including the direct provision of ABA and the importance of staff training/certification" (compare Parent Ex. P at pp. 2-3, with Parent Ex. O at p. 3, and Parent Ex. A at p. 3). In addition, the parent alleged for the first time that she "expressly requested the continuation of the 7.5 hours of home based ABA" at the February 2017 CSE meeting, and in response, the CSE "indicated that although they agreed these were necessary, they could not specifically recommend ABA on the IEP or include home based ABA per [district] policy" (compare Parent Ex. P at p. 3, with Parent Ex. O at p. 3, and Parent Ex. A at p. 3). The parent also included a new allegation asserting that the February 2017 CSE "denied transportation per policy of refusal to transport [the student] to and from HH4K" (compare Parent Ex. P at p. 3, with Parent Ex. O at p. 3, and Parent Ex. A at p. 3). Next, the parent indicated that the February 2017 CSE's recommendations were "based, at least in part, upon impermissible blanket policies resulting in an improper predetermination of what would and would not be recommended" (compare Parent Ex. P at p. 3, with Parent Ex. O at p. 3, and Parent Ex. A at p. 3). In addition, the parent indicated that while the CSE recommended a 12-month school year program in a "specialized non-public school with a 1:1 paraprofessional and related services," the district did not provide the parent with a copy of the IEP and failed to locate a "placement capable" of providing the student with "all of the supports the CSE agreed were necessary" at the start of the 12-month school year (compare Parent Ex. P at p. 3, with Parent Ex. O at p. 3, and Parent Ex. A at p. 3). As a result, the parent asserted that the district failed to provide her with "meaningful participation in the decision making process," which denied the student a FAPE.

Turning to the issue of pendency, the parent reiterated a position similar to that expressed in previous due process complaint notices about what constituted the student's pendency placement and services (compare Parent Ex. P at p. 3, with Parent Ex. O at p. 3, and Parent Ex. A at p. 3). However, the parent newly added that the student was entitled to round-trip transportation to HH4K based upon an "uncontested pendency order" that had been in place at the start of the 2016-17 school year (compare Parent Ex. P at pp. 3-4, with Parent Ex. O at p. 3, and Parent Ex. A at p. 3).

As relief—and similar to the language recited in the June 2018 and June 2017 due process complaint notices—the parent requested a finding that the "above noted failings and violations" deprived the student of a FAPE for the 2018-19 school year and that the "above noted violations significantly impeded [her] procedural and substantive rights under the IDEA" (compare Parent Ex. P at p. 4, with Parent Ex. O at p. 3, and Parent Ex. A at p. 3). The parent also requested an

order directing the district to pay the student's tuition costs at HH4K for the 2018-19 school year, to "fund after school ABA services at market rate for 7.5 hours per week dating back to the start of the 2018-2019 school year," and an order directing the district to reimburse the parent for any transportation costs she incurred for the student's attendance at HH4K (compare Parent Ex. P at p. 4, with Parent Ex. O at p. 3, and Parent Ex. A at pp. 3-4). In addition, the parent sought reimbursement for the costs of a neuropsychological evaluation (compare Parent Ex. P at p. 4, with Parent Ex. O at p. 3). Finally, the parent newly requested an order directing the district to provide the student with round-trip transportation to HH4K with "appropriate accommodations that include[d], at a minimum, limited time travel not to exceed 30 minutes and a carseat" (compare Parent Ex. P at p. 4, with Parent Ex. O at pp. 3-4, and Parent Ex. A at pp. 3-4).

In a decision dated August 1, 2018, the IHO consolidated the parent's July 2018 due process complaint notice with the already consolidated action involving the parent's June 2018 and June 2017 due process complaint notices (see Admin. Hr'g Exs. 2-4). Next, the IHO granted the parent's requests for approximately three additional extensions (see Admin. Hr'g Ex. 9 at pp. 13-15).

D. IHO Decision on the Merits

On September 12, 2018, the parties met for, and completed, the impartial hearing (see Tr. pp. 14-128).[8] At that time, the district's attorney stated that the district "concede[d]" that it failed to offer the student a FAPE, but objected to the "appropriateness of the program" requested by the parent (Tr. p. 22). The parent's attorney stated that the instant matter was "simply . . . a tuition case," but that it also involved "after school ABA hours, most of which were not received via [the IHO's] pendency decision," as well as the student's "need for transportation to and from" HH4K (Tr. pp. 22-23). When the IHO asked the parent's attorney whether the "after school ABA" she mentioned referred to a "pendency order noncompliance issue," the parent's attorney stated, "That [was] correct" (Tr. p. 23). Next, the parent's attorney proceeded with the presentation of two witnesses: the parent (see Tr. pp. 25-74) and the program director at HH4K (see Tr. pp. 74-125; see also Parent Ex. J at p. 1).[9] At the conclusion of the testimony, the parties and the IHO discussed

[8] According to the impartial hearing transcripts, September 12, 2018 was the only date on which the parent entered documents—here, parent exhibits A, C, E through L, and O through Q—into the hearing record as evidence (see Tr. pp. 15-16; see generally Tr. pp. 1-128). The district did not proffer any witnesses or documents as evidence throughout the impartial hearing held in this matter (see generally Tr. pp. 1-128).

[9] At times during the impartial hearing when the parent's attorney was attempting to enter a document into the hearing record as evidence, the IHO commented that it was "automatically a part of the record," but nonetheless, entered the document for "ease of reference" or alternatively stated that the document was "not a part of the record" automatically (see, e.g., Tr. pp. 33-35, 54-56). The IHO also stated at the impartial hearing that prior decisions—i.e., IHO decisions or pendency decisions—were "not admissible" as evidence and could not be entered into the hearing record as an exhibit (see Tr. pp. 34-37; but see Tr. pp. 55-56). The IHO did not explain these statements during the impartial hearing, but it appears that such statements may have been based upon her interpretation or belief that, pursuant to State regulations, certain documents were automatically considered to be a part of the hearing record without requiring a party to formally enter such documents into the hearing record as evidence (see 8 NYCRR 200.5[j][5][vi] [describing documents required to be a part of the hearing record before the IHO]; see also 8 NYCRR 279.9[a] [describing the contents of the hearing record to be submitted by the district to the Office of State Review]). With regard to documents required to be included in the hearing record, the applicable regulation does not indicate that the required documents are to be considered part of the hearing record without formally identifying and entering those documents as evidence in the hearing record (see 8 NYCRR

the submission of closing briefs and whether a further extension was necessary (see Tr. pp. 125-27).[10]

In a decision dated November 21, 2018, the IHO defined the claims and requested relief as relating to the 2017-18 school year (see IHO Decision at p. 2). The IHO noted that the district conceded that it failed to locate a "specialized, non-public school with one-on-one instruction and [ABA] therapy, among other things, as specified by [the student's] February 16, 2017 [IEP]" (id.). In addition, the IHO noted that the parent sought tuition reimbursement and "transportation reimbursement" for the student's unilateral placement at HH4K, as well as "funding for after-school ABA therapy and/or compensatory education for ABA therapy required" pursuant to the pendency order (id.).

Having determined that the district failed to offer the student a FAPE based upon its concession at the impartial hearing, the IHO then analyzed whether HH4K was an appropriate unilateral placement for the student (see IHO Decision at pp. 3-6). Based upon the evidence, the IHO concluded that HH4K provided the student with an educational program that met his needs (id. at pp. 4-6). More specifically, the IHO found that HH4K provided the student with 1:1 "ABA based, instruction in 'Social/Emotional', Writing, Math, Listening Comprehension, and Self-Care" (id. at p. 5). In addition, HH4K provided the student with 1:1 instruction in "Reading Group, Reading Specialist, Attending, Speech-Language Therapy, and Occupational Therapy" (id. [footnote omitted]). The IHO further noted the HH4K staff qualifications, that the student had "comprehensive educational goals and objectives," the student made progress on those goals, and he benefitted from a behavior plan at HH4K (id. at pp. 5-6). Consequently, the IHO concluded that HH4K was an appropriate placement for the student (id. at p. 6).

With regard to equitable considerations, the IHO found that while the parent "issued" the 10-day notice in June 2017 after the student's enrollment at HH4K in May 2017, the "equities still weigh[ed] in favor of [the parent]" (IHO Decision at pp. 6-7). In light of the foregoing, the IHO concluded that the parent was entitled to reimbursement for the costs of the student's tuition at HH4K for the 2017-18 school year (id. at p. 7).

Next, the IHO addressed the student's entitlement to SEIT services pursuant to the pendency order in this matter (see IHO Decision at p. 7). Here, the IHO found that, based upon a 12-month school year program and the pendency order directing the district to provide 7.5 hours per week of SEIT services, the student should have received a total of 390 hours of SEIT services during the 2017-18 school year and the parent obtained only "[14] hours of SEIT services during

200.5[j][5][vi]). And even assuming for the sake of argument that that State regulation supported the idea that an IHO need not formally receive a document into evidence because it was already considered a part of the hearing record, best practice for the parties and for the IHO would be to formally enter any and all documents—unless the IHO found the document to be "irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c])—into evidence in order to fully develop the hearing record and to allow a later reviewing administrative agency or court to know without question what facts and documents the IHO relied upon in reaching a decision.

[10] After the conclusion of the impartial hearing, the IHO granted the parent's request for one additional extension (see Admin. Hr'g Ex. 9 at p. 16).

the 2017-2018 school year" (id.). In addition, the IHO calculated that the student was entitled to "[19] weeks of pendency services during this 2018-2019 school year, or another 142.5 hours of SEIT services, for a total of 532.5 hours" (id.).[11]

As one final point, the IHO found that, pursuant to State statute, the student was entitled to receive round-trip transportation to HH4K (see IHO Decision at p. 8). However, the IHO also found that the parent failed to present any evidence to support her request to be reimbursed for transportation costs associated with the student's attendance at HH4K (id.).

As relief, the IHO ordered the district to "reimburse" the parent for the costs of the student's tuition at HH4K for the 2017-18 school year "within [30] days of receipt of proof of payment from [the parent] or an invoice" from HH4K (IHO Decision at p. 8). The IHO also ordered the district to provide the student with "access to 532.5 hours of SEIT services" within 30 days of the decision and to provide the student with round-trip transportation to HH4K for the "duration" of the 2018-19 school year (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO failed to issue a determination with respect to the 2018-19 school year. The parent also argues that the IHO erred in failing to accurately list evidence in the decision, which contributed to the IHO's failure to address the issues raised pertaining to the 2018-19 school year. Next, the parent contends that the IHO erroneously stated that she failed to timely provide the district with her 10-day notice for the 2017-18 school year. The parent further contends that the IHO erred in awarding tuition reimbursement for the 2017-18 school year and that the IHO should have ordered the district to directly pay HH4K for the costs of the student's tuition.[12] Finally, the parent asserts that the IHO erred in limiting the amount of SEIT services awarded for the 2018-19 school year for the unimplemented pendency services to the date of the decision, "as opposed to the entire" 2018-19 school year. On this point, the parent alleges that the student was entitled to compensatory educational services for both the unimplemented pendency services as well as for "services going forward based upon need."

As relief, the parent seeks a determination that the district failed to offer the student a FAPE for the 2018-19 school year. Relatedly, the parent seeks an order directing the district to directly pay HH4K for the costs of the student's tuition for the 2017-18 school year, as well as for the costs of the student's tuition for the 2018-19 school year. In addition, the parent seeks an order directing the district to fund 345 hours of ABA services for the 2017-18 school year (based upon a 46-week

[11] In a footnote, the IHO noted that the parent also asserted a "compensatory education claim for after-school [ABA]" and explained that because the claim "pertain[ed] to the now past 2017-2018 school year and these services were covered by the [p]endency [o]rder, there [was] no need for a separate determination and duplicative award" (IHO Decision at p. 7 n.4).

[12] It appears that the parent misconstrues this portion of the IHO's order regarding the 2017-18 school year because a reasonable interpretation of the IHO's language allowed for either reimbursement to the parent (upon proof of payment) or payment directly to HH4K upon the presentation of an invoice from HH4K (see IHO Decision at p. 8). As such, this contention will not be further addressed in this decision.

school year) and to similarly fund 345 hours of ABA services for the 2018-19 school year (based upon a 46-week school year).

In an answer, the district responds to the parent's allegations. Notably, the district admits in the answer that, at the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2017-18 and 2018-19 school years.[13] The district also admits that the IHO erred in failing to address the parent's claims for the 2018-19 school year. The district argues, however, that the parent is not entitled to direct funding of the student's tuition costs at HH4K for the 2017-18 school year or, if warranted, for the 2018-19 school year because the parent failed to present any evidence at the impartial hearing of her inability to pay or financial hardship. Next, the district agrees that, although the IHO's decision did not accurately reflect all of the parent's exhibits as having been entered into the hearing record as evidence, parent exhibits I through L and O through Q were part of the hearing record.[14]

With respect to equitable considerations, the district asserts that even if the IHO correctly found that the parent failed to timely provide the district with a 10-day notice for the 2017-18 school year, this finding was harmless error as the IHO did not reduce or deny the amount of tuition reimbursement awarded as relief to the parent for that school year.[15] Finally, the district contends that the parent is not entitled to compensatory educational services consisting of additional home-based SEIT services for the remainder of the 2018-19 school year because the IDEA does not require the generalization of skills across settings outside of the classroom.

As a cross-appeal, the district argues that the IHO erred in calculating the compensatory educational services awarded with respect to the unimplemented pendency services. More particularly, the district asserts that the award should have been based upon a 46-week school year as opposed to a 52-week school year.

In an answer to the district's cross-appeal, the parent responds to the district's allegations. Specifically, the parent agrees with the district's assertion that the IHO erred in calculating the amount of compensatory educational services awarded for the unimplemented pendency services. The parent agrees with the district that the IHO should have calculated the award based upon a 46-week school year. However, the parent also argues that the student is entitled to 7.5 hours per week of ABA "going forward through the end" of the 2018-19 school year, noting that the district made no argument on this issue.

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[13] Given this clarification in the district's answer, there is no need to determine—as the parent seeks in the request for review—whether the district offered the student a FAPE for the 2018-19 school year.

[14] Again, given this clarification in the district's answer, there is no need to determine—as the parent seeks in the request for review—whether the IHO erred in failing to accurately list whether certain documents had been entered into the hearing record as evidence.

[15] In light of the fact that the IHO did not reduce or deny the parent's request for reimbursement or direct funding of the student's tuition costs at HH4K for the 2017-18 school year based upon equitable considerations, any finding regarding the failure to timely provide the district with a 10-day notice is, as the district argues, harmless error. Thus, there is no need to determine—as the parent seeks in the request for review—whether the IHO erred on this issue.

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 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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR

200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the

placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

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—Unaddressed Issues and Scope of Review

Based upon the parties' pleadings, it is undisputed that the IHO erred in failing to address the parent's claims raised with respect to the 2018-19 school year. Given the district's position on appeal conceding that it failed to offer the student a FAPE for the 2018-19 school year, the only remaining issues to be determined are whether the evidence in the hearing record supports a finding that HH4K was an appropriate unilateral placement for the student for the 2018-19 school year; what, if any, relief may be warranted in the form of tuition reimbursement or direct payment of the student's tuition costs; and whether the student was entitled to compensatory educational services consisting of 7.5 hours per week of home-based ABA services separate and apart from the question of unimplemented pendency services.[16] While the parties appear to urge the undersigned SRO to make these determinations related to the 2018-19 school year, the matter must be remanded to the IHO for further administrative proceedings.

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (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

[16] To the extent that the parent and district agree that the IHO should have calculated the unimplemented pendency services based upon a 46-week school year as opposed to a 52-week school year, this issue will not be further addressed herein. Based upon a 46-week school year, both parties agree that, for the 2017-18 school year, the district was obligated to provide the student with a total of 345 hours of SEIT (or ABA) services (see Req. for Rev. at p. 5; Answer & Cr. App. at ¶ 21). Care should be taken, however, with regard to the calculation of unimplemented pendency services for the 2018-19 school year, as it appears that the parent did secure and obtain such services for a least a portion of that school year (see Tr. pp. 98, 123-24). Thus, any calculation of unimplemented pendency services must take into account those services already provided to the student. At this stage of the proceedings, the hearing record does not include sufficient information to identify the amount of pendency services delivered to the student for the 2018-19 school year and, unless the parties otherwise agree, the parties and the IHO should consider whether the hearing record requires further clarification of this issue upon remand.

unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the parent and the district acknowledge that the IHO erred in failing to address the parent's claims for the 2018-19 school and that the IHO should have made determinations regarding the remaining issues described above in the first instance.

In light of the foregoing, the matter must be remanded for further administrative proceedings. This is especially true where, as here, the IHO failed to engage in any analysis whatsoever with respect to the 2018-19 school year or set forth any rationale for not addressing the parent's claims related to this school year (see generally IHO Decision). Upon remand, it is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the issues described above and/or whether the parties should submit further evidence to otherwise fully develop the hearing record. Furthermore, the IHO is strongly encouraged to conduct a prehearing conference for the purpose of clarifying these issues, as well as the remaining requests for relief, and determining what, if any, further evidence may be required to issue a determination on these issues (8 NYCRR 200.5[j][3][xi]). Therefore, it is appropriate to remand this matter to the IHO for a determination consistent with this decision and based upon sufficient evidence and a complete hearing record (see Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *10-*11 [S.D.N.Y. Jan. 9. 2019] [remanding matter to IHO to supplement hearing record and to issue a pendency determination]; F.B., 923 F. Supp. 2d at 589).

If either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf. D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

VII. Conclusion

In summary, the matter must be remanded to the IHO for a determination on the merits of the parent's claims with respect to the 2018-19 school year, including whether HH4K was an appropriate unilateral placement, whether the parent is entitled to tuition reimbursement or direct payment of the student's tuition costs for the 2018-19 school year, and whether the student is entitled to any compensatory educational services consisting of 7.5 hours per week of home-based ABA as additional relief for the 2018-19 school year. In addition, the IHO is reminded to keep in mind the principle that equitable considerations are relevant to fashioning relief under the IDEA (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 454 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the matter is remanded to the same IHO who issued the November 21, 2018 decision to determine, within 45 days of the date of this decision, whether the parent's unilateral placement of the student at HH4K for the 2018-19 school year was appropriate; what relief, if any, the parent may be entitled to; and whether the student is entitled to compensatory

educational services consisting of additional home-based SEIT or ABA services as relief for the 2018-19 school year; and,

IT IS FURTHER ORDERED that the IHO's decision, dated November 21, 2018, is hereby modified to reflect the parties' agreement that the compensatory educational services awarded for the failure to implement the student's pendency services should have been based upon a 46-week school year for a total of 345 hours of SEIT or ABA services for the 2017-18 school year; and,

IT IS FURTHER ORDERED that the IHO's decision, dated November 21, 2018, is hereby modified to reflect the parties' agreement that the compensatory educational services awarded for the failure to implement the student's pendency services should also be based upon a 46-week school year, the award must account for any and all services already obtained and provided to the student during the 2018-19 school year, and the award must include the time period through the conclusion of the administrative and/or any further judicial proceedings consistent with the applicable statutory or regulatory provisions governing pendency.

Dated: **Albany, New York**
February 1, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER