The University of the State of New York

The State Education Department
State Review Officer
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No. 14-038

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 Board of Education of the North Shore Central School District

Appearances:
Ingerman Smith, LLP, attorneys for respondent, Susan M. Gibson, Esq., of counsel

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 son for the 2012-13 school year was appropriate. For the reasons set forth below, the matter must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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

According to the hearing record, the student has received diagnoses of an attention deficit hyperactivity disorder, combined type (ADHD), a cognitive disorder not otherwise specified (NOS), a mixed receptive-expressive language disorder, a reading disorder, a disorder of written expression, a mathematics disorder, an anxiety disorder NOS, and an oppositional defiant disorder (Dist. Ex. 17 at pp. 3, 18-19; Parent Ex. A). The hearing record also documents the student's ongoing academic, cognitive, attending, and social/emotional/behavioral challenges, as well as a number of school-based initiatives intended to ameliorate these concerns (see Dist. Exs. 10 at p. 3; 11 at pp. 1-3, 8-10; 16; 17 at p. 2-4; 18-28).

On May 26, 2011, the CSE met to conduct an annual review and plan for the student's 2011-12 (fifth grade) school year (Dist. Ex. 5 at p. 1). During this meeting, the CSE recommended placement in a general education classroom providing integrated co-teaching services (ICT) for 2 hours per day, a special class with a 15:1 student-to-teacher ratio for 30 minutes per day, three 30-minute small group (3:1) speech-language therapy sessions per six-day cycle, two individual 30-

minute counseling sessions per six-day cycle, and 20 one-hour behavioral consultation services, "with student and/or team members" (id. at pp. 1, 10).

The May 2011 IEP also provided for a behavioral consultant, and the district's director of special education stated that the behavioral consultant was the "person involved with developing and implementing a plan to help [the student] manage his behavior" (Tr. p. 90; Dist. Ex. 5 at p. 1). The district behavioral consultant developed an initial behavioral intervention plan (BIP) for the student's fifth grade year in "an effort to manage multiple behaviors which interfere with [the student's] daily participation in school" (Dist. Ex. 21 at p. 1). The BIP was amended in October and November 2011, in January 2012, and three times in March 2012 (Dist. Exs. 23-28).

In a letter dated March 23, 2012, the district superintendent notified the parent of a disciplinary hearing to review charges against the student related to the use of "language or gestures that are profane, lewd, vulgar or abusive towards school personnel" and engaging in "conduct that is insubordinate or disruptive by refusing to accompany his aide to his classroom" (Parent Ex. F at pp. 1-2; see Parent Exs. B-E). In an "Agreement Resolving Disciplinary Proceeding" dated March 29, 2012, the parent and the district agreed to terms placing the student on home instruction consisting of ten hours of home instruction per week and speech language therapy, indirect counseling services, and indirect "consultant behaviorist" services for the remainder of the 2011-12 school year as set forth in the May 2011 IEP (Dist. Ex. 33 at p. 2-4; see Dist. Ex. 28).[1] The hearing record lacks detailed information regarding the delivery of home instruction subsequent to the agreement resolving the disciplinary proceeding; it appears that the parent refused the provision of future special education services at home (Tr. pp. 884, 888-90).

In planning for the 2012-13 school year, the CSE met on May 17, 2012 to complete the student's annual review and develop the his IEP (Tr. pp. 109-10; Dist. Ex. 6 at p. 1). The hearing record contains two evaluations completed in 2012 prior to the May CSE meeting: a January 2012 speech-language review that recommended discontinuation of speech services, and a February 2012 psychological update that reported that the student was "difficult to manage" and that his ability to "sustain learning participation for any extended period of time" had decreased during his fifth grade year (Dist. Exs. 15 at pp. 1-2; 16 at pp. 1-2).

The May 2012 CSE recommended the student be enrolled in a twelve-month program including placement in a 12:1+1 special class, one 30-minute individual counseling session per week, and one 30-minute small group (3:1) counseling session per week (Dist. Ex. 6 at pp. 1, 8-9). "BOCES Class" was indicated as the location of recommended placement in the May 2012 IEP, which also indicated that "[t]he parent has expressed complete disagreement with placement outside of district" (Dist. Ex. 6 at pp. 1, 10-11).[2] In addition, the CSE recommended an interim plan to provide home instruction and counseling services if the student was not enrolled in a placement by the start of the new school year (id. at p. 1). The parent testified that she consistently made clear to district staff that she wanted the student to be placed in the district's middle school

[1] Although it is difficult to discern because the agreement is hand-written and contains many revisions, it appears that the change in the student's program to home instruction "shall constitute a pendency placement" (Dist. Ex. 33 at p. 3).

[2] Although not defined in the hearing record, BOCES stands for "Board of Cooperative Educational Services" (see Educ. Law § 1950).

but that she was told that placement in the middle school was "not an option" (Tr. pp. 902-05, 923-24).

On June 1, 2012, the CSE reconvened to further develop the student's IEP for the 2012-13 school year (Dist. Ex. 7 at p. 1). The June 2012 IEP included a notation indicating the CSE was "continuing to pursue a special class in an out-of-district program" and continued to recommend that the student be enrolled in a twelve-month 12:1+1 special class, one 30-minute individual counseling session per week, and one 30-minute small group (3:1) counseling session per week in a BOCES placement (id. at pp. 1-2, 9-12). Although the district "encouraged" the parent to cooperate with the screening process, the June 2012 IEP indicates that the parent "indicated in no uncertain terms that she was not in agreement with the recommendation" made by the CSE and would not cooperate with its attempts to locate an out-of-district placement for the student (id. at p. 2). By letter dated September 6, 2012, the parent notified the district of her intention to homeschool the student during the 2012-13 school year (Dist. Ex. 34).[3]

The CSE met and amended the student's IEP twice more after the start of the 2012-13 school year (see Dist. Exs. 8; 9). On November 15, 2012, the student's eligibility classification was changed from a student with an emotional disturbance to a student with an other health-impairment based on a recommendation contained in a September 2012 neuropsychological independent educational evaluation (IEE) of the student (Tr. pp. 80-81; Dist. Ex. 8 at p. 1; see Dist. Ex. 17 at p. 20). On December 21, 2012, the CSE met to discuss the results of the IEE and to consider the "parent's request for placement at [the district middle school]" (Dist. Ex. 9 at p. 1-2). The CSE made minor changes to the student's IEP but continued to recommend a special class program, indicating that an ICT program would be "insufficient" to meet the student's needs (id. at p. 2). The record shows that at the time of the impartial hearing, the student continued to be home-schooled (Tr. 977; Dist. Ex. 4 at p. 2).

A. Due Process Complaint Notice

The parent filed an amended due process complaint notice dated January 10, 2013, requesting, among other things, that the student's educational placement be changed from an "out of district program" to the district's middle school (Dist. Ex. 4 at p. 2).[4] In her amended due process complaint notice, the parent alleged, among other things, that during the 2011-12 school year district staff failed to monitor the student's medications and consult with the student's private psychiatrist (id.). The parent further alleged that the district prevented the student from attending school when he was temporarily without his medication and assigned the student a paraprofessional without the parent's consent (id. at pp. 1-2).[5] The parent also alleged that the

[3] The parent thereafter developed an individualized home instruction plan, identifying textbooks (as well as web-based instructional resources) and curriculum for English language arts, science, math, physical education, visual arts/music, health, library skills, and bilingual education (Dist. Ex. 36 at pp. 1-3). The hearing record also includes parent-prepared quarterly progress reports regarding the student's performance the first two quarters of the 2012-13 school year (Dist. Ex. 37).

[4] The parent initially filed a due process complaint notice dated December 17, 2012 (Dist. Ex. 1). The district challenged the sufficiency of the due process complaint notice in a letter to the IHO dated December 27, 2012 (Dist. Ex. 2). In an interim order dated January 1, 2013, the IHO granted the district's motion and granted the parent an opportunity to file a legally sufficient due process complaint notice (Dist. Ex. 3 at p. 4).

[5] There is no indication from the hearing record that the parent has not received a copy of the procedural

district prevented the student from attending his elementary school graduation ceremony despite the fact that attending graduation was allowed by the terms of the agreement resolving the disciplinary proceeding (id. at pp. 1-2).

Regarding the IEPs setting forth the CSE's recommended program and services for the 2012-13 school year, the parent alleged that the IEPs contained inaccurate information about the student and contained comments and concerns attributed to the parent that were not accurate reflections of her concerns (Dist. Ex. 4 at pp. 1-2). The parent asserted that the CSE should have placed the student in the district's middle school with proper medical supervision, providing him with a new environment, and a "fresh start," rather than the out-of-district placement recommended by the CSE (id.).

B. Impartial Hearing Officer Decision

On April 12, 2013, the parties proceeded to an impartial hearing, which concluded on October 1, 2013 after four days of proceedings (see Tr. pp. 1-1033). During the hearing, the parent was assisted by an advocate who examined witnesses and also appeared as a witness (Tr. pp. 4, 151, 1001). In a decision dated February 3, 2014, the IHO found that the district offered the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) during the time period at issue and denied the parent's claim (IHO Decision at pp. 18-22). The IHO determined that the "crux of the parties' dispute" was whether the CSE's recommended placement in an out-of-district school setting constituted an appropriate placement in the LRE (id. at p. 16). After analysis of the student's needs and the recommendations of the evaluators present in the hearing record, the IHO determined that the CSE's recommendation for a therapeutic out-of-district day program was an appropriate placement in the LRE for the student (id. at pp. 18-20). The IHO also found that although there were three special education programs in the district's middle school, none of the programs was appropriate for the student (id. at pp. 20-21). Lastly, the IHO found that the hearing record did not support the parent's assertion that the CSE's recommendation for an out-of-district program was motivated by "unwarranted animus by the elementary school principal against" the parent and the student, although the IHO indicated that he was "troubled" by the district's decision to bar the student from participating in his elementary school graduation for the parent's refusal to cooperate with the process for locating an appropriate out-of-district placement for the student because this prohibition "lacked any educational value, as it only served to punish the student for the errors of the parent" (id. at pp. 21-22).

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safeguards notice (see "New York State Education Department Procedural Safeguards Notice" [July 2013], available at http://www.p12.nysed.gov/specialed/formsnotices/psgn/PSGN-July2013.pdf). The notice describes, among other things, a parent's right to revoke consent for the continued provision of special education programs and services pursuant to State regulation (see id. at pp. 2-6). The notice provides that "[y]our school district may not use your refusal to consent to one service or activity to deny you or your child any other service, benefit, or activity" (id. at p. 6). The notice also provides that a "school district must develop and implement procedures to ensure that your refusal to consent to any of these other services and activities does not result in a failure to provide your child with FAPE" (id.). For a revocation of consent to the continued provision of special education programs and services to the student to be effective, State regulations require that the revocation must be in writing and that the district must provide prior written notice before ceasing provision of services (8 NYCRR 200.5[b][5][i]; see 20 U.S.C. § 1415[b][3], [c][1]; 34 CFR 300.503; 8 NYCRR 200.5[a]).

IV. Appeal for State-Level Review

The parent appeals, appearing pro se, and asserts that the IHO erred in finding that the district offered the student a FAPE. The parent asserts several claims concerning the IHO's management of the impartial hearing, including that the IHO erred in preventing the parent from "questioning the witnesses under direct examination" and in failing to compel the attendance of the former principal of the district's elementary school as a witness for the parent's direct case. The parent also objects to a number of the IHO's factual determinations underpinning his decision including, among other things, the IHO's finding that the student's behavior worsened when a particular medication was discontinued, that the parent failed to cooperate with the intake processes of the district's recommended out-of-district programs, and that the student's private psychologists recommended a "more structured therapeutic setting" for the student. The parent also asserts error with regard to the IHO's findings of fact concerning the details of the suspension of the student in March 2012 and the sufficiency of the rationale behind that suspension. Relatedly, the parent asserts that the IHO erred in determining that the district's recommended program was in the LRE, that the IHO erred in weighing the evidence, and ignored evidence in favor of the parent's claim that the student should be placed in the district's middle school. The parent asserts that the district failed to make reasonable efforts to accommodate the student in a district school and that the student was "singled out and treated differently". The parent also asserts that the IHO erred in finding that the district's middle school did not contain a 12:1+1 program suitable for the student, because during the hearing resolution period the district offered in settlement to change the student's IEP and place the student in a district middle school program, which proves an appropriate program exists in the middle school. For relief, the parent requests an order "reinstat[ing] the student's in district status" and for those responsible for denying the student a FAPE to be "held accountable." Finally, the parent asserts that the IHO demonstrated bias and prejudice and predetermined his ultimate decision before the parent presented her case.

In an answer, the district asserts that the IHO correctly determined that the district's recommended program for the 2012-13 offered the student a FAPE in the LRE and requests that the IHO's decision be sustained. Regarding the parent's contentions in relation to the conduct of the impartial hearing, the district asserts that the parent had ample opportunity to question the district's witnesses, that the parent never asked for any witness to be recalled, and that the parent had an opportunity to subpoena the former principal of the district's elementary school and did not do so. The district denies many of the parent's factual assertions and contends that the IHO correctly determined that the CSE offered the student a FAPE in the LRE. Finally, the district contends that the hearing record does not support a finding that the IHO was biased.

V. Discussion

For the reasons stated below, it is unnecessary to address the merits of the parent's complaint and the matter must be remanded to the IHO for further proceedings consistent with this decision.

A. Conduct of Impartial Hearing—Right to Compel the Attendance of Witnesses

The parent asserts that the IHO erred in failing to compel the attendance of the former principal of the district's elementary school as a witness in the parent's case. The district contends the parent had an opportunity to subpoena the former principal of the district's elementary school

and chose not to do so. A review of the hearing transcripts supports the parent's version of events and, as set forth below, the matter will be remanded to the IHO for further proceedings.

Parties to an impartial hearing have the power to compel the attendance of witnesses (20 U.S.C. § 1415[h][2]; 34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). To that end, IHOs in New York are authorized to issue subpoenas (8 NYCRR 200.5[j][3][iv]). Furthermore, where a parent appears at an impartial hearing without the benefit of counsel, it is incumbent upon the IHO to make reasonable efforts to assist the party in accessing the impartial hearing process (see 8 NYCRR 200.5[j][3][vii]).

Here, a central focus of the parent's case was her assertion that the former principal of the district's elementary school orchestrated events in the school district and compelled other members of the CSE to recommend an out-of-district placement for the student for reasons unrelated to the student's educational needs (see, e.g., Tr. pp. 991-98). During the impartial hearing, when it became apparent that the district did not intend to call the former principal as a witness the parent asked for a subpoena to compel his attendance at the impartial hearing (Tr. pp. 243-45). Specifically, counsel for the district noted that the parent was proceeding pro se, stated that, "districts typically make people available," and asked if there was anyone the parent wished to question who was not on the district's list of witnesses (id.). The former principal was immediately identified as a person the parent wanted to question (Tr. p. 244). Counsel for the district stated that the former principal no longer worked in the district and the parent was informed that if she wanted to question the former principal, she would need to subpoena him (id.). The parent responded, "I would like to subpoena him" (Tr. p. 245). The IHO informed the parent that he was authorized to issue, but not enforce, subpoenas (id.). Counsel for the district then stated that issuing a subpoena "tends to make witnesses very hostile and aggravated" and asked the parent if she would consent to the district's counsel requesting the principal's attendance without a subpoena, to which the advocate for the parent agreed (id.). Counsel for the district then advised the parent that the former principal might not agree to appear and indicated that the parent may need to subpoena him to secure his attendance (Tr. pp. 245-46). The district points to no information in the hearing record indicating that its counsel took any action to secure the attendance of the former principal as a witness as agreed. At a subsequent hearing date, the parent stated that she "would like to know what happened to [the former principal's] subpoena?" (Tr. p. 456). The IHO stated in response that, "[w]e can address that once we finish with [the district social worker who] has been with us a long time" (id.). However, it does not appear from the transcript of that hearing date that the issue of the subpoena was later addressed. On the last day of the hearing, the IHO stated that:

> I know we don't have the principal. He's no longer here in the district. He didn't testify. There was some issue of trying to subpoena him. I don't think that's going to happen at this point. I understand that that's the dispute. That's sort of related to why you raised this claim. So I'll sort that out later.

(Tr. p. 894).

While the import of the IHO's statement is not entirely clear, the former principal did not testify at the impartial hearing, despite the parent's repeated requests to have the IHO issue a subpoena for his attendance. On appeal, the parent asserts that she knew where the former principal was located at the time of the impartial hearing (Pet. at pp. 1-2). Accordingly, I find that the IHO erred in failing rule on whether a subpoena should issue which affected the parent's power

to compel the attendance of a witness despite apparently determining that it was appropriate to do so. This is particularly problematic where, as here, the district affirmatively agreed to produce the witness in lieu of the subpoena procedure and then failed to do so. Accordingly, I will remand the matter to the IHO.[6] The IHO and the parties may find it beneficial to hold a conference to determine, among other things, the precise scope of the hearing on remand; however, this remand is not intended to permit the parent to fully relitigate her claims, nor should the district be permitted to offer additional evidence in support of its contentions. These matters remain in the sound discretion of the IHO. Rather, the matter is being remanded to permit the parent the opportunity to attempt to secure the testimony of a witness whose presence she indicated was relevant to her claims, and whose testimony the IHO apparently considered sufficiently relevant to the disposition of the matter to offer to issue a subpoena.[7] From that point the IHO may redetermine, in light of his earlier findings whether the district offered the student a FAPE or was forced out of the district for reasons other than the student's identified needs.

B. IHO Bias

Turning to the parent's assertions regarding the IHO's conduct during the impartial hearing, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090) and render his or her decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealing with litigants and others with whom the IHO interacts in an official capacity, and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021). An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations; and must possess the knowledge and

[6] There is another evidentiary discrepancy appearing in the hearing record; after a district witness stated that he may have e-mails relevant to one of the parent's claims, the advocate for the parent made a request that the e-mails in question be produced and the IHO directed the witness to do so and to deliver any such e-mails to counsel for the district (Tr. pp. 392-94). On the final hearing date, the advocate for the parent indicated that he had not yet received the e-mails and requested that counsel for the district provide them, to which counsel for the district stated that he would "make sure [to] get them" (Tr. p. 866). However, there is no further mention of this document production request in the hearing record.

[7] I express no opinion with regard to whether the IHO was required to issue a subpoena to compel the former principal's attendance; however, having indicated his intention to do so, it closed a significant door regarding the parents theory of the of the case, when all of information in the hearing record suggests that both the district and the IHO intended to leave it open and allow the parent her "day in court," so to speak.

ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).[8]

In this case, based on my review and contrary to the contentions of the parent, the hearing record does not support a finding that the IHO acted with bias or abused his discretion in the conduct of the hearing. An independent review of the hearing record demonstrates that the parent was provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see, e.g., Tr. pp. 6-9, 222, 755-60, 944; IHO Ex. XVIII at p. 1; 20 U.S.C. § 1415[g]; Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]).[9] A review of the hearing record further shows that the IHO attempted to assist the parent, who was unrepresented by counsel, by restating questions, explaining the hearing process, and providing information on the proper phrasing of questions (see, e.g., Tr. pp. 5, 9, 88, 156, 163, 175, 181, 196-97, 219, 228-37, 238-43, 398, 902, 944, 1024-26; 8 NYCRR 200.5[j][3][vii]). The IHO also acted within the scope of his authority when he asked a series of questions of the district's director of special education and social worker in order to more fully develop the hearing record on the issues that were presented to him to resolve (Tr. pp. 224-43, 456-59, 461, 467-68; 8 NYCRR 200.5[j][3][vii]). I find the parent's accusation of IHO bias meritless.

VI. Conclusion

For the reasons set forth above, the matter is remanded to the IHO to determine whether to issue a subpoena to permit the parent the opportunity to offer additional testimonial evidence from the former principal of the student's elementary school. The parent should be prepared to provide an offer of proof to the IHO regarding the principal's testimony (that is, be prepared to explain to the IHO what she expects that the principal's testimony will show and how that will help her claim), so that the IHO can determine the relevance (or needless cumulative effect) of the proposed witness and whether there continues to be a need to issue a subpoena. I have considered the parties' remaining contentions and find that it is unnecessary to address them at this time in light of the determinations above.

IT IS ORDERED that the portion of the IHO's decision, dated February 3, 2014, which ultimately concluded that the district offered a FAPE is vacated; and

[8] Recent amendments to State regulations concerning the conduct of special education impartial due process hearings have been enacted effective February 14, 2014 (see 8 NYCRR 200.1, 200.5, 200.16). The Office of Special Education has issued two guidance documents which describe the amendments and provide guidance on their implementation (see "New Requirements Related to Special Education Impartial Due Process Hearings: Amendment to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner of Education," Office of Special Educ. Mem. [Feb. 2014], available at http://www.p12.nysed.gov/specialed/publications/IHOregsadoption213.pdf; "Summary and Guidance on Regulations relating to Special Education Impartial Hearings," Office of Special Educ. Mem. [Feb. 2014], available at http://www.p12.nysed.gov/specialed/publications/IHguidance-Feb2014.pdf).

[9] Although I have found that the IHO erred in concluding the impartial hearing without resolving certain evidentiary issues, in all other respects the IHO addressed the parent's claims in a coherent and well-reasoned manner, with appropriate citations both to the hearing record and pertinent legal authority.

IT IS FURTHER ORDERED that the matter is remanded to the IHO to determine whether the principal's testimony is necessary to allow the parent a full and fair opportunity to present her case in accordance with the body of this decision; and

IT IS FURTHER ORDERED that, if the IHO who issued the February 3, 2014 decision is unavailable, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
April 2, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER