The University of the State of New York

The State Education Department
State Review Officer
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No. 22-033

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to remove and expunge allegedly false information from the student's educational records. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student in this case has been the subject of one prior State-level administrative appeal (see Application of a Student with a Disability, Appeal 22-021). Accordingly, the parties' familiarity with the facts and procedural history preceding this case is presumed and they will not be repeated herein unless relevant to the disposition of the issues presented on appeal.

A. Due Process Complaint Notice

The instant appeal arose by virtue of the parent's due process complaint notice dated October 29, 2021 (see Admin. Hr'g Ex. 1 at p. 2).[1] Therein, the parent alleged that the student's

[1] The parent's due process complaint notice was not entered into the hearing record as an exhibit (see generally Tr. pp. 1-327; Parent Exs. 1-6; Dist. Exs. 1-6). The district provided the parent's due process complaint notice to

educational records maintained by the district—some of which dated back to 2014 when the student was 19 months old, as well as others that dated back to 2017 when the student was enrolled in kindergarten—contained "false and misguid[ed] information" that resulted in the district's failure to offer the student a free appropriate public education (FAPE) (id. at pp. 2-5). More specifically, the parent alleged that the student's educational records incorrectly reflected that he had been enrolled in a district 75 public school and that he continued to be improperly listed on at least one district public school's "[a]ctive [r]osters" from July 2017 through July 2021, which, according to the parent, prevented the student from having access to the general education curriculum and learning programs, as well as library resources and assignments (id. at pp. 2-3). In addition, the parent asserted that the student's educational records inaccurately reflected enrollment dates, as the student never received summer services or related services during summer (id. at p. 4). The parent also asserted that, despite repeated requests to review the student's educational records, approximately five different public school locations, and one CSE, failed to respond to her requests, which violated her rights pursuant to the Family Educational Rights and Privacy Act (FERPA) to expunge false and misleading information from the student's educational records (id.). As relief, the parent sought to expunge the allegedly false and misleading information from the student's educational records, remove information reflecting that the student was enrolled in a district 75 program, review the student's educational and related services records, remove the student from the district public school's active roster, provide the student with a FAPE with access to all the same opportunities and general education curriculum as his peers, and to review the student's educational records from the five different public schools the student had attended (id. at p. 5).[2]

B. Impartial Hearing Officer Decision

On December 8, 2021, the IHO conducted a prehearing conference (see Tr. pp. 1-47). The impartial hearing resumed on December 20, 2021, and concluded on February 9, 2022 after four days of proceedings (see Tr. pp. 48-347).[3] In a decision dated February 21, 2022, the IHO found that the parent had not challenged the "appropriateness of the [student's] IEP," but instead, sought to "correct allegedly erroneous information in the [student's] records including errors in [the] C[hild] A[ssistance] P[rogram] (CAP) and [the] A[utomate] T[he] S[chools system] (ATS)" that,

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the Office of State Review as part of the administrative hearing record on appeal, and for the sake of clarity, it will be referred to in citations as "Admin. Hr'g Ex. 1." In addition, the parent's due process complaint notice is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one (see Admin. Hr'g Ex. 1 at pp. 1-6).

[2] To be clear, the parent sought to review the educational records related to the student's attendance at several different public schools situated in various regions within the district, not from different school districts.

[3] At the prehearing conference, the IHO expressed concern about the parent's continued assertion that she had not been provided with "full access" to the student's educational records, pursuant to an order the IHO had issued in the previous impartial hearing (Tr. pp. 4-5). The IHO stated her intention to "hear information about that on this case as well to make sure that [the parent wa]s not having her FERPA rights denied" (Tr. p. 5). In addition, the IHO opined that, if the parent had been denied access to the student's educational records, "then maybe there was a denial of FAPE," and that that issue needed to be heard (id.).

according to the parent, resulted in a denial of a FAPE (IHO Decision at pp. 12, 15).[4] The IHO also noted that the parent had alleged that the public schools the student had "attended over the last five or six years for even as little as one week ha[d] failed to implement the [student's] IEP thus denying him a FAPE," and further noted that, on "each occasion, [the parent had] withdr[awn] the [student] from the school within a very [short] period of . . . time and chose to home-school him" (id. at p. 12).

With regard to the parent's claims that CAP and ATS included erroneous information about the student, the IHO indicated that the district witnesses' testimony directly and soundly refuted those assertions (see IHO Decision at pp. 12-13). In addition, the IHO noted that, based on the district witnesses' testimony, "even if there were errors in CAP or ATS," such errors "would not affect the [student's] educational opportunities to receive a FAPE" (id.). According to the IHO, the district witnesses explained that the CAP and the ATS systems were "merely tracking data bases that ha[d] nothing to do with the [student's] academics or related services," and the information in those "data systems" confirmed that the parent mistakenly believed that the student "was somehow considered a District 75 student"—and, moreover, as demonstrated by the evidence, neither system reflected that the student was ever considered a "District 75 student" (id. at p. 13). Next, the IHO noted that the parent had "several meetings with staff at the district offices who spent hours meeting" with her to "discuss the alleged discrepancies," and the parent "did not bring in any questions or examples of where she thought the records were erroneous" (id.). Consequently, the IHO concluded that the hearing record failed to contain any evidence of errors in the CAP or ATS system, as argued by the parent, or that the student was denied a FAPE on this basis (id.).

Turning to the parent's claims that the public schools the student had attended failed to implement his IEPs, the IHO found that the witnesses' testimony did not support these assertions (see IHO Decision at pp. 13-14). Instead, the IHO found that, based on the witnesses' testimony, the student had not attended at least one specific public school "long enough for the IEP to be fully implemented," "long enough to be graded," or to have received a report card (id.). The IHO also noted that, based on the evidence, the parent withdrew the student from one public school "because she did not like the method being used by the [speech-language] therapist even though that method was designated on the IEP" (id.).

With respect to the public school the student had attended for kindergarten in the 2017-18 school year, the IHO noted that, based on the evidence, the student had only attended that public school for 26 days (see IHO Decision at p. 13).[5] The IHO concluded that the public school implemented and followed the student's IEP and, therefore, did not deny him a FAPE (id.). Based on the evidence in the hearing record, the IHO also concluded that the parent's claims that the student did not receive "homework or books for those 26 days in kindergarten" did not rise to the

[4] During the impartial hearing, the parent stated on the record that the "hearings [wer]e not about the special education at all" and that the impartial hearing had "nothing to do with the IEPs" or "any recommendation placement" (Tr. pp. 271-72, 316).

[5] The principal of the public school where the student began attending kindergarten in 2017 testified at the impartial hearing pursuant to one of the parent's subpoenas signed by the IHO (see Tr. pp. 113, 268, 272, 282-83, 292, 295, 297, 305).

level of a denial of a FAPE, as the evidence reflected that each teacher had the discretion to assign the amount of homework to their respective students and teachers often provided students with "pages of books," rather than the "entire book," due to the size and weight of the books (id.). In addition, the evidence reflected that the parent met with the student's teacher, who explained the services in the student's IEP to her (id. at pp. 13-14).

Next, the IHO found that the evidence in the hearing record did not support the parent's claims that the student had been "erroneously designated as a child at-risk" by the public school he had attended for kindergarten, and similarly, that the student had not been placed on any "roster for summer school" at that particular public school (IHO Decision at p. 14).

Finally, the IHO noted that, at the impartial hearing, the parent testified that she received a report card from the public school the student had attended for kindergarten (September 2017) but that the parent also acknowledged that the student had only attended this public school for 26 days and had been discharged from that public school as of "November 11, 2017," the same day she had allegedly received the report card (IHO Decision at p. 14). The IHO did not find the parent's testimony about the receipt of the student's report card to be credible given that the evidence in the hearing record was contrary to the parent's testimony and the parent failed to produce the report card at the impartial hearing (id.). In addition, the IHO noted that, even if the parent had received a report card, the student was promoted to first grade and was "not denied a FAPE" by this particular public school (id.).

The IHO turned, next, to the parent's contention that the public school the student had attended from September 5, 2019 through October 7, 2019 denied the student a FAPE (see IHO Decision at p. 14). Here, the IHO noted that the hearing record failed to contain any evidence regarding how the public school denied the student a FAPE, especially given that the parent's sole allegation was that "documents were not provided" to her (id.). Contrary to the parent's allegation, the IHO found that the evidence demonstrated that the public school principal undertook a "thorough search of the files" and located only one document about the student, which the principal gave to the parent (id.).

Finally, the IHO addressed the parent's contention that the public school where the district currently had a seat available for the student for the 2021-22 school year was "unacceptable" (IHO Decision at p. 14). On this issue, the IHO noted that the district's "offer was not final but [was] made because at the time [the parent] ha[d] pulled [the student] out of [another district public school] and decided to keep him in home-schooling," and noted further that, if the parent had not removed the student from this particular public school, he "would have continued [to attend school] there" (id.). The IHO indicated that the district could not "hold a place for a [student] who [was] being home-schooled," and since the parent had not enrolled the student in a district public school after removing him from the public school in 2021, the student "currently ha[d] no specific school placement" (id.). The IHO indicated that when the student returned to school, the district would "try to get him a placement back" in the same public school he had been attending when the parent last removed him from the public school in 2021 (id.).

In light of the evidence in the hearing record, the IHO dismissed the parent's due process complaint notice with prejudice (see IHO Decision at p. 5).

IV. Appeal for State-Level Review

The parent appeals, arguing that she disagrees with the IHO's decision denying her request to expunge false and misleading information from the student's educational records and similarly denying her request to correct discrepancies and dates on enrollment transcripts, attendance logs, and educational records. The parent argues that the IHO also erred by denying her request to stop the district public schools and charter schools from depriving the student of a FAPE and by denying her request to access the student's educational records from the district public schools and charter schools. In addition, the parent asserts that the IHO "mixed up dates, [c]hange[d] [s]chools [c]ode [n]umbers, [e]dited and misrepresent[ed] schools and followed her personal agenda"; engaged in personal attacks on the parent; and raised issues about school years (i.e., the 2021-22 school year) that she had not raised in the due process complaint notice. Next, the parent disagrees with the IHO's failure to adhere to statutory timelines for scheduling the impartial hearing following the conclusion of the resolution period; asserts that the IHO lacked knowledge and competence regarding the IDEA and especially with respect to the parents' and students' rights pursuant to the IDEA; and alleges that the IHO improperly refused to sign certain subpoenas (for example, to compel testimony of charter school personnel), which deprived the parent of the opportunity to present evidence.[6] In addition, the parent asserts that the IHO refused to discuss her evidence demonstrating that the district public schools and charter schools completely deprived the student of "Academic Instructional Benefits," and the IHO improperly coached and instructed the district representative at the impartial hearing, as well as witness testimony. The parent further asserts that the IHO's plan to "invoke duplicity and res judicata" constituted IHO misconduct and was in direct contrast to the IHO's previous decision denying consolidation of the October 2021 due process complaint notice with a previously filed due process complaint notice because they "were on different tracks." The parent notes, however, that both due process complaint notices had included "new violations" concerning summer 2021 and September 2021 and a district public school's continued "embezzlement of funding," which the IHO had "refused to rule on and fix in May 2020."

Next, the parent disagrees with the IHO's finding that the student's alleged failure to receive any academic instruction, school assignments, usernames and passwords for applications provided to "General Education Students," books for English Language Arts (ELA), mathematics, social

[6] At the impartial hearing, the IHO signed three of the parent's subpoenas that she produced to compel testimony of witnesses (see Parent Ex. 5 at pp. 1-3). The IHO declined to sign the parent's subpoena seeking testimony from a speech-language therapy provider because the parent had not challenged either the speech-language therapy services provided to the student or the IEP that included the recommendation for speech-language therapy, and moreover, the parent was scheduled to meet with a representative from a CSE who had already testified at the impartial hearing (see Tr. pp. 106-09). The IHO also declined to sign the parent's subpoenas seeking testimony from two teachers because the principal from the same district public school was expected to appear pursuant to a parent subpoena who could address the parent's questions (see Tr. pp. 111-13). Finally, the IHO declined to sign the parent's subpoenas requiring the appearance of charter school personnel and a superintendent of a district public school because the IHO considered the anticipated testimony to be irrelevant to the parent's claims (see Tr. pp. 114-15). State regulation provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). Review of the hearing record in this matter does not support the parent's allegation that the IHO exceeded her discretion in declining to sign the parent's proposed subpoenas.

studies and writing, and his complete exclusion from "Curricular and extracurricular activities" at specifically identified district public schools and charters schools resulted in discrimination and a failure to offer the student a FAPE.

The parent asserts that the IHO engaged in misconduct by ignoring evidence and by accepting testimony from a witness (principal) who denied responsibility for a teacher within her school building whom the parent had previously claimed was not certified. The parent also asserts that one public school continued to erroneously keep the student's name on its "active roster" for summer 2021 through September 28, 2021, which allowed the district to "continue funneling funding" and prevented the student from accessing his school account to complete assignments and learning applications (i.e., "Blocking by a SAML and SSO-error protocol") to his detriment in fourth grade. Next, the parent disagrees with the IHO disregarding evidence of alleged discrepancies reflected in parent exhibit 6, which is a page from the student's educational records. Additionally, the parent argues that the October 30, 2020 IEP set forth the student's pendency placement and services and that the IHO engaged in misconduct by allowing the district to convert the student's IEP into an individualized education services program (IESP), and then back into an IEP, dated October 30, 2021, without the parent's consent or without providing any prior written notice.[7] Relatedly, the parent asserts that any failure to provide the student with academic instruction denied the student a FAPE, and she disagrees with the IHO's decision to the extent it failed to address the alleged denials of FAPE by six district public schools prior to the student's enrollments in homeschooling. Finally, the parent asserts that the IHO refused to discuss evidence concerning one specific district public school and that the principal of that district public school failed to comply with a subpoena issued by the IHO. With regard to the teacher who appeared on that principal's behalf, the parent alleges that she inaccurately represented that the student had not attended that particular district public school, which allowed funds to be improperly funneled for the 2019-20 school year.[8]

As relief, the parent seeks to reopen the IHO's decision to address her claims that the district continues to embezzle and "funnel[] funding" to a public school location where the student remained improperly enrolled, which the parent alleged prevented the student from being "fully

[7] The evidence in the hearing record includes only one IEP for the student, which reflects a meeting date of October 30, 2020 and an anticipated implementation date of November 2, 2020 (see Dist. Ex. 3 at pp. 1, 21). According to this IEP, the CSE meeting convened to transition the student from his then-current IESP ("finalized on 11/1/2019") to an IEP, as the student was "currently registered" for third grade in a district public school (id. at p. 1). The hearing record also includes a prior written notice to the parent, dated October 27, 2020, which relates to the anticipated CSE meeting to change the student's 2019 IESP into an IEP (see Dist. Ex. 2 at p. 1). Beginning early during the 2021-22 school year, the parent decided to home-school the student and declined an IESP for that period when the student was being home-schooled (see Dist. Ex. 4 at p. 2). The parent's argument regarding the IEP and/or IESP is not entirely clear; however, she made no allegation in her due process complaint notice regarding an inappropriate IEP or IESP or the district's conversion from one to the other without her consent (see Admin. Hr'g Ex. 1) and confirmed during the impartial hearing that she did not challenge any IEP (Tr. pp. 271-72, 316). Therefore, I will not further discuss this argument raised for the first time on appeal.

[8] Beginning at the bottom of paragraph 8 on page 6 of the parent's request for review (last four sentences) and continuing thereafter through approximately half-way through paragraph 11 on page 8 of the request for review, the parent repeated many, if not all of, the allegations she had asserted in her request for review filed in her previous State-level appeal (see Req. for Rev. at pp. 6-8; Application of a Student with a Disability, Appeal 22-021).

registered to public schools every year." The parent also seeks an order directing the district to "[f]ully [r]egister[]" the student in "his mandated General Education Classes" and to "ensure that [the student] will be provide[d] with Curricular and extracurricular activities as his peers" and as set forth in his IEP. Next, the parent seeks reimbursement for the "Academic Tuition and Therapies, Instructional books, School supplies" she provided to the student when the six different public school locations denied the student a FAPE for the 2017-18, 2018-19, 2019-20 school years, and for one month—September to October—during the 2020-21 school year. In addition, the parent seeks an order directing the district to remove the student from the "Child Assistance Program" and from the "In-Risk List." The parent also seeks an order directing the district to expunge false information related to the student's enrollment that the district allegedly misrepresented in order to receiving funding (citing to a prior impartial hearing), noting further that the student never attended summer programs or received any related services during summer. Next, the parent seeks to correct enrollment data that the district allegedly used to "gain funding" while depriving the student of a FAPE because one public school teacher was allegedly not certified. Finally, the parent requests a decision on the issues the IHO failed to address, namely, removing and expunging the student's records of enrollment and registration dates and "SSO-Blocking and SAML Block" that prevented the student from accessing learning applications and the school library.[9]

In its answer, the district seeks to uphold the IHO's decision in its entirety. In a reply, the parent reiterates several arguments addressed in her request for review.

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.

[9] The parent's relief requested on appeal is identical to the relief she requested, and was denied, in the previous State-level administrative appeal (compare Req. for Rev. at pp. 8-10, with Application of a Student with a Disability, Appeal 22-021).

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]).[10]

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 explained in the parent's previous State-level administrative appeal, the IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). The relevant federal and State regulations make provisions for permitting parents' access to "inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part" (34 CFR 300.613[a]; see 8 NYCRR 200.5[d][6] [limiting a parent's review and inspection of a student's educational records to those "with respect to the identification, evaluation, and educational placement of the student and the provision of a [FAPE] to the student, in accordance with the requirements" of 34 CFR 300.613 through 300.625]).

In addition, a separate portion of the IDEA (20 U.S.C. § 1417[c]) requires the Secretary of Education to promulgate regulations for the protection of the rights and privacy of parents and students in accordance with the provisions of FERPA (see 20 U.S.C. § 1232g). Federal regulations promulgated pursuant to 20 U.S.C. § 1417(c) prescribe a specific procedure for challenging alleged inaccuracies in a student's educational records (see 34 CFR 300.618-300.621).[11] The regulations provide that such hearings are to be conducted in accordance with the procedures specified in 34 CFR 99.22—federal regulations pertaining to FERPA—rather than an impartial due process hearing conducted under 34 CFR 300.511 (see 34 CFR 300.621; see also Amendment of Records at Parent's Request [§ 300.618] and Opportunity for a Hearing [§ 300.619], 71 Fed. Reg. 46735-36 [Aug. 14, 2006]). Hearings held pursuant to FERPA for the purpose of challenging alleged inaccuracies in educational records may be conducted by "any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing" (34 CFR 99.22[c]), rather than an IHO, who, as noted above, conducts a trial-type hearing regarding matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (see 8 NYCRR 200.5[i], [j]).[12]

[10] 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).

[11] As reflected in the "Procedural Safeguards Notice," which the parent submitted as evidence in the hearing record, a "hearing to challenge information in education records must be conducted according to the procedures for such hearings under FERPA" (Parent Ex. 1 at p. 14, citing 34 CFR 300.621).

[12] If, after a hearing held pursuant to FERPA, a district declines to amend a student's records, the parent would

In this case, in her October 2021 due process complaint notice, the parent sought, as relief, access to and amendment of the student's educational records (see Admin. Hr'g Ex. 1 at pp. 2-5). Having weighed and considered the evidence in the hearing record, the IHO concluded that the parent had been provided with access to the student's educational records, the district provided her with copies of any and all educational records concerning the student, and the student's educational records did not contain any errors, as argued by the parent (see IHO Decision at pp. 6-14). Nevertheless, even if errors had been found in the student's educational records, as described above, the IHO had no authority to amend or otherwise alter the student's records.

On appeal, the parent urges the undersigned SRO to address the same issues concerning the student's educational records, i.e., inaccuracies, enrollment information, disenrolling the student from certain programs, and misrepresenting enrollment information to improperly receive funding.[13] However, neither the IHO nor the undersigned has any authority or jurisdiction to grant the parent's request that the district review, expunge, and amend parts of the student's educational and enrollment records as such request does not relate to the identification, evaluation or educational placement of the student, or the provision of a FAPE to the student (20 U.S.C. § 1415[b][6]; Educ. Law § 4404[2]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1] see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its State counterpart"]).

In addition, the parent asserts, in the broadest of terms, that she disagrees with the IHO's finding that the district public schools properly implemented the student's IEPs. Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822

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have the right to place a statement in the student's records disagreeing with the decision (34 CFR 300.620[b]). However, there is no State-level review of a decision made after such a hearing (see Letter to Parent re: Amendment of Special Education Records, Family Compliance Office Aug. 13, 2004, available at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ltrtoparent.pdf). A parent may file a complaint with the Family Policy Compliance Office of the U.S. Department of Education, pursuant to 34 CFR 99.63.

[13] In her request for review, the parent requests reimbursement of tuition, therapies, books, and supplies she provided to the student for the 2017-18, 2018-19, and 2019-20 school years, as well as from September 2020 through October 2020; however, as the parent did not seek reimbursement as relief during the impartial hearing (see Admin. Hr'g Ex. 1), I will not address such a request interposed for the first time on appeal.

[9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

The parent's argument on appeal merely reasserts her belief that the student did not receive a schedule, assignments, books, usernames or passwords, and she fails to point to any evidence in the hearing record to support such generic and vague arguments or otherwise identify what recommendation or portion of the student's IEP(s) that the district failed to implement (see Req. for Rev. at p. 4). In addition, the hearing record includes only one IEP, dated October 2020, and the parent affirmatively stated at the impartial hearing that the "hearings [wer]e not about the special education at all" and that the impartial hearing had "nothing to do with the IEPs" or "any recommendation placement" (Tr. pp. 271-72, 316; see generally Dist. Ex. 3). Nor did the parent seek any meaningful relief at the impartial hearing to remedy an alleged implementation failure.

Beyond this, as noted above, neither the IHO nor the undersigned has jurisdiction to grant the parent's request for amendments to the student's educational records and, as such, the IHO—who, based upon the evidence in the hearing record, properly concluded that the district did not deny the student a FAPE—also did not err in dismissing the parent's due process complaint notice with prejudice.

As final points, both the parent and the IHO are cautioned that, should the parent have concerns about the accuracy of the student's educational records in the future, she must avail herself of the procedures outlined for a hearing pursuant to FERPA, not the impartial hearing procedures pursuant to the IDEA, as the IHO has no jurisdiction pursuant to the IDEA or State or federal regulations over such claims.

VII. Conclusion

In summary, after providing the parent with another opportunity to improperly litigate her FERPA claims through an impartial hearing pursuant to the IDEA, the IHO had no jurisdiction to order the relief sought in the parent's due process complaint notice and properly dismissed it with prejudice. To the extent that the IHO found that the district public schools did not fail to implement the student's IEP(s), there is no reason to disturb the IHO's finding that the district offered the student a FAPE.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 26, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER