The University of the State of New York

The State Education Department
State Review Officer
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No. 14-039

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

Appearances:
Law Offices of Lauren A. Baum, PC, attorneys for petitioners, Lauren A. Baum, Esq., and Kira I. Epstein, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2011-12 and 2012-13 school years. As explained more fully below, the appeal must be sustained in part and 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 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 State-level appeal, a full recitation of the student's educational history, as well as the facts and procedural history, need not be discussed in detail at this juncture. Briefly, in January 2011, when the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year, the student was attending 12th grade at Cooke where the student has continuously attended school since 2007 (see Dist. Ex. 5 at pp. 1-2; see also Tr. p. 653). Finding that the student remained eligible for special education and related services as a student with mental retardation, the January 2011 CSE recommended a 12-month school year

program in a 12:1+1 special class placement at a specialized school (see Dist. Ex. 5 at pp. 1, 13-14).[1] The January 2011 CSE also recommended the following related services: three 45-minute sessions per week of speech-language therapy in a small group, two 45-minute sessions per week of counseling in a small group, two 45-minute sessions per week of individual hearing educational services (HES), two 45-minute sessions per week of individual occupational therapy (OT), and one 45-minute session per week of individual physical therapy (PT) (id. at pp. 13, 15). In addition, the January 2011 CSE developed annual goals and short-term objectives targeting the student's identified needs (id. at pp. 7-12). The January 2011 CSE developed a transition plan, which included long-term adult outcomes and transition services (id. at pp. 16-17).

Similarly, in June 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 17 at pp. 1, 15-16, 20-22; see also Dist. Ex. 18 at p. 1). Finding that the student remained eligible for special education and related services as a student with an intellectual disability, the June 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a specialized school (see Dist. Ex. 17 at pp. 1, 15-17, 20-22).[2] The June 2012 CSE also recommended the following related services: three 45-minute sessions per week of speech-language therapy in a small group, two 45-minute sessions per week of counseling in a small group, two 45-minute sessions per week of individual HES, two 45-minute sessions per week of OT in a small group, and one 45-minute session per week of PT in a small group (id. at pp. 16, 21). In addition, the June 2012 CSE developed annual goals and short-term objectives targeting the student's identified needs (id. at pp. 7-15). The June 2012 CSE also developed a transition plan, which included measureable post-secondary goals and a coordinated set of transition activities (id. at pp. 4-7, 18-19).

The student attended Cooke for both the 2011-12 and 2012-13 school years (see Parent Exs. N; O at pp. 1-2; HH; II at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated January 30, 2013, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A at pp. 1-6). In an amended due process complaint notice dated April 30, 2013, the parents repeated the allegations in the January 2013 due process complaint notice related to the 2011-12 school year, and further alleged that the district failed to offer the student a FAPE for the 2012-13 school year (compare Parent Ex. V at pp. 1-12, with Parent Ex. A at pp. 1-6). Generally, the parents asserted several allegations with regard to the January 2011 CSE and June 2012 CSE meetings, the January 2011 and June 2012 IEPs, and the assigned public school sites for each school year (see Parent Ex. V at pp. 1-12). As relief, the parents requested, among

[1] Although the student's January 2011 IEP indicated that the student was eligible for special education and related services as a student with mental retardation, October 2011 revisions to State regulations replaced the term "mental retardation" with "intellectual disability," but retained the same definition (see 8 NYCRR 200.1[zz][7]; see also Dist. Ex. 1 at p. 1).

[2] The student's eligibility for special education programs and related services as a student with an intellectual disability for the 2011-12 and 2012-13 school years is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7].

other things, reimbursement for the costs of the student's tuition at Cooke for the 2011-12 and 2012-13 school years (id. at pp. 12-13).

B. Impartial Hearing Officer Decision

On March 4, 2013, the IHO conducted a prehearing conference, and on June 27, 2013, the parties proceeded to an impartial hearing, which concluded on October 22, 2013 after five days of proceedings (see Tr. pp. 1-763). Between the final date of the impartial hearing and the actual record close date of January 21, 2014, the parties exchanged e-mail correspondence with the IHO (see Parent Ex. HHH at pp. 1-9; IHO Decision). Initially, in an e-mail dated November 13, 2013, the district withdrew "Exhibit 20," which the IHO previously admitted into the hearing record in anticipation of the district's rebuttal case (Parent Ex. HHH at pp. 8-9). At that time, however, the district determined a rebuttal case was not necessary, and inquired as to whether the parties should submit closing briefs by December 13, 2013 (id. at p. 8).

Next, in an e-mail dated November 22, 2013, the parents requested that the "reporter/reporting company" review the October 8, 2013 hearing transcript because it contained "many omissions in the testimony indicated by ellipses," which the parents believed affected their case (Parent Ex. HHH at p. 4). As a result, the parents requested the preparation of a "corrected transcript," and further noted that "if the transcript omissions [could not] be satisfactorily resolved," then the parents wanted both the instant e-mail and the "original transcript" included as evidence in the hearing record (id.). In addition, the parents included a list of "ellipses" within the October 8, 2013 transcript that they characterized as "particularly problematic" (id. at pp. 4-8).

In an e-mail dated December 26, 2013, the parents indicated that although "some of the omissions" identified in the previous e-mail, dated November 22, 2013, had been "fixed, many were not" (Parent Ex. HHH at pp. 1-2).[3] The parents identified the "outstanding issues" in the October 8, 2013 "corrected transcript," and indicated that the remaining omissions "significantly" affected their case (id. at pp. 2-4). Again, the parents indicated that "if the transcript omissions [could not] be satisfactorily resolved," the parents wanted both the instant e-mail and the "original transcript" included as evidence in the hearing record (id. at pp. 2-4).

In an e-mail dated December 27, 2013, the IHO indicated that she would "address this issue" upon her return on January 3, 2014 (Parent Ex. HHH at p. 1).

In a Memorandum of Law and Closing Argument (memorandum), dated January 6, 2014, the parents indicated in a footnote that prior to the actual record close date, they advised the IHO of the "errors in the hearing transcript" through e-mails dated November 22, December 9, and December 26, 2013 (IHO Ex. II at pp. 2 n.1, 21). More specifically, the parents indicated that the errors included "several omissions" of testimony in the October 8, 2013 hearing transcript (indicated by ellipses), and further, the October 22, 2013 hearing transcript omitted testimonial evidence, as well the admission of "exhibits EEE, FFF, and GGG" into the hearing record (id.). The parents noted that although the IHO agreed to address the errors, the "transcripts had not yet

[3] Based upon this e-mail and the October 8, 2013 hearing transcript—marked with the word "CORRECTED" in yellow highlight--submitted as part of the hearing record, it appears that the parties received a revised copy of the original October 8, 2013 transcript (see Parent Ex. HHH at pp. 1-2; see also Tr. p. 475).

been adequately corrected" (id.). At that time, the parents requested that "exhibits EEE, FFF, and GGG be entered" into the hearing record, "as well as the emails contained in exhibits appended" to the memorandum (id.).[4]

By decision dated January 28, 2014, the IHO concluded that the district offered the student a FAPE for the 2011-12 and 2012-13 school years (see IHO Decision at pp. 9-12).[5] The IHO also briefly concluded that Cooke was an appropriate unilateral placement for the student for the 2011-12 and 2012-13 school years, and equitable considerations would not preclude an award of tuition reimbursement in this case for either the 2011-12 or the 2012-13 school years (id. at pp. 12-13).

IV. Appeal for State-Level Review

The parents appeal, and assert that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 and 2012-13 school years. The parents generally argue that the IHO failed to carefully consider all of the evidence in the hearing record, including the testimony of the parents' witnesses about the adequacy of the January 2011 IEP and the June 2012 IEP. The parents also generally assert that the IHO failed to separately consider the adequacy of each individual IEP. With respect to the January 2011 IEP and the June 2012 IEP and the respective CSE meetings, the parents argue that the IHO failed to address whether the parents were provided with an opportunity to meaningfully participate in the CSE meetings, whether the CSEs failed to adequately consult with the parents or the Cooke participants in developing the January 2011 IEP and the June 2012 IEP, and whether the CSEs failed to seriously consider concerns expressed by the Cooke participants. In addition, the parents contend that the IHO failed to address whether the January 2011 IEP and the June 2012 IEP offered the student sufficient supports or services to facilitate the student's transition from Cooke into a less restrictive, public school setting; and whether the transition plan in the January 2011 IEP and June 2012 IEP was appropriate.

In a footnote in the petition, the parents indicated that the October 22, 2013 hearing transcript failed to include the entire direct examination of the Cooke social worker, as well as the district's cross-examination of the Cooke social worker. The parents further indicated that although they made the IHO and the district aware of this particular omission, as well as the omission of a portion of the Cooke consulting teacher's testimony and other transcription errors, the errors and omissions were not corrected. The parents submitted "Attachment A" to the petition, which includes two exhibits for consideration on appeal as additional documentary evidence.

In an answer, the district responds to the parents' allegations, and argues to uphold the IHO's determinations that the district offered the student a FAPE for the 2011-12 and 2012-13 school years. In addition, the district argues that although the parents did not indicate why the

[4] However, the parents' memorandum did not include any appended exhibits, and the memorandum, itself, did not otherwise describe the appended exhibits (see IHO Ex. II at pp. 1-21). In addition, Parent Exhibit HHH in the hearing record, which included several e-mails exchanged between November and December 2013, did not include an e-mail dated December 9, 2013, and the e-mails exchanged throughout November and December 2013 did not refer to any errors or omissions with respect to the October 22, 2013 hearing transcript (see Parent Ex. HHH at pp. 1-9).

[5] A review of the exhibit list attached to the IHO's (corrected) decision indicates that Parent Exhibits EEE, FFF, GGG, and HHH were admitted into the hearing record as evidence (see IHO Decision at pp. 16-17).

additional documentary evidence should be considered on appeal, the district objects to the consideration of the additional evidence as it is not necessary to render a decision. In a reply, the parents assert that the additional documentary evidence is necessary to render a decision, especially with regard to the adequacy of the transition plan, the appropriateness of the 12:1+1 special class placement, and the IHO's failure to consider all testimonial evidence.[6]

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. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v.

[6] Since neither party appealed the IHO's findings that Cooke was an appropriate unilateral placement for the student for the 2011-12 and 2012-13 school years, and equitable considerations weighed in favor of the parents' requested relief for both school years, these determinations are final and binding upon the parties and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The remaining issues to be considered in the administrative proceedings are those issues relevant to whether the district offered the student a FAPE.

Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

As noted above, the parents attached two exhibits—exhibit HHH and exhibit III—as additional documentary evidence for consideration on appeal (Pet. Ex. A at pp. 1-11). The district objects to the consideration of the two exhibits, arguing that although the e-mails contained within both exhibits could not have been offered at the time of the impartial hearing, neither exhibit is required in order to render a decision in this appeal. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

Initially, a review of the hearing record reveals that the IHO previously admitted the exhibit attached to the petition and marked as "Exhibit HHH" into the hearing record on January 21, 2014 as Parent Exhibit HHH, and therefore, it is not necessary to again accept the exhibit as additional evidence because it has already been made part of the hearing record (see IHO Decision at pp. 6, 13, 16-17; compare Pet. Ex. A at pp. 3-11, with Parent Ex. HHH at pp. 1-9). However, the exhibit attached to the petition and identified as "Exhibit III"—which contains e-mails dated December 9, 2013 and January 6, 2014—has not been admitted as evidence into the hearing record (see IHO Decision at pp. 16-17). Upon review of exhibit III, it appears that the parents submitted both the January 6, 2014 and the December 9, 2013 e-mails to the IHO for inclusion in the hearing record when they submitted their memorandum on January 6, 2014 (see Pet. Ex. A at pp. 1-2). In this case, while the hearing record indicates that the two e-mails in exhibit III did not exist at the time of the impartial hearing and could not have been offered into evidence at that time, a review of the exhibit, itself, indicates that it is not necessary to render a decision in this appeal because the

information within the two e-mails in exhibit III also appears in the parents' memorandum, which the IHO admitted into the hearing record (compare Pet. Ex. A at pp. 1-3, with IHO Ex. II at p. 2 n.1). Therefore, the parents' request is denied.

B. Impartial Hearing Record

Pursuant to the IDEA, as well as State and federal implementing regulations, it is the district's obligation to ensure that a "verbatim record" of the impartial hearing is kept for use by the parents, the IHO, and subsequent administrative and judicial review (20 U.S.C. § 1415[h][3]; 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][3][v]; see 8 NYCRR 279.9[a] [the district is required to submit "a true and complete copy of the hearing record before the [IHO]" to the Office of State Review]). In the event that a hearing transcript is inadequate to conduct a meaningful review of the underlying proceedings, it may become necessary to consider whether to remand for a reconstruction proceeding (see Kingsmore v. Dist. of Columbia, 466 F.3d 118, 120 [D.C. Cir. 2006]). A review of the hearing transcripts dated October 8 and October 22, 2013 indicates that, consistent with the parents' position, the district has failed to meet its obligation to secure and produce a verbatim record of the impartial hearing for use by the parents and subsequent administrative and judicial review.

At the end of the impartial hearing held on October 8, 2013, the IHO indicated that at the next impartial hearing date scheduled for October 22, 2013, the parents' attorney would finish the direct examination of the Cooke social worker and the district would conduct its cross-examination of the Cooke social worker (see Tr. pp. 645-47). However, the transcript for the October 22, 2012 impartial hearing began with a transcription of the IHO stating "All right. So now that we're in a much better location--," and with a request by the IHO for the parents' attorney to "[s]tart from the beginning" of the direct examination of the Cooke consulting teacher (Tr. pp. 650-52). As noted by the parents in the memorandum and petition, the October 22, 2013 transcript does not include the entire direct examination, or the cross-examination, of the Cooke social worker, who was scheduled to appear at the "first witness" at the next scheduled hearing date of October 22, 2013 to complete her direct testimony regarding the coordinated set of transition activities and her cross-examination (see Tr. pp. 600-02, 645-48, 650-763). It also appears that the October 22, 2013 transcript may not contain all of the direct examination of the Cooke consulting teacher (see Tr. p. 650).

In addition, a review of the hearing record indicates that although the IHO's decision lists Parent Exhibits EEE, FFF, and GGG as evidence admitted into the hearing record—and the hearing record submitted for review on appeal included those three exhibits—the verbatim transcripts of the impartial hearing do not reflect their admission into evidence (compare IHO Decision at pp. 16-17, with Tr. pp. 1-764). Similarly, while the IHO's decision lists District Exhibit 20 as evidence admitted into the hearing record, the district later withdrew the exhibit from evidence when it decided to forego the presentation of a rebuttal case—however, the hearing record submitted for review on appeal also included this exhibit (see IHO Decision at p. 17; Parent Ex. HHH at pp. 8-9).

The IHO is reminded that State regulations require an IHO to provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 C.F.R. § 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO has the

discretion to limit or exclude evidence or testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c], [d], [e]), it is also an IHO's responsibility to ensure that there is an adequate record upon which to permit meaningful review (Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of a Child with a Disability, Appeal No. 00-021; Application of the Bd. of Educ., Appeal No. 97-92).

State regulations further provide in relevant part that "[t]he decision of the [IHO] shall be based solely upon the record of the proceeding before the [IHO], and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity (see Application of a Student with a Disability, Appeal No. 10-007; Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-138; Application of a Student with a Disability, Appeal No. 08-043). Moreover, State regulations further require that an IHO "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any IHO decision (see Application of the Dep't of Educ., Appeal No. 09-092; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-064).

Whereas here, when testimonial evidence and documentary evidence have not been completely or properly entered into the hearing record before the IHO, neither the IHO—nor an SRO on appeal—has a basis upon which to conduct a meaningful review or upon which to base any findings or determinations. Therefore, in this case, where the parents alerted the district and the IHO to the omissions and errors in the hearing record, and neither the district nor the IHO adequately remedied these issues, the matter must be remanded to the IHO for further administrative proceedings to correct or alternatively, to conduct a reconstruction hearing—upon agreement by the parties—those portions of the testimonial evidence omitted from the hearing record. In addition, the parties and the IHO must clarify the exhibits submitted and entered into evidence in the hearing record. Meaningful review of the parties' dispute is not possible with the current state of the record.

C. Unaddressed Issues

In addition to the incomplete hearing record, the parents contend that the IHO failed to address several issues with respect to the January 2011 CSE meeting and January 2011 IEP, as well as the June 2012 CSE meeting and the June 2012 IEP (see, e.g., Pet. ¶¶25-27, 50, 59). Accordingly, the matter should also be remanded to the IHO for a determination on the merits of the remaining issues set forth in the parents' January 2013 due process complaint notice or April 2013 amended due process complaint notice—or as agreed upon by the parties—which have yet to be addressed by the IHO (see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27,

2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013].). It is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to each of the unaddressed issues. Furthermore, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the remaining issues (see 8 NYCRR 200.5[j][3][xi][a]). Based on the foregoing, I decline to review the merits of IHO's decision at this time. However, if either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf., D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

VII. Conclusion

Based on the above, the matter must be remanded to the IHO and the parties for further administrative proceedings to ensure that a verbatim hearing record is created and accurate set of documentary exhibits are identified and included in the hearing record and for the IHO to determine the merits of any unaddressed issues. Strong consideration should be given to whether a procedural conference may be necessary between the IHO and the parties to clarify and confirm the remaining specific issues that must be addressed with regard to whether the district offered the student a FAPE.[7] As noted above, since the IHO's determinations regarding the unilateral placement and equitable considerations have become final and binding, it will not be necessary for the IHO to address those two portions of the Burlington/Carter analysis again.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO, in consultation with the parties, address the errors and omissions in the hearing transcripts and the hearing consistent with this decision; and,

IT IS FURTHER ORDERED that the matter is remanded to the same IHO who issued the January 28, 2014 decision to determine the merits of the unaddressed issues set forth in the parents' January 2013 due process complaint notice and/or April 2013 amended due process complaint notice, or to determine the merits of the unaddressed issues as otherwise agreed upon by the parties; and,

[7] The IHO recounted testimony offered during the impartial hearing in her decision, but did not clearly identify all of the issues from the parents' January and April 2013due process complaint notices that her decision was intended to address. Some claims appear to have been more clearly addressed in the decision than others. To be sure, there were many comingled or overlapping claims in the due process complaints and the IHO should not be expected to ferret them out alone unassisted by the parties' respective counsels; however, an IHO ultimately has the discretion to reorganize, reframe, or restate issues from a due process complaint, so long as the issues are thereafter clearly addressed (Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086, 1090 [9th Cir. 2002]; Adam J. v. Keller Independent Sch. Dist., 328 F.3d 804, 809 (5th Cir. [2003]).

IT IS FURTHER ORDERED that, if the IHO who issued the January 28, 2014 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
May 6, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER