The University of the State of New York

The State Education Department
State Review Officer
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No. 19-026

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Noelle Boostani, Esq. and Elisa Hyman, 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 those portions of an interim decision of an impartial hearing officer (IHO) which dismissed parent's claims related to the 2012-13, 2013-14, 2014-15, and 2015-16 school years as barred by the IDEA's statute of limitations and those portions of a final decision which denied relief sought by the parent to remedy respondent's (the district's) failure to provide her son with an appropriate educational program for the 2016-17, 2017-18, and 2018-19 school years. The district cross-appeals certain findings related to equitable considerations. The appeal must be sustained in part. The cross-appeal must be dismissed and the matter must be remanded for further 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). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record is sparse regarding the student's educational history, including information about his special education needs and prior educational placements.[1] The evidence in the hearing record consists of six exhibits, two of which are the parties' closing briefs to the IHO (see Parent Exs. A; B; OO; Dist. Exs. 15; 17; 21). The sole IEP admitted into evidence at the hearing record was developed at a CSE meeting held on February 24, 2015 and has an implementation date of April 30, 2015 (Parent Ex. A at pp. 1, 7-8, 12). The February 2015 CSE recommended 10-month services of a 12:1+1 special class with the related service of Spanish-language speech-language therapy in a group of two (id. at pp. 7-9, 12-13). The February 2015 CSE further recommended a full-time "Alternate Placement" Spanish-language paraprofessional (id. at p. 8).

According to a district psychoeducational evaluation report dated February 2, 2017, the student was evaluated as part of a "three year mandated review" on January 7, 2017 (Dist. Ex. 15 at pp. 1, 5). In a social history interview conducted on January 7, 2017, the student's mother reported that the student had not made any significant improvements in academic performance and continued to struggle in the areas of reading, writing and math, and was "a few grades behind" (id.). Results of the psychoeducational evaluation indicated that the student's cognitive assessment score fell within the extremely low range, and his reading, writing, and math scores fell within the below average range (id. at p. 5). A privately-obtained bilingual adaptive behavior assessment of the student was conducted on May 3, 2017 (Dist. Ex. 17 at p. 1). According to the adaptive assessment report dated May 12, 2017, the parents sought a "diagnostic clarification to assist with placement in an appropriate classroom setting," among other reasons for obtaining the assessment (id.).[2] Results of the assessment indicated that the student's general adaptive functioning was "low" and that coupled with the recent cognitive assessment scores, the student met the "criteria for [i]ntellectual [d]isability" (id. at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated July 3, 2018, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, and 2018-19 school years (see Parent Ex. B). The parent also asserted claims concerning various district policies, including systemic violations of the IDEA

[1] According to the parent's July 3, 2018 due process complaint notice, the student moved to the district from another country in 2012 at eight years of age and due to struggles with decoding, listening comprehension and mathematics, was found to be eligible for special education as a student with a learning disability and began receiving special education services in a 12:1+1 special class "within a general education setting" shortly thereafter (Parent Ex. B at p. 3). The student began attending a charter school, apparently at some point prior to the spring of 2017, but the evidence does not show when (Tr. p. 11; SRO Ex. K at pp. 156-59).

[2] The February 2, 2017 psychoeducational evaluation report indicated that the student was in 7th grade at a charter school and the recommended placement was a 12:1+1 special class setting (Dist. Ex. 15 at p. 1). Inconsistent with that report, the May 12, 2017 bilingual adaptive behavior assessment indicated that at the time of that evaluation the student was in 6th grade at a charter school, in an integrated co-teaching (ICT) "class" of approximately 26 students with the services of a paraprofessional (compare Dist. Ex. 15 at p. 1, with Dist. Ex. 17 at p. 2).

and section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a), affecting the CSE's ability to offer specific programming and services (see id.).

Concerning the seven school years at issue, the parent alleged that the two-year statute of limitations should not apply due to the district's failure to provide prior written notice in the parent's native language until May 2018 and for failing to identify the student's disabilities (Parent Ex. B at p. 2). The parent further asserted that the district engaged in systemic policies and practices that violated the student's rights (id. at pp. 2, 23-24). The parent also contended that the district never provided the student's special education records or an explanation thereof in the parent's native language (id. at pp. 2-3).

For the 2012-13 school year, the parent alleged that the CSE (1) convened for the student's initial eligibility determination without appropriate data or information regarding the student's needs, (2) only considered a psychoeducational evaluation, and never received a speech and language evaluation, (3) did not include the speech and language evaluator at the CSE meeting, (4) failed to conduct an audiological evaluation, (5) failed to follow IDEA procedures for initial evaluation, (6) failed to identify a specific learning disability or a severe speech and language disability, (7) failed to observe or review the student before determining that he was ineligible for 12-month services, (8) failed to consider the student's least restrictive environment (LRE), and (9) lowered the student's promotional criteria without an appropriate analysis (Parent Ex. B at p. 7).

For the 2013-14 school year, the parent alleged that the CSE (1) convened without appropriate evaluative data or information regarding the student's needs, (2) failed to identify a specific learning disability or a severe speech and language disability, (3) altered the student's promotional criteria without an appropriate analysis, (4) failed to assess and appropriately determine the student's eligibility for 12-month services, (5) failed to consider the student's LRE, and (6) predetermined the student's recommended program (id. at p. 10).

For the 2014-15 school year, the parent alleged that the CSE (1) failed to convene a timely review, even though the student's progress and promotion was always in question, and did not consider appropriate evaluative data or information regarding the student's needs, (2) did not include the student's speech and language provider, (3) recommended a restrictive placement that focused on an adaptive functioning curriculum without assessing the student's adaptive functioning skills, (4) failed to appropriately group the student, (5) failed to conduct a classroom observation, (6) failed to identify a specific learning disability or a severe speech and language disability, (7) altered the student's promotional criteria without an appropriate analysis, (8) removed English as a second language (ESL) services without proficiency testing, and (9) predetermined the student's recommended program (id. at pp. 12-13).

For the 2015-16 school year, the parent alleged that the district failed to reevaluate the student for his triennial evaluation and the CSE did not convene or develop an IEP for this school year (id. at p. 15).

For the 2016-17 school year, the parent alleged that the CSE (1) convened without appropriate evaluative data or information regarding the student's needs, (2) did not include the speech-language therapist at the CSE meeting, (3) failed to perform and review evaluations, (4) changed the student's classification to an intellectual disability without support or eligibility

review, (5) changed the student's placement without considering the student's LRE or a deferral to the central-based support team (CBST), and (6) recommended the student for alternate assessment without support, eligibility review, or adequate notice to the parent (id. at pp. 18-19).

For the 2017-18 school year, the parent alleged that she did not receive an offer of placement until February 2018 (Parent Ex. B at p. 20). The parent also contended that the June 2017 IEP could not be implemented at the student's charter school, the CSE offered three inappropriate placements that were "overly segregated" and did not offer appropriate functional grouping (id. at pp. 20-21).

For each of the school years at issue, the parent alleged that the class ratio of 12 children to 1 teacher was not appropriately intensive (Parent Ex. B at p. 22), the student did not make adequate or appropriate progress (id. at pp. 9, 12, 14, 15, 20, 22), and that she was denied meaningful participation in the development of the student's IEPs (id. at pp. 7-8, 10, 13-14, 19, 22-23).

As relief, the parent requested: a declaration that the district violated the IDEA, section 504, the Americans with Disabilities Act (ADA), 42 U.S.C. section 1983 (section 1983) and that the student was denied a FAPE for the seven years at issue; pendency pursuant to the February 2015 IEP; an order for independent educational evaluations (IEEs) including a bilingual neuropsychological evaluation, a bilingual speech-language evaluation, an auditory processing evaluation, an occupational therapy evaluation, an "[a]ssessment by a PhD-level [b]oard [c]ertified [b]ehavior [a]nalyst," an academic and social observation, and an assistive technology (AT) evaluation; an order directing the CSE to reconvene within ten business days following completion of the IEEs and develop "a legally valid IEP that implements the recommendations of the independent evaluations"; compensatory educational services; transportation, funding for a private school; interpreter services in the parent's native language at all meetings and translation of all written documents; prospective funding of monthly language access services; and extended eligibility beyond age 21 for the student (Parent Ex. B at pp. 25-26).

B. Impartial Hearing Officer Decision

In a letter dated July 11, 2018, as further discussed below, the IHO advised the parties of his rules for the conduct of an impartial hearing (IHO's prehearing directives), including those governing witness testimony and admission of evidence (SRO Ex. J at p. 1). On July 24, 2018, the impartial hearing was convened to address the issue of pendency (stay-put), wherein the parent offered two exhibits which were accepted into evidence based on agreement of the parties (Tr. pp. 2, 6-7; Parent Exs. A, B).[3] On August 7, 2018, the IHO issued an interim decision "on consent" in which he found that the parties, having appeared and "agreed to waive a hearing on the issue of pendency," were in agreement that pendency consisted of the services set forth in the February 24, 2015 IEP (Tr. pp. 13-20; Interim IHO Decision at p. 2). The IHO ordered that the student receive, for the pendency of the proceedings, 10 periods per week of English language arts (ELA) and math in a 12:1+1 special class in a community school, five periods per week of science in a 12:1+1 special class, four periods per week of social studies in a 12:1+1 special class, Spanish-language

[3] The impartial hearing convened on July 24, 2018 consisted of three days of proceedings and concluded on October 31, 2018 (Tr. pp. 1-110).

speech-language therapy in a group of two for two 30-minute sessions per week, and a full-time Spanish-language paraprofessional (Interim IHO Decision at p. 2; see Tr. pp. 18-19; Parent Ex. A at pp. 7-9, 11-13).

The impartial hearing reconvened on September 24, 2018, during which the district indicated that the matter was "likely to resolve as to Parent's request for independent educational evaluations and some of the years at issue" (Tr. p. 32). The parent stated that several IEEs had been requested, however, she noted that the IHO was of the opinion that he did not have the authority to issue interim orders other than to determine pendency (Tr. pp. 33, 64). The parties again reconvened on October 31, 2018 and concluded the impartial hearing (Tr. pp. 42-110). The IHO noted that on September 28, 2018, the district had filed a motion to dismiss claims related to the 2012-13, 2013-14, 2014-15, and 2015-16 school years, which they alleged were barred by the statute of limitations, and which the parent opposed on or about October 2, 2018 (Tr. p. 49). The IHO indicated that he had issued an email decision to the parties on October 8, 2018, finding that the parent's claims related to the 2012-13, 2013-14, 2014-15, and 2015-16 school years were barred by the statute of limitations (Tr. pp. 49-50).[4] The IHO then stated that the parent's claims were limited to the 2016-17, 2017-18, and 2018-19 school years (Tr. p. 50). Following the IHO's statement, the district conceded that the student had been denied a FAPE for the 2016-17, 2017-18, and 2018-19 school years (Tr. pp. 51-52).[5] No witnesses were called to testify and the IHO declined to admit into evidence the remaining 41 exhibits proffered by the parties (Tr. pp. 43-46, 80-105).

In a final decision dated February 27, 2019, the IHO acknowledged that the district had conceded FAPE, then continued to make findings that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years (IHO Decision at pp. 2, 5-8). The IHO also found that the hearing record did not support a finding that the parent failed to cooperate with the district or that equitable considerations barred an award (id. at p. 10). Regarding the two district exhibits that the IHO allowed into evidence, the January 7, 2017 psychoeducational evaluation report and the May 12, 2017 behavioral assessment report, the IHO found them both credible and uncontroverted (id. at pp. 9-10). Nevertheless, the IHO stated that "an IHO cannot determine the amount of compensatory education that a student requires unless the record provides him with sufficient 'insight about the precise types of education services the student needs to progress'" (id., citing Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 555 F. Supp. 2d 130, 135 [D.D.C. 2008]). The IHO further indicated that "[t]he [p]arent has the burden of 'propos[ing] a well-articulated plan that reflects the student's current education abilities and needs and is supported by the record." (IHO Decision at p. 10, citing T.P. v. D.C., 736 F. Supp. 2d 240, 248 [D.D.C. 2010]), and declined to award any compensatory education to the student "at this time" (IHO Decision at p. 10). However, the IHO directed the district to reimburse the parent or directly pay the cost of an independent bilingual neuropsychological evaluation not to exceed $5,000, an independent bilingual speech-language evaluation not to exceed $3,000, an independent auditory processing evaluation at a reasonable market rate, an independent occupational therapy evaluation

[4] The IHO did not include his October 8, 2018 decision in the hearing record.

[5] The district further indicated that the IHO had not been appointed to consider claims under section 504 (Tr. p. 52).

at a reasonable market rate, an independent functional behavioral assessment at a reasonable market rate, an independent academic and social observation at a reasonable market rate, and an independent AT evaluation not to exceed $2,500 (id. at p. 11). The IHO further ordered the CSE to reconvene "forthwith" upon receipt of the student's evaluations and to produce a new IEP for the 2019-20 school year after considering all of the student's "relevant evaluations" and information (id.). The IHO also ordered the district to provide a Spanish interpreter at all meetings with the parent and to provide Spanish translation of all "notices, educational documents and DOE documents belonging to the student or sent to the Parent" (id.).

IV. Appeal for State-Level Review

The parent appeals the IHO's adverse rulings and failures to rule. The parent requests that the IHO's decision be reversed and that the hearing record be amended to include the parties' applications, the IHO's rulings that he communicated via email, and the student's educational records that were offered but not admitted during the hearing. The parent further alleges that the IHO erred by finding that the 2012-13, 2013-14, 2014-15, and 2015-16 school years were barred by the statute of limitations. The parent argues that the IHO should not have dismissed her claims without determining when the claims accrued, and asserts three alternate grounds for reversing the IHO's dismissal of her claims: (1) the district waived the statute of limitations, (2) those claims accrued within the limitations period, or (3) the district's failure to provide prior written notice of her due process rights in her native language, among other violations of the IDEA, was so egregious as to toll the limitations period. The parent also contends that the IHO's hearing procedures violated her due process rights. Specifically, the parent argues that the IHO failed to provide advanced notice of his rules relative to witness appearances and admissibility of evidence, and further failed to allow the parent one full day of hearing.

The parent further alleges that the IHO erred by failing to award compensatory educational services for the three years for which he found a denial of a FAPE, and for failing to award compensatory educational services for the years he dismissed. Additionally, the parent argues that the IHO erred by failing to render an interim decision awarding IEEs and failed to award adequate funding for language access services (document translation). The parent also contends that the IHO improperly shifted the burden to the parent and thwarted her efforts to meet it. The parent asserts that the IHO should have awarded extended eligibility to the student, should have ruled on the parent's section 504 claims, had a conflict of interest, and failed to award the parent her choice of evaluator for the IEEs and failed to award an adequate rate. The parent has attached 12 exhibits totaling 478 pages to her request for review for consideration as additional evidence (SRO Exs. A-C; E-M).

For relief, the parent seeks findings of a denial of a FAPE for the 2012-13, 2013-14, 2014-15, and 2015-16 school years, and an award of compensatory educational services for the 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, and 2018-19 school years. The parent has submitted all of her hearing exhibits excluded by the IHO as well as the IHO's interim decision omitted from the hearing record as additional evidence and requests that it be considered as part of her appeal. With regard to the IHO's award directing translation of documents, the parent does not appeal to the extent it applies to an award for current and prior documents. In the event that a determination is made that the award applies only to future translation, the parent requests that past and present records be translated. Additionally, the parent requests an award of eight hours

per week of "language access services by a private agency." The parent also requests a finding that the district violated section 504 and that the IHO should have ordered that compensatory education be delivered by the parent's chosen providers at private rates, which are denoted as "enhanced rates" in her memorandum of law.[6]

In an answer with cross-appeal, the district responds to the parent's allegations with admissions and denials and argues to uphold the IHO's decision. The district cross-appeals the IHO's finding that equitable considerations did not warrant a reduction in an award of compensatory educational services to the parent. Although styled as a cross-appeal, the district objects to some of the exhibits the parent has attached to the request for review and also argues that the parent's section 504 claim should be dismissed. The district has submitted 11 exhibits totaling 49 pages together with its answer with cross-appeal for consideration as additional evidence (SRO Exs. 2-4; 6-8; 10-13; 20).

In an answer to the district's cross-appeal, the parent objects to all but one of the exhibits proffered by the district, the district's due process response (SRO Ex. 2) as it is part of the record, and alleges that the district has waived any defenses related to equitable considerations by failing to raise them at the impartial hearing. The parent also argues that the IHO and the SRO have jurisdiction over her section 504 claims. Attached to her answer to the district's cross-appeal, the parent has included an additional three exhibits totaling 52 pages for consideration as additional evidence (SRO Exs. N-P).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

[6] The similarity between the terms "enhanced rate" approved by the district for the delivery of certain special education and related services and the "private rate" mentioned by the parent, and the "market rate" in the IHO's decision is not clear.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

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

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

VI. Discussion

As the district conceded that it denied the student a FAPE during the 2016-17, 2017-18, and 2018-19 school years, the limited number of issues remaining on appeal include whether the IHO correctly dismissed the parent's claims related to the 2012-13, 2013-14, 2014-15, and 2015-16 school years as barred by the statute of limitations and whether the IHO correctly declined to award any compensatory education to the student as relief.

A. Preliminary Matters

Due to the unusual nature of the impartial hearing and treatment of the evidence in this case, the issue of additional evidence submitted on appeal will be discussed below after the Relief section.

1. Burden of Proof and Conduct of the Impartial Hearing

The parent alleges that the IHO's procedures violated her due process rights. The parent further contends that the IHO improperly shifted the burden to her and thwarted her efforts to meet it. Additionally, the parent argues that due to pressure on IHOs to meet timelines, payment policies and an insufficient number of IHOs, the IHO in this matter had an inherent conflict of interest which resulted in denial of due process.

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

Specifically, the parent asserts that the IHO violated her right to due process by (1) requiring in-person testimony for witnesses fewer than 200 miles away, (2) requiring both parties to agree to the admissibility of evidence or provide an in-person, foundation witness (3) failing to provide advanced notice of his hearing rules, (4) failing to conduct fact-finding and allow the parent to call witnesses regarding statute of limitations issues, (5) failing to allow the parent one full day of hearing, and (6) failing to admit the parent's private evaluation report.

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]).

As noted above, by letter dated July 11, 2018, the IHO informed the parties of his appointment and provided the parties with a guide for the conduct of the impartial hearing (SRO Ex. J at p. 1). The IHO's prehearing directives disclosed his views on the use of telephonic testimony, and that evidence and/or testimony must be relevant, material, reliable and not overly repetitive or duplicative (id. at p. 7). The IHO's prehearing directives stated that "whenever possible, the parties should stipulate to the facts and/or joint exhibits agreed to" and if not possible, "the general rules for the admission of evidence in an administrative hearing provided below should be followed" (id. at pp. 7-8). The prehearing directives then described the IHO's general rules of conduct including evidentiary standards (id. at pp. 10-12).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence. At the outset, I note that the IHO's prehearing directives were partially consistent with the Commissioner's regulations for initiation of an impartial due process hearing (compare 8 NYCRR 200.5[j][3]; with SRO Ex. J at pp. 5-8). With regard to evidence, the Commissioner's regulations tend to promote admissibility stating that an IHO may receive any oral, documentary or tangible evidence except that the IHO "shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]), and State regulations provide that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing

the hearing record (8 NYCRR 200.5[j][3][vii]). Any party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). However, if a party fails to disclose all completed evaluations, the prohibition against introduction of evaluations is discretionary insofar an IHO "may" bar a party from introducing an evaluation (34 CFR 300.512[b][2]; 8 NYCRR 200.5[j][3][xii][a]). The IHO incorporated additional requirements in his prehearing directives in the areas of telephonic testimony (SRO Ex. J at p. 4, 5, 7), issuing subpoenas (id. at pp. 5-6, 12), exclusion of evidence (id. at p. 7), admissibility of evidence (id. at pp. 4, 7, 12), and testimony (id. at pp. 4, 5, 7, 9, 10-12) not all of which were required by or entirely consistent the Commissioner's regulations, at least as applied by the IHO.[8]

On the last day of the hearing, the IHO reiterated that he had found the parent's claims related to the 2012-13, 2013-14, 2014-15 and 2015-16 school years were barred by the two-year statute of limitations (Tr. pp. 49-50). Next, the district conceded on the record that the student had been denied a FAPE for the 2016-17, 2017-18 and 2018-19 school years (Tr. p. 51). Concerning the parent's section 504 claims, the district stated that those claims were not properly before the IHO (id.). The district then alleged that much of the parent's requested relief had been "satisfied" in that the district had issued authorizations for each of the independent evaluations the parent had requested (Tr. p. 56).

At this time, the IHO suggested reviewing the due process complaint notice and determining what of the parent's requested relief was resolved or not resolved (id.). The IHO then stated that he was making a finding—given the district's concession—of a three-year denial of a FAPE and that such a finding amounted to a "gross violation of FAPE" (Tr. p. 58). After discussing the status of the parties' negotiations over the parent's requests for IEEs, the parties then established with the guidance of the IHO that none of the parent's remaining requests for relief had been resolved (Tr. pp. 65-69).

In its closing brief to the IHO, the district argued that the parent failed to show that the student was entitled to the specific compensatory education and equitable relief the parent sought (Dist. Ex. 21 at p. 4). The district also alleged that since the parent did not produce any evidence to justify the specific items of compensatory relief sought, she could not "simply rely on the district's concession, absent evidence in the record setting forth the student's lack of progress or even the student's present academic functioning, there is no appropriate way to calculate an award of compensatory education" that would make the student whole (id. at p. 8). Lastly, the district contended that due to the parent's failure to present testimonial or documentary evidence in support of the need for compensatory educational services, the IHO had "no choice but to consider these items of relief abandoned" (id. at pp. 8-9).[9]

[8] One objection by the parent relating to telephonic verses live testimony is a matter that lies within the discretion of the IHO, but when combined with the IHO's rule that every document must be stipulated to or supported by foundational witness testimony before it can be considered for admission may be impractical for special education due process proceedings, especially when, as the IHO described it, the district and IHOs are involved in nearly 10,000 due process proceedings.

[9] In a stark reversal, the district in its answer and cross-appeal argues that based on the record as a whole, "there

In his decision, the IHO stated that the parent had the burden of proposing a well-articulated plan that reflected the student's current educational "abilities and needs," supported by the record (IHO Decision at p. 10). In her appeal, the parent argues that the IHO improperly shifted the burden of proof to her to establish her entitlement to compensatory educational services. The parent also alleges that the IHO improperly determined that the hearing record was insufficient to determine relief when it was the IHO's obligation to "admit evidence and ensure that the record was developed" (Parent Mem. of Law p. 11).

The IHO's decision indicates in one part that the burden of proof is on the district, but elsewhere placed that burden on the parent and he failed to hold the district accountable to its burden or craft compensatory education relief as a result. This was error. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85; see also Application of a Student with a Disability, Appeal No. 18-015; Application of a Student with a Disability, Appeal No. 18-058; Application of a Student with a Disability, Appeal No. 16-028; Application of a Student with a Disability, Appeal No. 11-091;). Moreover, the IHO relied on out-of-state caselaw that follows the Schaffer rule (see T.P., 736 F. Supp. 2d 240, 248 [D.D.C. 2010]) rather than on Education Law § 4404(1)(c).[10]

The IHO's misplacement of the burden of proof, as well as the IHO's procedures for conducting the impartial hearing had a profound impact on the development of the hearing record because the parties were not given a reasonable opportunity to submit evidence in a consistent manner, however, I will further address those issues below as it relates to the parent's requested compensatory education relief.

B. Statute of Limitations

The parent alleges that the IHO erred by finding that her claims for the 2012-13, 2013-14, 2014-15, and 2015-16 school years were barred by the IDEA's two-year statute of limitations without determining whether any exceptions to the limitations period applied, or when the parent "knew or should have known about the alleged action that forms the basis of the complaint" (20

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was no burden shifting" and the IHO's decision "clearly demonstrates that the IHO placed the burden of proof, including development of an appropriate record regarding compensatory relief, on the DOE" (Answer ¶16). The IHO's decision was not clear at all on whom he placed the burden. Although it did not do so at the impartial hearing stage, district now capitulates that the "DOE had the burden of production, and was obligated to describe its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that most reasonably and efficiently could place the student in the position that he would have been but for the denial of a FAPE" (Answer ¶19).

[10] The Court in Schaffer left open the question of whether States have the authority to shift the burden of proof through legislation (546 U.S. at 61-62).

U.S.C. § 1415[b][6][B], [f][3][C]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]).

In this case, the parent's due process complaint notice is dated July 3, 2018 (Parent Ex. B), and her claims that the student was not provided prior written notice in her native language, the parent was not provided with the student's special education records or an explanation of the records in her native language, the student was not properly evaluated or offered appropriate placements accrued just prior to or contemporaneously with the evaluation and CSE processes scheduled for the 2012-13, 2013-14, and 2014-15 school years. The allegations that no CSE meeting occurred or IEP developed for the 2015-16 school year accrued at the time that the CSE meeting was due to reconvene for an annual review. The claims described above were not within the two-year statute of limitations when the parent filed the due process complaint after the commencement of the 2018-19 school year on July 3, 2018, and she will not be able to pursue them further unless one of the exceptions to the statute of limitations applies.

1. Specific Misrepresentations

As to one of the exceptions, the parent asserts that her claims should not be barred by the IDEA's two-year statute of limitations due to the district having "misdiagnosed and failed to identify [the student's] disabilities" (Parent Ex. B at p. 2). The "specific misrepresentations" exception to the timeline to request an impartial hearing applies "if the parent was prevented from requesting the hearing due to . . . specific misrepresentations by the [district] that it had resolved the problem forming the basis of the complaint" (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]; Bd. of Educ. of N. Rockland Cent. Sch. Dist. v. C.M., 2018 WL 3650185, at *3 [2d Cir. 2018][noting that the district's refusal to accede to the parents requests formed the basis of the complaint and that the district did not misrepresent that it had resolved the problem]; R.B. v. Dept. of Educ. of City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar. 24, 2009], aff'd 422 Fed. App'x 76 [3d Cir. Apr. 6, 2011]; Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 569 [E.D. Pa. 2013] [holding that negligent misrepresentations will not trigger application of the exception]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp. 2d 997, 985 [E.D. Tex. 2011] [identifying that the parent, with the benefits of hindsight, "might consider the district's assessment of the [student] to be wrong, but that does not rise to a specific misrepresentation triggering" the exception, and that if "inadequate assessments were sufficient to warrant application of the statutory exception, the exception would swallow the rule"]; see also Application of a Student with a Disability, Appeal No. 13-215).

In this case, the parent raises numerous procedural and substantive violations of the IDEA for each of the seven school years at issue. The only evidence in the hearing record is from the 2016-17 school year. It appears that the parent is alleging that a change in classification demonstrates a misdiagnosis of the student or a failure to identify all of his disabilities. Even assuming for the sake of argument that the parent is correct that the district misdiagnosed the student or otherwise failed to correctly evaluate the student or correctly identify every facet of his needs, it does not satisfy the exception because a misdiagnosis or mere error is not a specific misrepresentation that the problem forming the basis of the parent's complaint had been resolved.

Further, the record does not include any evidence that the district attempted to resolve the problem forming the basis of the parent's complaint.

2. Withholding of Information

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]. Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. Sch. Dist. 2018 WL 3650185, at *3; R.B. 2011 WL 4375694, at *4, *6; see D.K. 696 F. 3d at 246; C.H., 815 F. Supp. 2d at 986; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7]). Such safeguards include the requirement to provide parents with a procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[d]; 34 CFR 300.504; 8 NYCRR 200.5[f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

In this case, the parent's due process complaint notice specifically indicates that the district failed to provide prior written notice and procedural safeguards notice in her native language until May 2018. In finding that the withholding of information exception did not apply, the IHO determined that the parent did not allege that the failure to provide prior written notice and procedural safeguards notices in her native language prevented her from timely filing a due process complaint notice. In her appeal, the parent contends that the IHO improperly based his decision on exhibits the district attached to its motion, in lieu of a fact-finding or reliable evidence (Req. for Rev. pp. 2-3; see SRO Ex. C). Additionally, the parent argues that the IHO failed to determine when the parent's claims accrued for each of the school years at issue (id.). The hearing record supports the parent's position that the IHO failed to properly determine whether the withholding of information exception applied. The document contains blank consent forms (SRO Ex. C at pp. 37-43) and does not include a procedural safeguards notice or prior written notice and states in the social history evaluation that the parent's due process rights were "explained to her" (id. at p. 45).[11] While the social history package is relevant to the issue, it does not actually state that a procedural

[11] Although I address the larger issue in greater detail below, this happens to be an example of the IHO accepting and relying on documentary evidence for which no witness was called to lay a foundation, but upon which several years of claims were disposed, which is inconsistent with his own rules for the conduct of an impartial hearing (see SRO Ex. J). The question then becomes why this was permissible at the time but not when the parent sought to enter evidence into the record at the impartial hearing, and the IHO contended that those rules were subject to his "discretion" (see Tr. pp. 101-104). It was not consistent with the requirements of due process and was error (34 CFR 300.514[b][2][ii]).

safeguards notice was provided to the parent in English or Spanish. Nor does any of the additional evidence offered by the parties provide evidence either way that a procedural safeguards notice was offered to the parent in English or Spanish for any of the years at issue. In view of the disposition of this appeal, additional evidence regarding the district's transmittal of a procedural safeguards notice is required on remand to determine whether the withholding information exception applies to the parent's claims that were beyond the two year statute of limitations.

Further, with respect to prior written notices, for example, both parties seek to submit additional evidence in relation to the 2014-15 school year consisting of prior written notices dated April 21, 2015 in English and Spanish relating to the student's recommended program for that school year as attached to the parent's request for review and the district's answer and cross-appeal (SRO Ex. K at pp. 149-155; SRO Ex. 3 at pp. 1-7.) The parent seeks as well to submit evidence of the district's SESIS log containing various entries relating to the 2014-15 school year, among other years (SRO Ex. K at pp. 39-40). Likewise, these documents present an opportunity for record development that may bear on the issue.

Overall, the sparse evidence in the hearing record makes it impossible to determine whether or not the withholding information exception to the two-year statute of limitations applies to the parent's claims. The IHO's interim decision barring the parent's claims on statute of limitations dated October 8, 2018 must be vacated. The matter must be remanded for further proceedings consistent with due process and specifically to determine whether the parent was given a procedural safeguards notice her native language for any or all of the school years in question.

C. Relief

The parent alleges that the relief ordered by the IHO was inadequate insofar as the IEEs should have been ordered on an interim basis. The parent also contended that the IHO erred in failing to award compensatory education after determining that the district had denied the student a FAPE for three years.[12] I will address each below in turn.

1. Independent Educational Evaluations

In addition to the IHO's determinations that the student was denied a FAPE for the 2016-17, 2017-18, 2018-19 school years, neither party has appealed the IHO's determinations that student should receive an independent bilingual neuropsychological evaluation not to exceed

[12] The parent also appeals the IHO's lack of determination concerning claims she raised under Section 504 of the Rehabilitation Act of 1973. State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and Article 89 of the Education Law (Application of a Student with a Disability, Appeal No. 09-056; Application of a Student with a Disability, Appeal No. 09-044; see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parent's claims regarding section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012], aff'd, Moody v. New York City Dep't of Educ., 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Accordingly, the parent's claims related to section 504 shall not be reviewed in this appeal.

$5,000, an independent bilingual speech-language evaluation not to exceed $3,000, and an independent AT evaluation not to exceed $2,500. Additionally, neither party asserts a cognizable challenge to the portion of the IHO's decision ordering as relief an independent auditory processing evaluation at a reasonable market rate, an independent occupational therapy evaluation at a reasonable market rate, an independent functional behavioral assessment at a reasonable market rate, and an independent academic and social observation at a reasonable market rate. As such, those determinations have therefore become final and binding upon them (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]). However, the parent alleges that the IHO erred insofar as he failed to order the IEEs on an interim basis and in his reasoning that an IEE could not be issued on an interim basis.

The parent is correct that it is permissible for an IHO to order an IEE in an interim decision, and the statements by the IHO to the contrary in the hearing record are error (Tr. p 64), as both federal and State regulations explicitly contemplate that an IHO may order "an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense" (34 CFR 300.502[d] [emphasis added]; 8 NYCRR 200.5[g][2]). Furthermore, in his prehearing directives the IHO acknowledged the authority of an IHO to order an IEE as part of an impartial hearing (SRO Ex. J at p. 6). There are some due process proceedings in which it may not be possible for the IHO to rely on IEE reports ordered as part of an impartial hearing and still comply with the 45-day timeline for completing the impartial hearing; however, in such cases, such directive from the IHO may nevertheless help avoid the necessity of a remand if the hearing record is otherwise inadequate to design an appropriate compensatory education services because the parties would have the opportunity to offer the IEE as additional evidence in a State-level review or upon judicial review. In this case, no such impediment was present as there was ample time for completion of the IEEs between the time they were sought by the parent in August 2018 and the time the IHO rendered his decision in February 2019. However, the IHO ultimately ordered the relief sought with respect to IEEs in his final decision and the issue has been rendered moot at this stage of the proceedings because, as the district points out, it has agreed to fund the IEEs at the rates ordered by the IHO.

2. Additional Evidence and Compensatory Education

Both parties in their pleadings state that the hearing record was deficient with the parent arguing it was inadequate and the district, to a lesser extent, admitting it was incomplete, and both parties have submitted additional documentary evidence with their pleadings for consideration on appeal. As noted above, the parent attached in excess of 500 pages of documents with her request for review and answer to the cross-appeal. The district also submitted 11 exhibits for consideration with its answer and cross-appeal.

State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]).

In this case, several of the documents offered by the parent are deemed part of the hearing record that the district was required to submit in accordance with State regulation and therefore do

not constitute additional evidence. Those documents are: (1) the IHO's prehearing directive (SRO Ex. J); (2) the parent's motion for interim relief relating to IEEs and the IHO's response (SRO Exs. E; F) (3) the parent's motion for interim relief relating to admission of certified records and the IHO's response (SRO Exs. G; K at pp. 240-41), and (4) the district's motion to dismiss, the parent's opposition, and the IHO's interim decision relating to claims barred by the statute of limitations (SRO Exs. A; B; C).[13] In addition, the district submits the district's due process response, which is also deemed part of the hearing record (SRO Ex. 2). I will address some of the other submissions below as it relates to compensatory education, but first I will review the standard for compensatory education.

Turning to the parties' arguments regarding the IHO's refusal to award compensatory education to the student, case law instructs that compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the

[13] SRO Exhibit C, the district's motion to dismiss, includes two district exhibits that were offered at the hearing but not separately admitted into evidence. The first exhibit (District Exhibit 1), is the district's copy of the parent's due process complaint notice that was admitted as a parent exhibit (compare SRO Ex. C at pp. 10-35, with Parent Ex. B at pp. 1-26). The second exhibit (District Exhibit 5), described as a social history package, consists of blank consent forms in English and Spanish (SRO Ex. C at pp. 37-43) and a social history evaluation dated September 25, 2012 (id. at pp. 44-46).

educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

As noted briefly above, the manner in which the hearing was conducted did not result in the opportunity to develop a sufficient evidentiary record on the issue of compensatory education relief, and it is insufficient to determine appropriate compensatory services to remedy at a minimum, the uncontested three-year denial of a FAPE.

After discussing the status of the IEEs requested by the parents with the IHO during the impartial hearing, namely that the district agreed to authorize them but the rates were still in question, the district requested that the IHO dismiss the parent's due process complaint notice with leave to refile once the evaluations had been conducted and the parent could articulate a request for appropriate relief (Tr. p. 72). The IHO indicated that he would not decide a summary judgment motion on an oral application, stated that "it might be prudent" to have the IEEs completed and for the parent to refile, but ultimately noted that withdrawing or dismissing the due process complaint notice would terminate the student's pendency services (Tr. pp. 72-73). The parent's counsel then proposed the procedure that she could articulate a specific request for relief in a closing brief and that the district could brief its position on an appropriate amount of compensatory educational services in its own closing brief (Tr. p. 74).

The parent also indicated that she had documentary evidence to offer that would support the requested relief that the IHO could refer to when determining the amount of compensatory relief (Tr. p. 77). However, the IHO stated his preference for settlement when the district "knows that it has denied the student a FAPE and there is some entitlement to compensatory education, it should try to work that out with the Parent" (id.). The parent reminded the IHO that he had affirmatively stated at the previous hearing date that there would be no further adjournments for settlement and that sufficiency of the due process complaint notice was a preliminary issue (Tr. p. 78). The parent further stated that she had prepared her case to proceed on the issue of relief (Tr.

pp. 78-80, 82-83). The IHO noted that the district was going to rest its case and determined that there was " a gross denial of FAPE," a presumption that the parent had cooperated with the CSE, and that the burden was on the parent to demonstrate that she was seeking appropriate relief (Tr. p. 80).

The parent then stated that she would not be calling the two witnesses who had appeared in person because they would not be testifying on the issue of relief (Tr. p. 80). The parent's statement seemed to trigger the IHO's frustration, who stated that "Things have got to change… We have over 10,000 cases now being filed in New York City. I'm going to do things differently. I'm taking control of the process because nobody else is" (Tr. pp. 80-81). The IHO further detailed his aggravation with the attorneys for not communicating with each other and failing to settle the matter that had "been kicked around since July" (Tr. p. 81). The IHO noted the contentiousness between the litigants and the unnecessary length of proceedings (id.). Turning back to the parent's case, the IHO dismissed the two witnesses (Tr. p. 82). The parent then stated that she was unable to secure the testimony of the evaluator who prepared the Lindamood-Bell Learning Assessment, but she intended to offer her evaluation into evidence (Tr. p. 83).

The IHO then stated "Well, look, documents come in as per stipulation of the parties. If the parties don't stipulate, they don't come in without laying a foundation… Hearsay is permissible. It can't trump fairness. You can't cross-examine a document" (Tr. pp. 83-84). The parent argued that evaluations were presumptively admissible so long as they were disclosed five days prior to the hearing (Tr. p. 84). The IHO replied that if the parties agreed, "the documents will come in if I think they're relevant and material to the narrow issue, because there's a denial of FAPE. All I need to know are what are the unique needs of the student" and whether what has been requested as relief is appropriate (id.). Then the IHO stated, "If the documents are relevant and there's an agreement between the parties, then I'll consider them" (id.). The IHO noted that the parent did not have witnesses to lay a foundation and that he could not admit documents without giving the district the opportunity to cross-examine [a foundation witness] because it would be unfair (Tr. p. 85). The IHO concluded by stating that he believed there was already a substantial record (id.).

The parties' documentary evidence was thereafter marked for identification (Tr. pp. 86-89, 92-95), but only documentary evidence upon which both sides agreed upon was admitted as evidence to be considered (Tr. pp. 89-92, 95-97). The parent attempted to move in exhibits that were part of the student's educational records, some of which were certified by a district representative and had been received from the district pursuant to a subpoena (Tr. pp. 98-99). The basis of the IHO's rulings was that the district refused to stipulate to the admission of the documents (Tr. p. 99). When the parent asked the basis for permitting the district to object to documents that were disclosed and certified by the district, the IHO stated, "they just don't want to agree" (id.). The parent then asked the IHO to clarify the legal basis for requiring a foundation (Tr. pp. 99-100). The IHO stated that although the rules of evidence did not apply, "adherence to the rules is a way of getting control over the process and getting the parties to be reasonable with one another" (Tr. p. 100). The IHO further stated that documents would only be admitted pursuant to stipulation of the parties or by laying a foundation with a witness. The parent objected on the ground that such a rule was not a part of the regulations and further that there was no notice to her that foundation witnesses would be required for document admissibility (Tr. pp. 100-02). The IHO continued to refuse to admit the parent's exhibits and repined that parties do not communicate, fail to adequately

prepare for hearings, and that he personally had in excess of 340 cases on his docket (Tr. p. 104).[14] The IHO indicated that the parties planned to submit closing briefs and stated that the parties should settle the matter (Tr. p. 105). He commended the district for agreeing to fund the parent's requested IEEs and after more discussion about the parent's exhibits, he adjourned the hearing (Tr. pp. 105-09).

Upon rendering his decision, the IHO quoted caselaw indicating that there must be an adequate record to craft a compensatory education remedy, quoted caselaw indicating that the parent had the burden of proof, and effectively determined that the record was not adequate to support an award of compensatory education for a three-year gross denial of a FAPE (IHO Decision at pp. 3, 10; see Tr. pp. 58, 80). As described above, the IHO misallocated the burden of proof, and while I agree that a compensatory education award should be based upon a hearing record that is developed through an inquiry that is fact-specific, no such inquiry was permitted to occur in this case due to the confluence and unyielding application of several specific rules that the IHO imposed upon the parties. The result was that almost no record was developed that would help reach an informed decision for placing student in the position she would have been in had the district complied with its obligations under the IDEA. At one point during the hearing even the district's counsel seemed to recognize the need for a hearing record, suggesting that the results of the IEEs would be of use (Tr. pp. 72-73).[15]

With respect to the IHO's use of his prehearing directive (SRO Ex. J) on remand, initially I note that the formal rules of evidence applicable in civil proceedings do not apply strictly to administrative proceedings held under the IDEA (Pottsgrove Sch. Dist. v. D.H., 2018 WL 4368154, at *12 [E.D. Pa. Sept. 12, 2018]; D.C. v. Mount Olive Twp. Bd. of Educ., 2014 WL 1293534, at *28 [D.N.J. Mar. 31, 2014] [permitting hearsay in administrative determinations];[16] Council Rock Sch. Dist. v. M.W., 2012 WL 3055686, at *6 [E.D. Pa. July 26, 2012]; see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 68 [2d Cir. June 24, 2013]; Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children & Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977]). And while I strongly endorse IHO's practice of providing a general set of written directives for the conduct of the impartial hearing to the parties in advance, which in my experience has contributed considerably to orderly and effective hearing processes, in this case the IHO's overly restrictive application of those rules backfired. It led to pyrrhic victory for the student, which was especially hollow given that the IHO concluded that there was a gross denial of a FAPE but no basis to determine compensatory services. Particularly, I am compelled to comment on the IHO's statements referenced herein regarding "hearsay," particularly that

[14] I agree that the parties must adhere to all reasonable directives of the IHO such as communicating in between hearing dates in order to prepare for the hearing.

[15] The suggestion of dismissal without prejudice in order to have time to complete the IEEs, however, would have had other problematic ramifications to deal with.

[16] New York no longer follows a legal residuum rule with regard to the evidence supporting determinations in administrative proceedings (Eagle v. Paterson, 57 N.Y.2d 831, 833 [1982]).

"documents may come in as per stipulation of the parties" or by "laying a foundation" as "[h]earsay is permissible [but] [i]t can't trump fairness" and further in response to the parent's attorney that "none of that trumps fundamental fairness. The IDEA doesn't trump fairness … There's no law, no statute that trumps fundamental fairness." (Tr. pp. 83-84).[17]

It is well-settled that hearsay is permissible in impartial due process hearings brought under the IDEA (see Jalloh v. D.C., 535 F. Supp. 2d 13, 22 (D.D.C. 2008); Sykes v. D.C., 518 F. Supp. 2d 261, 268 [D.D.C. 2007] [noting, in addition to case law allowing hearsay evidence in administrative hearings, that "the IDEA supports this precedent by not explicitly banning hearsay evidence from administrative proceedings held pursuant to the statute"]; Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093, 1101 [C.D. Cal. 2000]; see also Application of the Dep't of Educ., Appeal No. 12-075, Application of a Student with a Disability, Appeal No. 12-007, Application of a Child with a Disability, Appeal No. 03-053, Application of a Child Suspected of Having a Disability, Appeal No. 93-018). Even if the evidence were to constitute hearsay in a judicial tribunal, the IHO has an obligation to ensure that the parent's ability to present a case is not unduly prejudiced, while at the same time safeguarding against unreliable evidence.[18] Relevant hearsay testimony is admissible in an administrative due process proceeding, furthermore, it can be useful, provided it is accorded the proper weight by an IHO when, for example, the evidence in the hearing record is limited on a particular issue and the only evidence is hearsay testimony offered by a witness, or a foundational witness is unavailable. In other words, formal rules of evidence may be relied as a basis for structuring an impartial hearing, but those rules should be applied flexibly so as to avoid an outcome, such as in this case, where an inadequate record resulted despite some additional relevant evidence having been offered by a party.

Within the documents submitted on appeal, there was available, relevant evidence with which to determine an award, had the IHO opted to grapple with it. Rather than outright exclusion of every exhibit, according varying degrees of weight to the evidence would alleviate the IHO's concern for reliability. To illustrate: on the last day of the hearing, the parent's attorney reported that she was unable to secure the testimony of the evaluator who determined the amount of compensatory educational services requested by the parent, but she intended to offer the evaluator's report (Lindamood-Bell Learning Ability Evaluation Summary) into evidence (Tr. pp. 83-85; SRO Ex. L at pp. 139-43).[19] The IHO refused to admit the report without a foundational witness, if the district would not stipulate to its admissibility stating that to do so would violate fundamental fairness (Tr. pp. 84-85). The result being a hearing record that is completely silent on an amount of services to which the student might be entitled, based on an uncontested three-year gross denial of a FAPE. A better result would be a starting point, to wit: admitting the Lindamood-Bell

[17] State regulations encourage the practice of stipulating to facts and/or joint exhibits agreed to by the parties (see 8 NYCRR 200.5 [j][3][xii][b]), but they do not endorse a practice of excluding evidence for lack of a stipulation or rigid adherence to the technical rules of evidence.

[18] One way to safeguard against according undue weight to potentially unreliable evidence is to "ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3[vii]).

[19] This report, for example, offered a recommendation that the student receive daily instruction for four hours per day, five days per week, for 45-60 weeks to develop his language and literacy skills as well as mathematical concepts and computation skills (SRO Ex. L at p. 143).

Learning Ability Evaluation Summary into evidence. Beyond that, the IHO as the trier of fact would be free to accord the proper weight to an evaluation that was unsupported by the preparer's testimony and not subject to cross-examination.

While I am sympathetic to the systemic problems that the IHO is experiencing in the impartial hearing system as he described them above, the solution cannot include evidentiary standards that are so inflexible that there is no record basis to craft relief. Some evidence is better than no evidence, particularly in a case with seven school years potentially at issue. Consequently, the matter must be remanded. On remand, the IHO should err on the side of record development, consistently apply administrative hearing procedures as outlined in the Commissioner's regulations and address reliability concerns by assigning weight to relevant evidence.

To further assist the parties and the IHO in crafting relief on remand, the hearing record should include documentation that described the student's special education needs during the time periods for which it is determined that there has been a denial of a FAPE, service delivery records and IEP progress reports (other teacher progress reports or assessments of the student's performance. At this point, the IEEs should already be in progress and would likely serve as a current assessment of the student's needs, therefore the parties should make all efforts possible to make them available to the IHO for the purpose of crafting compensatory relief. Once the student's current needs and appropriate programming are determined, the services the student received in prior school years, even if inadequate, may nevertheless have provided some assistance and are relevant to crafting a compensatory remedy.

With regard to past services that the student received, of particular import and almost entirely absent from the record are the circumstances relating to the student's enrollment in the charter school, the services he received therein and any reports of progress demonstrated or lack thereof. In New York, both the public school district of residence, as the local educational agency under the IDEA and State law, and the charter school are assigned responsibilities to ensure the provision of a FAPE to a student with a disability who attends a charter school, with the public school having the initial responsibility for creating a student's IEP.[20] Before a charter is approved, the applicant must, when filing an application with a charter entity, provide the "[m]ethods and strategies for serving students with disabilities in compliance with all federal laws and regulations

[20] The Education Law provides that

> a charter school shall be deemed a nonpublic school in the school district within which the charter school is located. Special education programs and services shall be provided to students with a disability attending a charter school in accordance with the [IEP] recommended by the [CSE] of the student's school district of residence. The charter school may arrange to have such services provided by such school district of residence or by the charter school directly or by contract with another provider. Where the charter school arranges to have the school district of residence provide such special education programs or services, such school district shall provide services in the same manner as it serves students with disabilities in other public schools in the school district, including the provision of supplementary and related services on site to the same extent to which it has a policy or practice of providing such services on the site of such other public schools.

(Educ. Law § 2853[4][a]).

relating thereto" (Educ Law § 2851[s]). Thus, according to the State's charter school office, the "charter school is responsible to implement the IEP as written. The charter school may provide these services directly or arrange to have such services provided by the school district of residence or by contract with another provider" ("Charter Schools and Special Education," at ¶¶ 14, 17-19, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/specialeduc.html; see also Educ. Law § 2853[4]).[21] When it comes to the IDEA's procedural safeguards, the public school district is responsible for compliance with the due process procedures, but "[c]harter schools must cooperate with school district personnel and school district attorneys in the conduct of due process proceedings, by making charter school personnel available to testify and providing documentary evidence upon request. ("Charter Schools and Special Education," at ¶ 8, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/specialeduc.html). In addition to due process it may be necessary to file a complaint against a charter school if it has failed to comply with the IDEA responsibilities assigned to it under state law ("Charter Schools and Special Education," at ¶ 22, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/specialeduc.html; see also "How to File a Charter School Complaint" available at http://www.p12.nysed.gov/psc/complaintprocess/DOEComplaintProcess2019.pdf).

In this case, the charter school would have been expected to implement the student's IEP; however, there is a dearth of information regarding how the student came to be there, the method that the charter school used to implement the student's services, and which IEP services the student did or did not receive. There are only the parent's allegations in her due process complaint notice that the student began attending a charter school in September 2015 because the parent "disagreed with the [district's] recommendations," but that the charter school did not implement a 12:1+1 special class for the student (Parent Ex. B at p. 15), although the parent also repeatedly alleged in the due process complaint notice that the district's proposals for a special class placement were "overly restrictive" (id. at pp. 7-8, 10-12, 14, 19). On the other hand, some of the documentation shows that the district continued offering the student a seat in one or more of the district's public schools at a time when the student was apparently attending the charter school (SRO Exs. K at pp. 174-78; L at pp. 126-30). For at least some of the time, it appears that the student was receiving ICT services (see, e.g., Dist. Ex. 17 at p. 2). The placement in an ICT classroom, the parent's disagreement with the public school placement, and the parent's allegations that the district placed the student in an overly restrictive setting appear to be factually related, and this information bears significantly on the task of crafting an appropriate compensatory education remedy.

Concerning the remaining submissions of additional evidence, it is clear some of the

[21] According to guidance issued by the charter school office,

> If the charter school is providing all special education and/or related services either directly or by contract, one of the child's special education providers must serve as the special education teacher member of the CSE. If both the school district and the charter school, directly or by contract, provide special education and/or related services to the child, the school district must designate the most appropriate provider to serve as the special education teacher member of the CSE. Charter schools are expected to cooperate fully with school districts by assuring that charter school teachers and other charter school personnel participate in CSE meetings relating to charter school students.

("Charter Schools and Special Education," at ¶ 4, Charter School Office, available at http://www.p12.nysed.gov/psc/Footer/specialeduc.html).

evidence that the parties offered at the impartial hearing should have been admitted and given the weight it was due. In particular the additional evidence submissions that I have discussed above are relevant to the remaining issues and should be accepted as evidence (see, e.g., SRO Exs._C at pp. 37-46; K at pp. 39-40, 149-55, 156-59, 174-78; L at pp. 126-30, 139-43). However, the submissions on appeal, especially those by the parent's 241-page SRO Exhibit K in particular, are in very poor condition. Each individual document should have been marked as its own exhibit with separate pagination rather than submitting voluminous exhibits containing multiple documents (some of which were duplicative with those contained in other exhibits). The parent needs to correct these deficiencies before returning to the impartial hearing on remand. The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]) with an eye toward the IHO's obligation to exclude from the hearing record any evidence he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

Given the disposition of this matter, I decline at this juncture to further rule on parties' remaining documents as they can be better addressed upon remand.

VII. Conclusion

For the reasons stated above, this matter is remanded to an IHO to determine whether any exception to the IDEA's two-year statute of limitations applies to the parent's claims, whether the district offered the student a FAPE for the 2012-13, 2013-14, 2014-15, and 2015-16 school years, and whether the student is entitled to compensatory educational services for a denial of a FAPE for the 2016-17, 2017-18 and 2018-19 school years, and to address any remaining claims set forth in the parent's July 3, 2018 due process complaint notice.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's interim decision dated October 8, 2018, is vacated; and

IT IS FURTHER ORDERED that the IHO's decision dated February 27, 2019 is modified by reversing those portions which placed the burden of production and persuasion on the parent and denied compensatory education relief; and

IT IS FURTHER ORDERED that if they have not already been conducted, the independent educational evaluations ordered by the IHO shall be completed within 60 days of the date of this decision, as described in the body of this decision, including the bilingual neuropsychological evaluation, the bilingual speech-language evaluation, the auditory processing evaluation, the occupational therapy evaluation, the functional behavioral assessment, the academic and social observation, and the AT evaluation; and

IT IS FURTHER ORDERED that the matter is hereby remanded to the same IHO who issued the October 8, 2018, and February 27, 2019 decisions to determine whether the withholding information exception to the IDEA's two-year statute of limitations applies to the parent's claims and if so, whether the district offered the student a FAPE for the 2012-13, 2013-14, 2014-15 and 2015-16 school years; and,

IT IS FURTHER ORDERED that the IHO shall, upon the parties' submission of additional relevant evidence, determine appropriate compensatory educational services for the gross denial of a FAPE for the 2016-17, 2017-18 and 2018-19 school years; and

IT IS FURTHER ORDERED that, if the IHO who issued the October 8, 2018, and February 27, 2019 decisions is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
May 9, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER