The University of the State of New York

The State Education Department
State Review Officer
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No. 22-082

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Eastchester Union Free School District

Appearances:
Keane & Beane, PC, attorneys for respondent, Stephanie L. Burns, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2021-22 school year was appropriate. 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). 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

Given the disposition of this appeal, a full recitation of the student's educational history is unnecessary. Briefly, the evidence in the hearing record reflects that during the 2019-20 school year the student attended a district public school, was eligible to receive special education services as a student with autism, and received instruction in an 8:1+2 special class placement (intensive needs class) along with related services of three 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual physical therapy (PT), one 30-minute session per week of individual "push-in" PT, two 30-minute sessions per week of individual occupational therapy (OT), one 45-minute session per quarter of parent counseling and training in a small group, the support of a 1:1 monitor throughout the school day, and crisis intervention/protective holds when the student was a danger to herself and/or others (Dist. Exs. 4

at pp. 1-14; 7 at pp. 1-2; 8 at pp. 1-2; 25 at pp. 1-10; 26 at pp. 1-3; 59 at pp. 1-8; 74 at pp. 1-13; 75 at pp. 1-2).[1]

In winter/spring 2020, the district conducted a reevaluation of the student which included a "Re-Evaluation/Tri-ennial Review-Education," a psychological evaluation, a speech-language evaluation, and an OT evaluation (Dist. Exs. 17 at pp. 1-11; 18 at pp. 1-6; 19 at pp. 1-7; 20 at pp. 1-5).

Due to the COVID-19 pandemic, school buildings were closed commencing on March 16, 2020, and the student participated in remote learning for the remainder of the 2019-20 school year via synchronous and asynchronous instruction (Dist. Exs. 12 at pp. 1-2; 36 at pp. 1-6; 36A at pp. 1-17; 37 at pp. 1-10; 52 at pp. 1-11; 53 at pp. 1-35; 61 at pp. 1-25; 62 at pp. 10-34; 76 at pp. 1-26).

In May 2020, a CSE convened to review the student's reevaluation, conduct the student's annual review, and develop the student's IEP for the 12-month, 2020-21 school year (Dist. Exs. 5 at pp. 1-14; 10 at pp. 1-4). Finding the student continued to be eligible for special education and related services as a student with autism, the CSE recommended an 8:1+2 special class placement (intensive needs class) along with the same related services and accommodations and supports recommended for the previous school year with the addition of an "Other" support for school personnel to help the student "to slow down with cuing and following a schedule" (compare Dist. Ex. 4 at pp. 1-14, with Dist. Exs. 5 at pp. 1-14; 10 at pp. 1-4). The May 2020 IEP included summer 2020 recommendations of an 8:1+2 special class placement (intensive needs class) and one individual 30-minute session per week each of speech-language therapy, OT, and PT (Dist. Ex. 5 at pp. 1, 12).

In June 2020 the district shared with district families its plan to reopen in-person school for 12-month services using a "hybrid" model (Dist. Ex. 38 at pp. 1-23). The parent chose not to send the student to school in-person and the student received 12-month services for July and August 2020 remotely (Dist. Ex. 42 at pp. 6-8; see Parent Ex. 14 at pp. 1-2; Dist. Exs. 62 at pp. 35-40; 78 at pp. 1-10; 85 at pp. 1-20).

The district shared with families the re-entry plan for in-person instruction for the 2020-21 school year with updates in December 2020 and March 2021 (Dist. Exs. 39 at pp. 1-39; 39A at pp. 1-7; 39B at pp. 1-17). The parent notified the district that she would not send the student to school in-person and the student continued to receive remote instruction for the 2020-21 school year (Dist. Exs. 27 at p. 1; 28 at p. 1; 29 at p. 1; 30 at p. 1; 31 at pp. 1-7; 42 at p. 10; 79 at pp. 1-4; 80 at pp. 1-12).

In April 2021, a CSE convened to conduct the student's annual review and develop the student's IEP for the 12-month 2021-22 school year (Dist. Exs. 6 at pp. 1-14; 11 at pp. 1-4). Finding the student continued to be eligible for special education and related services as a student with autism the CSE recommended the same program, related services, and accommodations and supports recommended for the student from the previous school year, including the same

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

recommendations for 12-month services (compare Dist. Ex. 5 at pp. 1-14, with Dist. Exs. 6 at pp. 1-14; 11 at pp. 1, 3).

By email dated May 27, 2021, the parent notified the district's assistant superintendent of pupil personnel (assistant superintendent) that she had decided not to send the student for "in person learning over the summer" (Dist. Ex. 43 at p. 1). In a reply, dated May 27, 2021, the district's assistant superintendent informed the parent that the district was not offering a remote option for 12-month services for the 2021-22 school year and requested a meeting with the parent to discuss the student returning for in-person instruction (id.). The hearing record reflects that a number of meeting times were scheduled with the parent; however, the parent did not attend the meetings and continued to write to the district stating that she would not be sending the student to in-person summer services (id. at pp. 1, 3-4, 9-21). The hearing record further reflects that after alternate accommodations were proposed and rejected by the parent, the district offered the student remote instruction for July and August 2021 (see Parent Exs. 7 at pp. 1-2; 7C at pp. 1-3; 11A at pp. 1-8; 11D at pp. 1-6; Dist. Exs. 43 at pp. 6-8, 22-53; 57 at pp. 1-12; 64 at pp. 1-4; 65 at pp. 4-19; 66 at pp. 1-2; 82 at pp. 1-9; 83 at pp. 1-2).

A. July 2021 Due Process Complaint Notice

By due process complaint notice dated July 21, 2021, the parent alleged that the district was failing to provide the student with remote learning during the summer session of the 12-month 2021-22 school year (Dist. Ex. 1 at p. 2). As relief, the parent requested make up services for all of the missed sessions (id.).

In a response to the parent's due process complaint notice dated August 2, 2021, the district denied the parent's claim that it was "failing to provide remote summer learning" (Dist. Ex. 2 at p. 1). The district asserted that the student had been recommended to receive 12-month services for the summer session from July 5, 2021 through August 13, 2021, and that the district offered in-person services (id.). According to the district, the CSE recommended that the student attend an 8:1+2 special class and receive the related services of two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual PT (id.). The district next alleged that in response to the parent's refusal to send the student to in-person instruction, the district offered to provide instruction and related services to the student in a separate classroom with no other students and to provide separate transportation for the student with a bus monitor (id. at pp. 1-2). The district further asserted that after the parent refused this accommodation, the district agreed to provide the student with remote related services and with one hour daily of remote 1:1 instruction by a special education teacher for the summer session (id. at p. 2).

According to the response to the parent's due process complaint notice, the district contracted with an outside agency to provide the special education instruction and permitted the parent to schedule the student's instruction directly with the provider because she wanted all of the student's services provided before 9:00 a.m. (Dist. Ex. 2 at p. 2). The district also claimed that it contracted with an outside agency for the provision of the student's OT and PT, and a district employee provided speech-language therapy (id.). Next the district alleged that after the summer session began, the parent reported "an inability to access or locate the links provided for the services and instruction" and that the parent "insisted that all links be placed in [the student]'s

google calendar" (id.). The district noted that although it had no obligation to do so, the district's providers placed links to their services in the student's google calendar (id.). In addition, when the parent continued to have difficulties accessing remote services, the district's assistant superintendent created a google document that outlined all of the student's services and embedded links to the services in this document (id.). The district further indicated that the parent had "repeatedly stated that [she] d[id] not want any telephone or cellular phone calls and d[id] not want to have to check [he]r email to find the links for remote services" and that this position had "frustrated the [d]istrict's efforts and ability to resolve [he]r difficulties with the links for the remote services" (id.).

In its response to the parent's due process complaint notice, the district noted that in-person services remained available to the student and that the district had arranged and provided links to the remote related services and remote special education instruction (Dist. Ex. 2 at p. 2). The district further noted that the student had attended at least a portion of all of her OT sessions, "except the session on July 12 that [the parent] canceled" and that the student "had attended at least a portion of all but two" speech-language therapy sessions (id. at pp. 2-3). The district then detailed the specific dates the student attended remote instruction and services and listed the dates the student did not attend despite the providers being available (id. at p. 3). The district asserted that it had no obligation to provide make up services for the student's absences when the service provider or instructor was available (id.). However, the district offered "to provide additional special education instruction in an effort to resolve [the parent's] dispute" (id.). The district also asserted that equitable considerations did not support the parent's claim (id.).

B. Facts Post-Dating the Due Process Complaint Notice

By email dated August 17, 2021, the parent informed the district's assistant superintendent that the student would not attend in-person instruction for the 10-month, 2021-22 school year and indicated that she would not permit anyone to enter her home, "[t]herefore, an organized and decent remote learning must be provided" (Parent Ex. 7A at p. 3). In an email dated August 26, 2021, the parent reiterated that the student would not attend in-person instruction for the fall and asked what the school would have in place for remote learning (Dist. Ex. 44 at p. 2). In email correspondence dated August 27, 2021, August 28, 2021, September 1, 2021, and September 4, 2021, the district informed the parent that there was no option available for remote instruction for the 10-month, 2021-22 school year without a medical exemption, and that the first day of school was September 9, 2021 (Dist. Ex. 44 at pp. 1, 3, 8, 10; see Parent Ex. 4 at pp. 1-2). In email correspondence dated August 29, 2021, September 3, 2021, and September 21, 2021, the parent requested remote learning for the student (Dist. Ex. 44 at pp. 5, 10, 37, 38). By email dated September 14, 2021, the parent provided the district with copies of a March 2017 psychology evaluation report and a May 2017 developmental pediatric evaluation report (Dist. Ex. 44 at pp. 12, 27; see Dist. Exs. 12, 15).[2] By email dated September 20, 2021, the parent provided the district with a copy of a September 20, 2021 note from a pediatrician, which stated the student had received diagnoses of autism, pediatric overgrowth syndrome, precocious puberty, attention deficit/hyperactivity disorder (ADHD), seasonal allergies, and asthma (Dist. Ex. 44 at pp. 34-35; see Dist. Exs. 33; 45

[2] In emails, dated September 15, 2021 and September 23, 2021, the district sent the parent information related to home schooling the student for the 10-month, 2021-22 school year, which included a sample blank individualized home instruction plan (IHIP) (Dist. Ex. 44 at pp. 41-63).

at p. 2). The September 20, 2021 pediatrician's note also stated that the student had "underlying risk[] factors for severe complications due to COVID-19 infection" and recommended that the student "receive academic instruction and therapies at home secondary to being high risk for complications due to COVID-19 infection" (Dist. Ex. 44 at p. 35). By email dated September 21, 2021, the parent provided the district with a note from a different doctor stating that the student had received diagnoses of autism, developmental delays, and obesity (Dist. Ex. 44 at pp. 38-39; see Dist. Ex. 34).

By email dated September 22, 2021, the district's assistant superintendent wrote to the parent stating that the district's medical director needed the specific diagnosis that formed the basis of the student's diagnosis of pediatric overgrowth syndrome (Dist. Ex. 44 at p. 36). On September 22, 2021, the parent replied stating that the student's diagnosis was "not a rocket science" and that she had provided "enough evidence so far" (id. at p. 37). The district's assistant superintendent replied on September 22, 2021 and advised that the parent could consent to the district's medical director speaking to her doctor or provide a "statement with greater specificity or detail the diagnosis for pediatric overgrowth syndrome as there are multiple types with dist[in]ct symptoms" (id at p. 40). By email dated September 28, 2021, the district's assistant superintendent again wrote to the parent stating that the district's medical director required more information about the student's diagnosis of pediatric overgrowth syndrome before she could determine if the student was "medically unable" to attend in-person instruction (id. at p. 64). In addition, the district's assistant superintendent stated that "until further documentation [wa]s provided to the [s]chool [d]istrict to support her medical inability to attend school, [the student] [wa]s expected to attend school in-person or be home-schooled by you pursuant to an IHIP" (id. at p. 64). The parent replied on September 28, 2021, stating that she was extremely disappointed at the way the student's "situation" was being handled, that she had provided doctors' notes and asking "[w]hat else do you need?" (id. at p. 66). Additional emails continued on September 30, 2021 and October 1, 2021, wherein the assistant district superintendent requested additional information about the student's pediatric overgrowth syndrome diagnosis and the parent replied that she had provided two doctors' notes (id. at pp. 65, 68-69).

By email dated October 1, 2021, the district's medical director wrote to the district's assistant superintendent stating that she had reviewed the doctors' notes and evaluations provided by the parent and determined that "none of [the student]'s current medical diagnoses fit criteria for severe immunocompromise, therefore it is my recommendation that she attends school in person" (Dist. Exs. 44 at p. 72; 47 at p. 1). By letter dated October 4, 2021, the district's assistant superintendent provided the parent with the district's decision, which included the medical director's determination of October 1, 2021 (Dist. Ex. 48 at pp. 1-2). On October 4, 2021, the parent consented to the district's medical director speaking with the parent's pediatrician (Dist. Exs. 44 at p. 73; 49 at pp. 1-2).

By email dated October 5, 2021, the district's medical director wrote to the district's assistant superintendent to report that she had spoken to the student's pediatrician who had written the September 20, 2021 note (Dist. Ex. 33), and further stated that the student's pediatrician advised that the student was at increased risk of severe COVID due to obesity and an inability to wear a mask, but "did not provide any other medical information as to why [the student] would be classified as immunocompromised" (Dist. Ex. 50 at p. 1). In conclusion, the district's medical director stated that there was no further information in support of a medical exemption and her

recommendation continued to be that the student attend in-person instruction (id.). By letter dated October 5, 2021, the district's assistant superintendent communicated the medical director's determination to the parent (Dist. Ex. 51 at p. 1).

C. Impartial Hearing and August 2021 Amended Due Process Complaint Notice

Along with the certified record submitted to the Office of State Review, the district submitted a 15-page packet that included a cover page entitled "Pre-hearing Conference Summaries," blank spacing pages, and email correspondence, along with a 143-page document that included a cover page entitled "Impartial Hearing Officer Interim Orders, Rulings and Decisions," blank spacing pages, email correspondence, and the district's motion to dismiss.[3]

According to email correspondence between the parties and the IHO dated August 25, 2021, during a prehearing conference the parent stated that she intended to amend the due process complaint notice "to include a time period going back much earlier than the summer" and intended to request a prospective placement out-of-district. After several attempts beginning on August 27, 2021, the parent successfully submitted, via an email dated August 30, 2021, an amended due process complaint notice which was handwritten and hand dated August 11, 2021. The parent alleged that the district was failing to provide remote learning, was not meeting IEP goals, was not following guidelines for the reopening of schools which impacted the student's learning, and she requested remote learning for the fall of the 2021-22 school year (Dist. Ex. 3 at p. 3). As relief, the parent requested make up sessions for speech-language therapy, OT, PT, and special education instruction "since the beginning of [the] pandemic February, 2020" (id.). In addition, the parent requested an out-of-district placement and proposed two possible nonpublic schools for the 2021-22 school year; the Rebecca School or the Blythedale Children's Hospital School Program (id.).

By email dated August 31, 2021, the district indicated that it did not consent to the amendment and further challenged the sufficiency of the amended due process complaint notice. In an email dated September 1, 2021, the IHO accepted the parent's amended due process complaint notice, found it sufficient and identified the issues as "the district failed to provide remote learning, did not produce IEP goals, and did not follow guidelines regarding the opening of schools." The district further submitted email correspondence dated September 29, 2021, September 30, 2021, October 7, 2021, October 8, 2021, and October 29, 2021 purporting to be prehearing conference summaries.

By email dated October 29, 2021, the district submitted a motion to dismiss that portion of the parent's initial and amended due process complaint notices which sought remote instruction for the 2021-22 school year. The district asserted that the parent's request was not properly before the IHO, rather it should be considered a request for homebound instruction and directed to the Commissioner of Education (Dist. Mot. to Dismiss Mem. of Law at pp. 2-3). By email dated October 29, 2021, the IHO stated he was "not planning on issuing any Interim Order at this time" and that he would "issue an Order with my findings and the Decision when the hearing has ended."

[3] None of these documents were marked as exhibits or otherwise identified in the hearing record and will be identified by the respective date and relevant content.

An impartial hearing convened on November 18, 2021, and concluded on April 1, 2022, after nine days of proceedings (Tr. pp. 1-1936).[4]

Included in the packet of documents described as "Impartial Hearing Officer Interim Orders, Rulings and Decisions" is a series of email correspondence between the IHO and the parties. In an email dated April 4, 2022, the parent wrote to the IHO and stated that at a CSE meeting held that morning, the parent's request for a third session per week of PT was denied.[5] The IHO replied on April 4, 2022, asking the district's attorney what the district's position was with regard to the parent's request.

In an email response dated April 4, 2022, the district's attorney stated that the district opposed the issuance of an interim order to provide a third PT session, noting that the CSE had considered the parent's request and had declined adding a third session per week based on the student's then-present levels of performance and the recommendation of the student's physical therapist. The IHO replied stating that it appeared there were "two opinions with regard to the need to add an additi[o]nal physical therapy session" and asked the parent to confirm her disagreement. The parent replied that she did "not agree at all, as the district itself have been isolating [the student] and even stopping her to navigate on the building due to poor body balance issues, which can be helped on PT sessions". By email dated April 5, 2022, the IHO declined to issue an interim order and suggested that "perhaps there needs to be an updated physical therapy evaluation conducted by the district or perhaps an independent physical therapy evaluation". In an email response dated April 5, 2022, the district's attorney indicated that the district was prepared to conduct a PT evaluation and would send the parent a prior written notice and consent to evaluate form. By email dated April 8, 2022, the parent asked the IHO to immediately order a third weekly session of PT. The IHO responded in an email dated April 8, 2022, stating that he had no legal basis to issue an interim order for a third session of PT per week, and reiterated that there would be no further hearing dates as the parent had requested, and that the parent should include her request in her closing statement.

By email dated April 8, 2022, the parent wrote to the IHO asking, "Wondering please if I could get a package sent out to private/non approved and approved schools. I understand there is no definition of anything as yet but I would like to see what the options are in case []my request for placement out of the district has been approved".

In a response dated April 8, 2022, the district's attorney objected to an interim order requiring the district to send any packets to approved out-of-district programs as the IHO had yet to determine whether the student had been offered a free appropriate public education (FAPE). The IHO also replied on April 8, 2022, stating that he would not issue an interim order and that he

[4] The "Impartial Hearing Officer Interim Orders, Rulings and Decisions" packet also included email correspondence between the parties and the IHO related to issues with the district's exhibits, recording the hearing, compliance dates, expedited transcripts, the parent's exhibits, and the parent's allegations of bias during the impartial hearing.

[5] During the April 1, 2022 impartial hearing date, the parent questioned the witnesses on the CSE's decision to recommend two sessions per week of PT, rather than the three sessions per week requested by the parent and asked the IHO to order a third session (Tr. pp. 1845-46, 1852-53, 1855-56, 1858-59, 1926-33).

planned to issue a findings of fact and decision; however, he was waiting for the parties' closing statements. After several extensions, the IHO directed that the parties' closing statements would be due on May 3, 2022.[6]

D. Impartial Hearing Officer Decision

In a decision dated May 24, 2022, the IHO described the issues before him as "the district ha[d] not provided an appropriate education during the current 2021-22 school year, but also going back a number of years" (IHO Decision at p. 2). The IHO also noted that the parent alleged that the district had not provided appropriate remote learning or in-person instruction to meet the student's needs, as demonstrated by the student continuing to "display highly problematic behaviors" (id.). In addition, the IHO stated that the parent asserted that the student's annual goals had been repetitive, and that the student was a danger to herself and others when attending school (id.). According to the IHO decision, as relief before the IHO, the parent sought compensatory related services for missed sessions, a prospective placement in a nonpublic school, "such as the Rebecca School," and an increase in the amount of PT sessions per week from two to three sessions (id. at pp. 2-3).

The IHO determined that, based on the extensive documentary and testimonial evidence provided during the impartial hearing, the district demonstrated that it offered the student a free appropriate public education (IHO Decision at p. 5). The IHO further found that the district had "conducted professional evaluations," provided "many professional grade progress reports," and provided instruction and related services that were responsive to the student's learning needs and designed to achieve progress (id.). The IHO determined that the evidence did not support the parent's position that the district's learning environment was unsafe (id.). With regard to the time period when the district returned to in-person instruction and the parent kept the student at home due to concerns about COVID-19, the IHO found that the decision to keep the student home "was the parent's choice and not the fault of the district" (id.). The IHO determined that the district demonstrated that the student was provided appropriate programming based on evaluations and the student's functioning and needs (id.). The IHO further found that the relevant IEPs appeared to be appropriate and the district was fully capable of implementing them (id. at p. 6). The IHO also determined that the district provided a reasonable program during the period of remote instruction that included group and individual formats, materials were sent to the home, related services were provided, technology was utilized, and the student was provided with synchronous and asynchronous instruction (id.).

With regard to the parent's requested relief, the IHO found that the hearing record did not support the parent's request for make-up sessions of PT, OT, and speech-language therapy "as the parent ha[d] not shown . . . with specificity that related services were denied" (IHO Decision at p. 6). The IHO also determined that even if the district had failed to offer the student a FAPE, the parent's requested relief of a prospective placement was not appropriate as the hearing record did not include any information about the parent's suggested nonpublic school (id. at pp. 6-7). Turning

[6] The district submitted a closing statement dated May 2, 2022 and the parent submitted a closing statement dated May 3, 2022.

to equitable considerations, the IHO found "no basis in the equities here to order funding a nonpublic school" (id. at p. 7).

Notwithstanding the above, the IHO directed the district to conduct "a new comprehensive evaluation" that included psychoeducational, PT, OT, and speech-language evaluations and to reconvene the CSE within two weeks of completion of the comprehensive evaluation to review the results and make appropriate recommendations for the student's program and placement (IHO Decision at pp. 9-10).

IV. Appeal for State-Level Review

The parent appeals. Allegations that can be discerned from the parent's request for review, include assertions that the IHO failed to address her request for a prospective placement, that the IHO discriminated against her on the basis of nationality and financial status, that the IHO did not analyze the appropriateness of the student's program, that she proved the district ignored a March 28, 2017 psychology evaluation and a May 5, 2017 developmental pediatric evaluation and as a result failed to address the student's physical and developmental needs, and that the district failed to follow the recommendations set forth in the evaluations, ignored the student's intellectual disability diagnosis, and did not address her learning requirements appropriately. The parent also raises allegations related to the provision of instruction during the COVID-19 pandemic, specifically, that the IHO did not consider the effect of COVID-19 on the student's in-person learning, that the district did not comply with school reopening guidelines, harassed the parent to return the student to in-person instruction, did not consider the student's "underlying diagnoses for COVID-19," and contacted child protective services. The parent further alleges that when the student was returned to in-person instruction, the district could not manage her, and the student was improperly isolated multiple times. Lastly, turning to the IHO's order directing that the student be reevaluated, the parent asserts that the IHO should have ordered the district to reevaluate the student at the beginning of the impartial hearing and should not have allowed the impartial hearing to proceed for five months without addressing the need for a reevaluation.[7]

In an answer, the district attaches, as exhibit 1 to the answer, a copy of the parent's request for review with each sentence numbered and responds to each of the parent's allegations as numbered by the district. The district's answer is predominantly in support of upholding the IHO's decision.

In addition, the district requests that the parent's request for review be rejected for failure to comply with the regulations regarding the service and filing of an appeal. In particular, the district asserts that the request for review was not properly served on the district. In support of this assertion, the district has provided three affidavits from district employees which allege that the parent's affidavit of service contains false information and that the request for review was not properly served. The district also requests that the parent's request for review be rejected due to a

[7] Neither party has challenged the IHO's order of a comprehensive reevaluation of the student consisting of a psychoeducational evaluation, a PT evaluation, an OT evaluation, and a speech-language therapy evaluation. As such, that order has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

lack of a verification, for failing to number the paragraphs, and for failing to include a date and the parent's name and address. For all of these reasons, the district asserts that the parent's request for review is not in compliance with the practice regulations and should be rejected.

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]).[8]

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

[8] 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).

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. Initiation of Appeal

As a threshold matter, it must be determined whether or not the parent's appeal should be dismissed for lack of personal service of the request for review.

In particular, the district asserts that the request for review should be rejected because the parent served the request for review on a receptionist in the district office who was not authorized to accept service. An appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be initiated by timely personal service of a verified request for review and other supporting documents, if any, upon respondent (8 NYCRR 279.4[b], [c]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]).

In general, the failure to properly serve an initiating pleading may result in the dismissal of the request for review by an SRO (8 NYCRR 279.8[a]; see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-66 [S.D.N.Y. Sept. 6, 2013] [upholding an SRO's dismissal of a parent's appeal where, among other procedural deficiencies, the amended petition was not personally served on the district]; Application of a Student with a Disability, Appeal No. 16-015 [dismissing a parent's appeal for failure to effectuate proper personal service of the petition on the district where the parent served a district employee not authorized to accept service]; Application of a Child with a Disability, Appeal No. 06-117 [dismissing a parent's appeal for failure to effectuate proper personal service in a timely manner where the parent served a CSE chairperson and, thereafter, served the superintendent but not until after the time permitted by State regulation expired]; see also Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner where the parent served the district's counsel by overnight mail]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition on the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition on the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition on the district]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition on the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition on the parent where the district served the parent by facsimile]).

The parent filed with the Office of State Review the following documents: a notice of intention to seek review dated June 16, 2022, a request for review bearing a signature and

handwritten date of July 5, 2022, and an affidavit of service of "the annexed Initiation of Review" dated July 1, 2022 and notarized on July 1, 2022. The parent did not file an affidavit of verification as required by State regulation or proof of service of the notice of intention to seek review (8 NYCRR 279.2[a], [b]; 279.7[b]).[9] Also contrary to State regulation, the request for review does not include the parent's name, mailing address, or telephone number and is not accompanied by the required notice of request for review (8 NYCRR 279.7[a]; 279.3). In addition to the request for review, the parent submitted a list of attachments, a copy of the IHO's decision, cover pages identifying parent exhibits 10 and 11 without copies of the exhibits, copies of the March 28, 2017 and May 5, 2017 evaluation reports, and the August 11, 2021 amended due process complaint notice.[10]

On its face, the parent's request for review and affidavit of service are problematic insofar as the request for review bears both a handwritten date of July 5, 2022 at the bottom of the page and a stamped date of July 5, 2022 at the top of the page, yet the parent's affidavit of service indicates that the documents were purportedly served on the district on July 1, 2022. The affidavits accompanying the district's answer shed some light on the discrepancies in the parent's documents and support a finding that the parent failed to initiate the appeal in accordance with the procedures prescribed in State regulations (see 8 NYCRR 279.4[b]).

First, the district offers an affidavit from the individual who notarized the parent's affidavit of service: an assistant district clerk (Answer Ex. 4; see Parent Aff. of Serv.). The assistant district clerk averred that she encountered the parent on Friday, July 1, 2022 at approximately 3:30 p.m. after the district offices had closed for the day (Answer Ex. 4 ¶¶ 1, 3). The assistant district clerk was in her car preparing to leave for the day when she noticed a woman ringing the doorbell; she rolled down the window, advised the woman that the district offices had closed at 3:00 p.m., and asked if the woman needed help (id. ¶¶ 3-4). The assistant district clerk next averred that the woman indicated that she needed her signature notarized, and the assistant district clerk offered to notarize the woman's signature (id. ¶¶ 5-6). The assistant district clerk asked the woman for identification, and she produced an expired passport, which the assistant district clerk declined to use as proof of identification (id. ¶ 7). The woman then produced a valid driver's license, which identified her as the parent in this matter (id.). The assistant district clerk next averred that the parent signed a document in front of her, and she notarized the signature without reading or verifying the document for content (id. ¶ 8). The assistant district clerk further averred that the parent left with the notarized document and never indicated that she had documents to serve on the district nor did she attempt to serve the assistant district clerk any documents (id. ¶¶ 9, 10).

The district also offers an affidavit from a receptionist in the district office who averred that the parent entered the district office on July 5, 2022, just after 2:00 p.m. (Answer Ex. 2 ¶¶ 1, 5). The district receptionist averred that the parent stated that she had papers for the assistant to the assistant superintendent for pupil personnel services (district assistant) in the special education

[9] Along with a letter dated June 24, 2022, the district filed the hearing record with the Office of State Review, which was received on June 27, 2022; therefore, it appears that the district received the notice of intention to seek review from the parent on some date prior (see 8 NYCRR 279.9[b]).

[10] All of the documents listed or submitted by the parent were already included with the hearing record filed by the district with the Office of State Review.

department, which was located in the district's high school building (id. ¶ 6). The district receptionist further averred that she received papers from the parent which included an unsigned and undated copy of the request for review along with the attachments described above, which the district receptionist stamped with the date July 5, 2022 (id. ¶ 7). The district receptionist next averred that the parent left the building and returned a few minutes later with a signed and hand dated copy of the request for review without attachments (id. ¶ 8). The district receptionist averred that the parent did not indicate that she was serving papers on the district and that she was not authorized to accept service on behalf of the district and would have directed the parent to the district clerk had she known the parent was attempting to serve the district (id. ¶¶ 9-10).

The district further offers an affidavit from the district assistant who is named in the parent's affidavit of service as the individual served (Dist. Ex. 3; see Parent Aff. of Serv.). The district assistant averred that at no time on July 1, 2022 or July 5, 2022 did the parent deliver any papers to her (Dist. Ex. 3 ¶¶ 1, 3). The district assistant further averred that the parent contacted her by telephone on July 1, 2022 stating that she had papers to drop off and inquired as to what time the office closed (id. ¶ 4). The district assistant next averred that the parent did not indicate what kind of papers she was dropping off (id.). The district assistant averred that she provided the closing time to the parent and the parent stated she needed something notarized (id. ¶¶ 5-6). The district assistant further averred that she advised the parent that no one in the office was a notary public and, when the parent asked where she could get something notarized, the district assistant suggested a bank (id. ¶ 6). The district assistant averred that the parent indicated that she would drop off the papers on Monday, which the district assistant advised her was a holiday and that the office would reopen on July 5, 2022, she also advised the parent that she could drop off her papers at the district office (id. ¶ 7).

According to the affidavit of the district assistant, she received a telephone call from the receptionist on July 5, 2022, notifying her that the parent had dropped off papers at the district office and stated that they were to be given to the district assistant (Dist. Ex. 3 ¶ 8). The district assistant next averred that she went to the district office to collect the papers and noticed that her name was handwritten on the parent's affidavit of personal service indicating that she had been personally served by the parent on July 1, 2022 (id. ¶¶ 9, 10). The district assistant averred that "[t]hese statements are false," that the parent did not deliver any papers to her on July 1, 2022 or July 5, 2022, and that the papers she received had been delivered to the reception desk in the district office on July 5, 2022 (id. ¶ 11).

The events described in the affidavits from the district employees explain the inconsistent dating on the parent's request for review and affidavit of service and support a finding that the parent's affidavit of service contains false information. Moreover, to the extent the parent delivered her appeal papers to the district receptionist on July 5, 2022, a receptionist is not among the individuals listed in State regulation as authorized to accept service (see 8 NYCRR 279.4[b]; see also Appeal of Villanueva, 49 Ed. Dep't Rep. 54, Decision No. 15,956 [personal service upon unidentified receptionist found improper]; Appeal of Baker, 47 Ed. Dep't Rep. 280, Decision No. 15,696 [service upon the executive secretary to the superintendent found improper]).

The parent has not filed a reply to the district's answer and, therefore, has offered no rebuttal of the sworn statements of the district employees.[11]

While SROs may exercise their discretion to accept a request for review in spite of service irregularities, particularly in cases involving a pro se parent, in this matter, I am inclined to agree with the district. Here, the parent has failed to comply with several requirements of the practice regulations. In particular, as set forth above, the parent has failed to effectuate personal service on the district. Further, the irregularities in the request for review and affidavit of service, combined with the description of the series of events that occurred on July 1, 2022 and July 5, 2022 as sworn to by the district employees in their affidavits, are not mere service irregularities as they manifest a lack of veracity in the underlying pleading. Finally, in addition to the failure to properly serve the request for review, the parent's request for review was not verified, it did not include the required notice of request for review, it did not contain the parent's name, mailing address, or telephone number as required by State regulation, and the allegations contained in the request for review were not numbered and set forth separately as required by State regulation (see 8 NYCRR 279.2; 279.3; 279.7; 279.8).

In this instance, given the deficiencies in service and the false content of the parent's affidavit of service, the appeal must be dismissed.

B. Alternative Findings

Even if the parent's appeal had not been dismissed on procedural grounds for failure to properly initiate the appeal, the allegations contained in the parent's request for review would have been dismissed on the merits. 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]). Here, the IHO correctly determined that the student was offered a FAPE for the 2021-22 school year and that there was no basis to award compensatory educational services or a prospective placement. The IHO accurately recounted the facts of the case, addressed the majority of the specific issues identified in the parent's due process complaint notice, set forth the proper legal standard to determine whether the district offered and provided the student a FAPE for the challenged time period, and applied that standard to the facts at hand (IHO Decision at pp. 3-11). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations

[11] On July 28, 2022, the parent contacted the Office of State Review via telephone inquiring about the status of her appeal and representing that she had not received any papers from the district, including the district's answer. The district's answer was accompanied by an affidavit of service reflecting that the district served the answer on the parent via Federal Express on July 12, 2022 (see Dist. Aff. of Serv.; see also 8 NYCRR 279.5[e]). Nevertheless, on July 28, 2022, the Office of State Review sent the parent a duplicate copy of the district's answer by United States mail and, in an accompanying letter, notified the parent that if she wished to reply to the district's answer at that juncture, she could request an extension of time to do so, as by that time the regulatory deadline for a reply had passed (see 8 NYCRR 279.6[b]). The parent was also notified that a decision was due to be issued on August 5, 2022. The parent did not request an extension of time to serve a reply or otherwise file any further papers with the Office of State Review.

of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

Briefly, I will address the parent's allegation that the IHO exhibited bias against her. A thorough examination of the hearing record reveals that this allegation is unsupported by the hearing record. The length of the hearing—which the parent later complained of—was primarily due to the IHO allowing the parent to raise additional claims and the district's obligation to address each claim (Tr. pp. 1414-29, 1823-24, 1826-28, 1840-41, 1855). Review of the transcript indicates that the IHO spent a great deal of time trying to (1) assist the parent with evidence and the presentation of her case, (2) explain why the parties' questions were relevant or not, and (3) explain what constituted permissible objections and proper cross-examination (Tr. pp. 153-54, 163-64, 169-75, 182-84, 188-90, 194-97, 202-04, 213-15, 286-89, 315-16, 324-28, 351, 405-06, 408-10, 420-23, 427-36, 438, 445-46, 448-49, 451-53, 491-92, 569-70, 573-74, 591-92, 638-41, 643-45, 653-61, 666, 670-71, 695-97, 714-15, 720-27, 737-39, 801-02, 818-19, 827-29, 850-51, 866-79, 890-93, 895-900, 904-05, 1005-08, 1022-23, 1079-80, 1116-18, 1217-20, 1221-22, 1224-25, 1240-41, 1314-17, 1319-24, 1329, 1332-35, 1356-59, 1465-66, 1491-95, 1506-24, 1533-42, 1546-49, 1551-59, 1566-68, 1570-83, 1592-1608, 1609, 1610-12, 1639-41, 1667-68, 1711-17, 1731-35, 1742-45, 1752-53, 1771-75, 1784-1802, 1823-30, 1843-45, 1852-64, 1866-70, 1873-76, 1886-1900, 1914-18). At one point, while the parent was cross-examining the occupational therapist who provided remote instruction during the summer of 2020, the IHO asked the parent to explain the relevance of a series of compound questions; in response, the parent stated that the IHO was disrespecting her by interrupting her during her questioning and, as shown in the transcript, had a verbal outburst directed at the IHO (Tr. pp. 1275-86). Based on the above, the parent's allegations regarding bias are unsupported.

An additional reason why the parent's request for review must be dismissed is that even if her allegations as to the merits of her claims were supported, the parent has not requested any relief in her request for review. Further, looking back to the parent's amended due process complaint notice, the parent only requested placement of the student in a nonpublic school and make up sessions for speech, OT, PT, and instruction missed due to the COVID-19 pandemic (see Dist. Ex. 3 at p. 3).

First, although the parent has not requested placement in a nonpublic school as a form of relief on appeal, her request for review did include an allegation that the IHO "ignored . . . [her] request of school placement." However, contrary to the parent's allegation, review of the decision shows that the IHO analyzed the parent's request for an out-of-district placement at a nonpublic school and denied it (IHO Decision at pp. 6-7). The IHO correctly noted that the parent had not unilaterally placed the student and that the hearing record did not include evidence to show that the Rebecca School or any other school was appropriate for the student (id.). Prospective placement or compensatory education in the form of tuition at a nonpublic school is generally disfavored, particularly, whereas here, the evidence in the hearing record is not fully developed regarding the appropriateness of an identified school (see Application of a Student with a Disability, Appeal No. 19-018 [discussing at length the potential pitfalls that may arise as a result of an award of prospective placement of a student at a nonpublic school]). An award of prospective placement may have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285

F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]; see generally Application of a Student with a Disability, Appeal No. 21-209). Moreover, the disputed time period at issue in this matter has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2022-23 school year (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

Turning to the request for compensatory services contained in the amended due process complaint notice, the IHO explicitly denied the parent's request finding that there was no evidentiary basis to order the services as the parent did not show specifically what services were missed (IHO Decision at p. 6). The parent has not reasserted her request for compensatory educational services in her request for review, and has not asserted any claim of IHO error with respect to his finding on this issue. As such the parent's request for compensatory services has been abandoned (8 NYCRR 279.8[c][4]).

Finally, to the extent the parent alleges on appeal that, when the student returned to school, the district could not manage her and she was "multiple times isolated," these allegations appear to refer to a time period that is outside the scope of the impartial hearing as they refer to alleged events that post-date the July and August 2021 due process complaint notices in this matter. If the parent continues to have concerns regarding the student's attendance when she returned to school, she may file a new due process complaint notice containing allegations related to that period of time.

VII. Conclusion

Based on the foregoing, the appeal is dismissed for failure to properly initiate the appeal.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 5, 2022

STEVEN KROLAK
STATE REVIEW OFFICER