The University of the State of New York

The State Education Department
State Review Officer
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No. 20-037

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Matthew A. Ullman, Esq.

Queens Legal Services, attorneys for respondent, by Amy Leipziger, 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 district) appeals from the decision of an impartial hearing officer (IHO) which directed it to fund a functional behavioral assessment and behavioral intervention plan (FBA/BIP) for the student to be completed by the respondent's (the parent's) chosen provider at a prevailing rate. The district also appeals from the IHO's decision which ordered that the student's travel time be limited to no more than 45 minutes each way. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts is presumed and will not be recited here. The procedural history of the case and the IHO's decision form a central component of the appeal in this matter and must be detailed as relevant. The CSE convened on August 16, 2019, to formulate the student's IEP for the 2019-20 school year (see generally Dist. Ex. 2). The parent disagreed with the special transportation recommendations contained in the August 2019 IEP. By letter dated August 16, 2019, the parent also requested that the district fund a private FBA/BIP to be conducted by the parent's chosen Board Certified Behavior Analyst (BCBA) to consider whether

the student would benefit from applied behavior analysis (ABA) therapy (Dist. Ex. 3). In an email dated September 20, 2019, the district offered an FBA/BIP to be completed by a district school psychologist and written by the CSE (Dist. Ex. 4 at pp. 4-5). In an amended due process complaint notice dated October 21, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A).[1, 2]

A prehearing conference was held on December 11, 2019 (Tr. pp. 1-9). By email dated December 11, 2019, the district asked the IHO to clarify whether the proceeding she had scheduled for December 13, 2019 was a substantive hearing and if so, the district objected to continuing without disclosure by the parties (Dist. Ex. 9). The IHO replied to the parties by stating that the five-day disclosure rule did not apply to "emergent hearings" and that the next available hearing date was in late January 2020 (id.). The impartial hearing began on December 13, 2019 and the parties exchanged documentary evidence (Tr. pp. 12-18).[3] In a discussion on the record, the district argued that the parent was not entitled to an independent FBA because the district had not been given the opportunity to conduct its own FBA by a district school psychologist (Tr. pp. 19-22). The IHO asked the district's attorney on what date did the district offer to conduct its own FBA because the answer would "determine whether I'm going to take testimony or not" (Tr. pp. 22-23). The district's attorney stated that an FBA was offered via email on September 20, 2019 (Tr. pp. 23-24; see Dist. Ex. 4 at p. 5). The IHO stated that the parent had requested an FBA on August 16, 2019 (Dist. Ex. 3), and that once the parent made that request, the district was required to either defend its own evaluation by requesting an impartial hearing or by funding the parent's request (Tr. pp. 24-25). The IHO further stated that the district must respond to the parent's request within a reasonable amount of time (Tr. p. 25). Next, the IHO found that the district "did neither" and that "guidance from OSEP" prohibits a district from conducting its own evaluation in response to a parent's request for an independent educational evaluation (Tr. pp. 25-26). The district's attorney argued that the district was "ready, willing, and able to provide an FBA with a psychologist" but the parent did not consent to a district evaluation, rather the parent insisted that a private FBA be conducted by a BCBA (Tr. p. 26). In response, the IHO asked if the parent had refused to make the student available for an FBA prior to the date of her request on August 16, 2019 (Tr. p. 27). The district's attorney indicated that the parent had not (id.). The IHO then ruled on the record that the parent was "entitled to an FBA and potentially a BIP at public's [sic] expense with the parent's chosen provider" (id.).

The IHO then turned to the second issue at the impartial hearing, the parent's request for limited travel time of 40 minutes or less.[4] The IHO asked the parent to explain the rationale for

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[1] The parent annexed four exhibits to her answer, which will be addressed below.

[2] The parent originally filed a due process complaint notice on October 2, 2019 (Answer Ex. B at p. 1).

[3] The hearing transcript does not reflect that any exhibits were admitted into evidence. However, the IHO's decision indicated that the parent's evidence consisted of three exhibits (Parent Exs. A-C) and the district's evidence consisted of 11 exhibits (Dist. Exs. 1-11).

[4] Throughout the hearing record the duration of the parents' request for limited travel time is alternately described as for no more than "40 minutes" (Tr. p. 18; Parent Ex. A at pp. 2, 3; Dist. Ex. 5 at p. 3), or "45 minutes" (Parent Ex. B at p. 2; Dist. Exs. 7 at p. 1; 8 at p. 2). The IHO ultimately ordered that the student's one-way bus ride not exceed 45 minutes (IHO Decision at p. 2; Tr. p. 32).

her request (Tr. p. 27). The parent stated that the student "spen[t] too much time on the bus 90 minutes every day" (id.). The parent also reported that the student sometimes vomited "when he comes back", had a bad temper and "sometimes pain" (id.). The IHO then asked the district to respond (Tr. p. 28). The district's attorney argued that the hearing record indicated that the Office of School Health (OSH) spoke with the student's physician who agreed that there was no "medically-based reason" for limited travel time and that the CSE's recommendations for special transportation addressed the student's needs and the parent's concerns (Tr. pp. 28-29; see Dist. Ex. 8 at p. 2). The district further argued that the OSH physician review form documented the conversation between an OSH physician and the student's physician which reflected the student's physician's agreement with "the plan for this school year" (Tr. p. 31; see Dist. Ex. 8 at p. 2). The IHO then asked the district's attorney if the OSH physician was going to testify (Tr. p. 31). Initially, the district's attorney argued that OSH would not "provide a doctor for testimony" and that the documentary evidence in the hearing record was sufficient to demonstrate the content of the conversation between the physicians (id.). The IHO disagreed and stated that the OSH physician's testimony "would be very helpful" to explain "what took place" during the conversation between the physicians (Tr. pp. 31-32). The IHO further stated that the district either failed or refused to produce the OSH physician "to testify today" and therefore the IHO "ha[d] to make the inference that [the OSH physician's] testimony would have been favorable to the parent" (Tr. p. 32). The IHO then ordered that the student's travel time be "shortened to 45 minutes" (id.). In response, the district's attorney asserted that the district did not refuse or fail to produce the OSH physician, rather the district could not secure the witness with "less than 36 hours' notice" of an emergent hearing (Tr. p. 33). The district's attorney also objected to the IHO's adverse inference arguing that the OSH physician should be expected to testify consistently with the documents she prepared that were already in evidence and that it was improper to infer that the physician's testimony would be favorable to the parent (Tr. pp. 33-34). The district's attorney further argued that the parent had not provided any evidence to counter the position of OSH or the recommendations of the CSE (Tr. p. 34). The IHO asked the parent to respond and she stated that she believed the student spent too much time on the bus, was afraid to take the bus and go to school, and "also because he wets his pants… which make [sic] him embarrassed" (Tr. p. 35).

The IHO then stated that she would issue an interim order granting the parent's requests for limited travel time and an independent FBA/BIP (Tr. p. 36). The IHO acknowledged the district's concerns about the hearing "being brought on short notice", but due to the urgent nature of the matter and the unavailability of a hearing date until late January 2020, the IHO could not "in good conscience… put off this hearing… to satisfy the 5-day disclosure rule" (id.). In response, the district's attorney argued that an emergent hearing "[wa]s only applicable in New Jersey" and should be denied in any event because the parent had not sought any emergency relief, the matter was not related to a disciplinary placement or graduation, and did not otherwise constitute grounds for an expedited hearing (Tr. pp. 37-39). The IHO stated "[f]inal word from the hearing officer will be it is well within my discretion to manage my calendar and transportation when it concerns the safety, health, and welfare of the student [sic] rises to the level of an emergent hearing" (Tr. p. 39). The IHO then asserted that "[a]ccording to New York State, emergent hearings are held at all times for relief that is appropriate, and the hearing officer has rendered a decision, final order will issue, and you can set a date to come back for impartial hearing on the merits" (id.). The district's attorney then questioned whether the IHO was issuing an interim order and offering to reconvene another hearing date to address the merits because the IHO's order had addressed each claim in the parent's due process complaint notice (Tr. p. 40). The IHO clarified that the purpose of the interim

order was to give the district an opportunity to secure the OSH physician as a witness (Tr. p. 41). The district's attorney argued that the IHO's interim order changed the student's transportation services from the recommendations set forth on the August 2019 IEP and as such improperly failed to maintain the status quo (Tr. p. 42). The IHO disagreed and an additional hearing date was scheduled for February 26, 2020 (Tr. pp. 42-43).

In an interim decision dated December 15, 2019, the IHO ordered the district to fund an FBA/BIP to be completed by the parent's chosen provider at the prevailing rate and further ordered that the student's travel time be limited to 45 minutes each way (Interim IHO Decision at p. 1). By email dated December 16, 2019, the district requested that the IHO issue a final decision on the merits given that the parent had received all of the requested relief in the due process complaint notice (Answer Ex. C at p. 1). In a decision dated January 21, 2020, and "for good cause shown for emergent relief" the IHO directed the district to fund an FBA and BIP at the parent's chosen provider's prevailing rate and that the student's travel time be limited to 45 minutes each way (IHO Decision at p. 2).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer thereto is also presumed and will not be recited in detail here. Briefly, the district appeals the IHO's decision in its entirety and requests that the award of an independent FBA and BIP be reversed. The district further challenges the IHO's directive to limit the student's transportation time to no more than 45 minutes each way. The district further asserts that the IHO exceeded her authority and abused her discretion by convening an emergent hearing and erred in her evidentiary rulings. In an answer with exhibits, the parent argues that the IHO's decision should be upheld in its entirety. In a reply, the district challenges the admission of one of the parent's supplemental exhibits to wit: an affidavit from the parent's selected FBA/BIP provider.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in

an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's

needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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

VI. Discussion

A. Preliminary Matters

1. Conduct of Hearing

The district alleges that the IHO exceeded her authority, abused her discretion and denied the parties a meaningful opportunity to exercise their rights during the impartial hearing. Specifically, the district asserts that the IHO abused her discretion by ordering the parties to appear for an "emergent hearing." The district argues that scheduling the impartial hearing two days after the prehearing conference resulted in unfair prejudice to the district by eliminating the five-day disclosure rule and preventing the district from obtaining a witness.

In its request for review, the district asserts that the resolution period ended on November 2, 2019 and one adjournment was granted on December 4, 2019. The district argues that a timely prehearing conference was scheduled for December 11, 2019, and there was no basis for the IHO to schedule an emergent hearing on December 13, 2019. The district further alleges that no legal mechanism exists in State regulation by which an IHO may convene an emergent hearing. In her answer, the parent alleges that the resolution period ended on November 12, 2019, and that the district never notified the parent that a resolution session had been scheduled. The parent further asserts that the district did not make any attempt to resolve the matter before the district requested a hearing date on November 12, 2019. On that basis, the parent argues that the IHO correctly determined the urgency of the matter and further asserts that the district did not object during the prehearing conference.

At the outset, I note that neither party has correctly calculated the date the resolution period ended. The IDEA, as well as State and federal regulations, provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR

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

200.5[j][2][i]). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]). If a party files an amended due process complaint, the timelines for the impartial hearing, including the timelines for the resolution process recommence (20 U.S.C. § 1415[c][2][E][ii]; 34 CFR 300.508[d][4]; 8 NYCRR 200.5[i][7][ii]).[6]

The hearing record reflects that the parent filed an amended due process complaint notice on October 21, 2019 (Parent Ex. A). The amended due process complaint notice was sent via email to the district on October 21, 2019 (Dist. Ex. 1 at p. 4). Based on those documents the resolution period ended on November 5, 2019.

The impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period, unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). The IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]).

An IHO may grant extensions beyond these timeframes; however, such extensions may only be granted consistent with regulatory constraints and an IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]).

It appears that the IHO was influenced by the district's failure to respond to the parent's due process complaint notice or to initiate a resolution session when determining the urgency of scheduling a hearing date to address the parent's requested relief (Tr. pp. 2-5, 6). Nevertheless, the parent did not request any specific relief related to the district's failures other than to proceed with the hearing, which was scheduled within two days of the prehearing conference (Tr. pp. 3-4).

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[6] The Second Circuit has described the resolution period as the timeframe within which the district has to remedy any deficiencies in a challenged IEP without penalty (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 187[2d Cir. 2012]). When, at the conclusion of the resolution period, parents "feel their concerns have not been adequately addressed . . . , they can continue with the due process proceeding and seek reimbursement. The adequacy of the IEP will then be judged by its content at the close of the resolution period" (id. at 188). The resolution period allows a "district that inadvertently or in good faith omits a required service from the IEP [to] cure that deficiency during the resolution period without penalty once it receives a due process complaint" (id.).

The district also contends that it was unfairly prejudiced by the IHO's determination that the five-day disclosure rule did not apply to an emergent hearing and by the IHO's making an adverse inference against the district for its failure to call the OSH physician as a witness.

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

However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

The parent argues that the three exhibits offered into evidence were already in the possession of the district and therefore did not result in any unfair surprise. The parent also asserts that the district was offered an additional hearing date of February 26, 2020, wherein the district could have called the OSH physician as a witness and offered additional documentary evidence.

Hearing officers are charged with making a determination of whether the student received a FAPE based on substantive grounds (20 U.S.C. § 1415[f][3][E][i]; 8 NYCRR 200.5[j][4][i]), and, if necessary, they must take steps to ensure that an adequate hearing record has been completed upon which to base a decision (see 8 NYCRR 200.5 [j][3][vii]). In this case, however, any error related to the IHO's de facto elimination of the five-day disclosure rule for the hearing was remedied when the IHO offered to issue an interim order and scheduled an additional hearing date for the district to present additional evidence. The IHO admitted both parties' exhibits into evidence, the district chose not to proceed with an additional hearing date and has failed to articulate sufficient prejudice as a result of the IHO's discretionary determination to allow the parent's documents into the hearing record as evidence (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]; see Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016], aff'd, 700 F. App'x 25 [2d Cir. 2017] ["Like all procedural rules and deadlines, those set in this sort of administrative proceeding were set to ensure a fair and expedited process, not a summary 'gotcha' game. No prejudice from the failure to notice [the assistant principal's] testimony five days before the hearing (as opposed to the four days' notice given before her testimony) was articulated"]).

Concerning the IHO's decision to make an adverse inference against the district for failing to call a witness, I initially note that the IDEA does not "specify what particular remedies, including penalties or sanctions, are available to due process hearing officers or to decision makers in State-level appeals. The specific authority of hearing officers and appeal boards, including the types of sanctions that are available to them, generally will be set forth in State law or regulation" Letter to Armstrong, 28 IDELR 303 [OSEP 1997]. IHOs and SROs may nevertheless assert appropriate discretionary controls over the due process and review proceedings; however, in New York they have not been expressly granted contempt powers (Application of the Bd. of Educ., Appeal No. 02-056; Application of a Child with a Disability, Appeal No. 02-049).

Given the disposition of this matter, it is not necessary to determine whether it was an abuse of discretion for the IHO to make an adverse inference against the district for its failure to call the OSH physician as a witness because, as further described below, the available evidence does not support the district's position. There is no basis in the hearing record to find that the OSH physician's testimony would contradict the documents she prepared and there is no evidence in the hearing record that the district acted in such a way as to warrant sanction.

Turning to the IHO's scheduling of an emergent hearing, the district correctly asserts that State regulation does not provide for emergent hearings.[7] 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.

While the IHO's statements relative to emergent hearings were incorrect, the IHO's assertion that it was within her discretion to control her calendar formed a sufficient basis to schedule the hearing two days after the prehearing conference. Because the district was offered an additional hearing date to present evidence, I find that the IHO took appropriate measures to alleviate any undue surprise to the district and, in light of the remedial actions, it did not result in a hearing process in which she exceed her authority or abuse her discretion.

2. Additional Evidence

The parent has included four exhibits with her answer. 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

[7] In matters relating to discipline of a student with a disability, a party may request an expedited hearing under particular circumstances (8 NYCRR 201.11).

(8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]). In this case, two of the four exhibits 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 original due process complaint notice (Answer Ex. B); and (2) the district's December 16, 2019 email to the IHO requesting a final decision (Answer Ex. C).

The other two exhibits submitted from the parent are (1) an email thread between the parent's attorney and the CSE from June 2019 (Answer Ex. A); and (2) an undated, unsworn affidavit from the parent's selected provider for the requested FBA/BIP (Answer Ex. D). Concerning the parent's submission on this front, generally, documentary evidence not presented at an impartial hearing will be considered in an appeal from an IHO's decision only if the additional evidence could not have been offered at the time of the impartial hearing and is necessary to render a decision (8 NYCRR 279.10[b]; see, e.g., L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 468-69 [S.D.N.Y. 2013]).

Disallowing the submission of evidence on appeal that could have been offered during the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable an IHO to make a correct and well-supported determination, and to prevent the party submitting the additional evidence from "sandbagging"—that is, withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]).

Here, the June 2019 email thread and affidavit of the parent's private BCBA submitted on appeal were both available at the time of the impartial hearing and were not necessary to render a decision in this matter. Therefore, I decline to exercise my discretion to consider exhibits A and D to the parent's answer as additional evidence.

B. Independent Educational Evaluation

The district appeals the IHO's award of an FBA/BIP to be conducted by the parent's chosen BCBA at public expense. The district asserts that the IHO misconstrued State and federal regulations governing a parent's right to an IEE. The district argues that the parent is not entitled to an IEE because she never requested an FBA/BIP from the district and withheld consent when the district offered to conduct its own FBA/BIP.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE

is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]); see also Lauren W. v. DeFlaminis, 480 F.3d 259, 275 [3d Cir. 2007] [explaining that parents do not have the right to an IEE at public expense where parents actually agreed with the school's evaluation]; Edie F. v. River Falls Sch. Dist., 243 F.3d 329, 335 [7th Cir. 2001] [explaining that parents do not have the right to an IEE at public expense where their disagreement was with the result of the child's IEP not with a particular diagnosis or methodology of evaluation]; M.C. v. Katonah/Lewisboro Union Free Sch. Dist., 2012 WL 834350, at *11–12 [S.D.N.Y. Mar. 5, 2012]; M.V. v. Shenendehowa Cent. Sch. Dist., 2013 WL 936438, at *6 [N.D.N.Y. Mar. 8, 2013]; "If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation [m]ust be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child" (34 CFR 300.502[c]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although the district will not be required to provide it at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; see A.H. v. Colonial Sch. Dist., 779 Fed. Appx. 90, 94-95 [3d Cir. 2019]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).[8] An IEE must use the same criteria as the public agency's criteria (Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 973–79 [5th Cir. 2016]). Informal guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]), however recent caselaw clarifies that parents may not demand a comprehensive IEE at public expense while at the same time refusing to consent to the school district's offer to conduct the same assessments (D.S. v. Trumbull Bd. of Educ., 357 F. Supp. 3d 166, 178 [D. Conn. 2019], citing N.D.S. v. Acad. for Sci. & Agric. Charter Sch., 2018 WL 6201725, at *5–*7 [D. Minn. 2018] [explaining that where parents request an IEE to challenge an obsolete evaluation, they are entitled to a due process hearing limited only to whether the evaluation was appropriate at the time it was completed; if parents wish for a publicly funded IEE with respect to their child's current condition, then they must allow the school district to conduct a current reevaluation and then request an IEE if they disagree]).

Here, the parent did not disagree with an evaluation conducted by the district or with the district's failure to conduct an FBA/BIP. In a letter dated August 16, 2019, following the CSE meeting, the parent reiterated her position that "it [wa]s necessary to follow up on the psychologist

[8] The time period for asserting claims based upon a disagreement with a school district's evaluation can be shorter than the mandatory three-year reevaluation period in some cases (see D.S., 357 F. Supp. 3d at 179).

recommendation from the neuropsychological report that [an FBA] be conducted by a [BCBA] to develop a [BIP], and consider whether [the student] would benefit from ABA therapy" (Dist. Ex. 3). The parent also included the contact information for her preferred provider (id.). In an email dated September 20, 2019, the district school psychologist offered to complete a district FBA to be conducted by a district school psychologist and "written by the CSE" (Dist. Ex. 4 at p. 5; see also Dist. Ex. 11 at p. 3). In response, the parent filed her initial due process complaint notice on October 2, 2019, seeking a private FBA/BIP at public expense to be conducted by the parent's chosen provider (Answer Ex. B at p. 2). The parent did not assert her disagreement with the district's failure to conduct an FBA/BIP in either due process complaint notice (see Letter to Baus, 65 IDELR 81), rather the parent asserted that an FBA and a BIP that included ABA therapy would "provide more detailed information about how to manage [the student]'s disabling condition" and was "warranted to ensure that the school district has sufficient information about [the student]'s emotional and behavioral regulation" (Parent Ex. A at p. 2; see 20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]).

The evidence in the hearing record supports a finding that the district attempted to obtain consent to conduct an FBA and create a BIP for the student only to be rebuffed by the parent in favor of a private evaluation that the parent sought to have conducted by her preferred provider at district expense. As a result, the district was never afforded an opportunity to conduct its own FBA and the parent did not disagree with an FBA created by the district. Accordingly, under these circumstances, the IHO erred by ordering the district to fund an FBA/BIP to be conducted by the parent's private BCBA at a prevailing rate.

C. Special Transportation-Limited Travel Time

The district also appeals from the IHO's decision directing that the student's travel time be limited to 45 minutes each way. In her amended due process complaint, the parent asserted that she repeatedly provided medical documentation to the CSE and OSH requesting that the student's bus ride not exceed 40 minutes each way (Parent Ex. A at p. 2). The parent alleged that the student experienced vomiting, dizziness, and several instances when the student "wet himself because of the lengthy bus ride" (id.).

Neither party disputes the student's need for special transportation services. The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 16-035). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]).

The State Education Department has indicated that a CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that an IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1375 [11th Cir. 1997]; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]). When reviewing the transportation provisions made for a student by a district, the relevant question is whether the transportation arrangements are appropriate to meet the student's needs (Application of a Child with a Disability, Appeal No. 16-035).

In a medical accommodations request to the district dated March 18, 2019, the student's physician indicated that the student was easily distracted, did not follow instructions and that "his transportation time should be as short as possible" (Dist. Ex. 5 at p. 3).[9] At that time, the student's physician indicated stated "transportation time no more than 45 minutes" (id.).[10] An OSH physician review form dated April 10, 2019 indicated that the student's physician had requested transportation time that was "as short as possible" and "no more than 60 minutes" (Dist. Ex. 6 at p. 1). The OSE form indicated that the district's physician then reviewed the student's current IEP as written and that the OSH physician spoke with the student's physician "and clarified that they are asking for a minibus to reduce travel time on the bus" (id.). The OSE recommendations "approved" of a route with fewer students, climate control, and door-to-door busing, but did not address the parent's request for limited travel time (id.). According to the district school psychologist, on June 24, 2019, the parent requested that OSH reconsider its decision (Dist. Ex. 11 at p. 2). On August 15, 2019, the parent met with the district school psychologist and a representative from OSH and it was explained to the parent that "this decision was made in conjunction with [the student]'s physician" and that there was agreement between the two physicians that the recommended accommodations were adequate for the student (id.). The parent was also advised that she could submit an updated request and OSH would reconsider the decision (id.).

The student's annual review with the CSE was held August 16, 2019 (Dist. Exs. 2 at p. 14; 11 at p. 2). The members of the CSE consisted of the school psychologist, who served as the district representative, both a special and regular education teacher from the student's nonpublic school, a parent advocate and the parent (Dist. Exs. 2. at p. 17; 11 at p. 2).[11] The August 2019 CSE recommended 12-month services consisting of an 8:1+1 special class at a State-approved nonpublic day school, group counseling, individual and group occupational therapy, individual physical therapy, individual speech-language therapy, parent counseling and training and as

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[9] According to an affidavit from the district school psychologist who participated in the August 16, 2019 CSE meeting, the form was received on March 22, 2019 (Dist. Ex. 11 at p. 1).

[10] The handwritten form is difficult to read and may also read "40" minutes rather than 45.

[11] An interpreter was also present by telephone.

relevant herein special transportation (Dist. Ex. 2 at pp. 11-12, 14, 15). Specifically, the August 2019 CSE recommended special transportation accommodations of an air-conditioned vehicle, a route with fewer students and door-to-door busing in alignment with the decision of the OSH physician made in April 2019, but there is no information indicating whether the CSE addressed the request for limited transportation time (id. at p. 14; see Dist. Ex. 6 at p. 1). In another request for medical accommodations dated September 17, 2019 completed by the student's physician, a request for limited travel time of no more than 45 minutes was made due to the student having vomited, experienced nausea, dizziness and "on several occasions ha[d] urinated on himself" (Parent Ex. B at p. 2).

On October 2, 2019, the parent filed the original due process complaint notice (Answer Ex. B). An OSH physician review form dated October 8, 2019 included the prior recommendations, recommended the addition of a 1:1 paraprofessional, but denied the request for limited travel time of 45 minutes (Dist. Ex. 8 at pp 1-2). The form also included a narrative recommendation from the OSH physician who completed the review stating "I recommend that the student have a transportation para to help with the behaviors on the bus and I also recommend that the student voids prior to entering the bus in the morning and the afternoon" (id. at p. 2). The OSH physician also noted that limited travel time was denied and the other accommodations of a 1:1 paraprofessional, a route with fewer students and climate control were approved (id.). Lastly the OSH physician reported that "[the student's physician] agreed to the plan for this school year" and "sa[id] that the student doesn't listen and he does act out for attention" (id.). According to the district school psychologist, on October 15, 2019, the parent requested another meeting with OSH to reconsider its recommendation, which was denied (Dist. Ex. 11 at p. 2). The parent filed an amended due process complaint notice on October 21, 2019 (Parent Ex. A; Dist. Ex. 1).

As described above, the IHO awarded limited travel time of 45 minutes each way, on the basis of (1) an adverse inference made against the district for the lack of testimony by the OSH physician who spoke with the student's physician; and (2) the content of the request for medical accommodations form in September 2019 (Tr. pp. 30, 31, 32; Dist. Exs. 7 at p. 1; 8 at p. 2). However, the IHO's decision was not otherwise grounded in any discussion of the student's needs, contained no analysis of whether or not the student had been offered a FAPE for the 2019-20 school year, and instead simply stated a conclusion. As I noted previously, I find it was unnecessary to draw an adverse inference against the district due to a lack of witness testimony in order to reach a decision on the issue of limited transportation time.

The CSE is tasked with recommending appropriate special education and related services that address the needs of the student—including special transportation—but the affidavit of the school psychologist shows that the district's OSH made the determinations regarding the student's special transportation both in April and October 2019—not the CSE (see Dist. Ex. 11 [noting the procedure explained to the parent on August 15, 2019 for how OSH could reconsider its decision as distinguished from the CSE process conducted on August 16, 2019]). The available evidence in the hearing record suggests that the August 2019 CSE simply adopted April 2019 the service recommendations of the OSH physician in the IEP, but the evidence until that point in time was silent on the issue of limited transportation time. But as described above, no one in that office participated in the CSE process. The approach of having a separate agency or office make determinations regarding IEP services has been viewed as problematic.

> Here, DOE's policies never required OSH or OPT—agencies critical to providing the services at issue in this action—to appear for IEP meetings. Accordingly, Plaintiffs were required to contact OSH and OPT separately after the IEP meeting. This policy created a disjointed bureaucracy in which OSH and OPT acted in isolation without coordinating—much less knowing—the services each was required to provide.
>
> J.P.'s situation is emblematic of the organizational dysfunction fostered by DOE's policies.

(J.P. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464–65 [S.D.N.Y. 2018] [internal citations omitted]). In this case, district's own evidence shows that the parent was similarly directed to a different policy to address the student's special transportation needs, a process outside of the CSE process for pursuing special transportation requests, and it does not provide a strong or reasoned basis for overturning the IHO's determination to limit the student's transportation to 45 minutes. While the district's OSH indicated in the October 2019 decision regarding the September 2019 accommodations request for limited travel time that the student's physician "agreed to the plan for this school year," the April 2019 OSH's written determination merely indicates that the two physicians had spoken and clarified that a mini bus had been requested to reduce travel time, not that the student's physician no longer believed the student needed limited travel time (Dist. Exs. 6 at p. 1; 8 at p. 2). The October 2019 determination merely indicates that the student's physician identified the student's behavior as attention seeking (Dist. Ex. 8 at p. 2). By September 2019, it should have been clear to the district's physician that the student's physician was not in agreement with the district's plan due to completing a second request for travel time that was limited to 45 minutes, a request that did not appear at any time relevant to this proceeding to have been supplied to the CSE (Dist. Ex. 7). The district's documentation explains that the student could void before entering the bus, but the OSH determination does not explain how the student's nausea or vomiting would be addressed. The forgoing evidence does not convince me that the CSE properly determined that the student did not require limited travel time or that this aspect of the IHO's decision should be overturned.

VII. Conclusion

In summary, the evidence in the hearing record does not support the IHO's award of an independent FBA and BIP to be conducted by the parent's BCBA at the provider's prevailing rate, and the IHO's decision must be reversed in part.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 21, 2020 is modified by reversing that portion which awarded an independent FBA and BIP to the parent.

Dated: **Albany, New York**
April 20, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER