



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-027

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

Appearances:

The Cuddy Law Firm, P.C., attorneys for petitioner, Nina C. Aasen, Esq. and Jason H. Sterne, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 the decision of an impartial hearing officer (IHO) which denied the parent's request for a comprehensive reading evaluation of the student and for an award of compensatory educational services as relief. As explained more fully 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 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

In light of the limited scope of this appeal, the student's educational history need not be recited in detail. Briefly, however, during the 2013-14 school year the student attended an 8:1+2 special class placement at a State-approved nonpublic school and received related services of speech-language therapy and occupational therapy (OT) (see Dist. Exs. 4; 6; 8). On March 14, 2014, the CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (see Parent Ex. B at pp. 1, 9-10, 12). Finding that the student remained eligible for special education and related services as a student with autism, the March 2014 CSE

recommended a 12-month school year program in 6:1+1 special class placement at a specialized school and the following related services: two 30 minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, and two 30-minute sessions per week of individual OT (id.).

A. Due Process Complaint Notice

By due process complaint notice dated June 20, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (see Parent Ex. A at pp. 1, 3-5). More specifically, the parent alleged that the March 2014 CSE changed the student's "placement without conducting any updated evaluations of the student," and the CSE developed the March 2014 IEP without "any new evaluative data" (id. at pp. 2, 4). In addition, the parent indicated that the March 2014 IEP did not include a recommendation for parent counseling and training (id.). The parent also alleged that the March 2014 CSE failed to recommend sufficient OT services to address the student's "sensory and self-regulation" needs and his "fine and large motor" needs, and further, the March 2014 IEP failed to include counseling to address the student's "severe emotional and behavioral issues" (id.). Next, the parent asserted that despite the student's "severe behavioral issues," the March 2014 CSE failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student (id. at p. 2). In addition, the parent noted that the March 2014 IEP indicated that the student did not need "strategies, including positive behavioral interventions, supports and other strategies" to address his behavior needs (id.). The parent also noted that the district failed to provide a final notice of recommendation (FNR) for the 2014-15 school year identifying the "educational placement and location" of the student's "program" (id. at pp. 2, 4). Finally, the parent alleged that the March 2014 IEP failed to contain annual goals to address the student's reading needs (id. at p. 4).

As relief, the parent requested updated evaluations of the student, including a psychological evaluation, a psychoeducational evaluation, an FBA, an OT evaluation with a sensory profile, an auditory processing evaluation, a comprehensive reading evaluation, and a speech-language evaluation (id. at p. 4). In addition, the parent requested to annul the March 2014 IEP, and for the CSE to reconvene to review the updated evaluations to develop an appropriate IEP (id. at p. 5). The parent further requested that the IHO order the CSE to include parent counseling and training on the IEP and to order the district to provide compensatory educational services for the district's failure to provide the same during summer 2014 and for the 2014-15 school year (id. at p. 5).

B. Impartial Hearing Officer Decision

On July 3, 2014, the parties proceeded to an impartial hearing (see Tr. pp. 1-10).¹ On August 8, 2014, the IHO conducted a prehearing conference, and at that time, the district agreed to conduct some of the updated evaluations of the student as requested by the parent (see Tr. pp. 11-90). Shortly thereafter, in a second due process complaint notice dated August 15, 2014, the parent repeated the allegations in the June 2014 due process complaint notice, and further clarified

¹ In an order on pendency dated July 8, 2014, the IHO determined that the State-approved nonpublic school the student attended during the 2013-14 school year constituted the student's pendency placement (see July 8, 2014 Interim IHO Order at pp. 2-3).

that the 6:1+1 special class placement at a specialized school was not appropriate (compare Parent Ex. N at pp. 1-5, with Parent Ex. A at pp. 1-4).² By interim order dated August 20, 2014, the IHO consolidated the issues raised in the parent's June 2014 due process complaint notice and the August 2014 due process complaint notice for one impartial hearing (see Aug. 20, 2014 Interim IHO Order at pp. 1-2; see also Parent Exs. A at pp. 1-6; N at pp. 1-6). On August 22, 2014, the IHO conducted a second prehearing conference in order to follow-up on the evaluations that the district agreed to conduct (see Tr. pp. 91-105). In a second interim order dated August 26, 2014, the IHO ordered the district—pursuant to the district's agreement at the August 8, 2014 prehearing conference—to conduct an OT evaluation of the student that included a sensory profile, a speech-language evaluation of the student, an FBA, and a psychoeducational evaluation of the student by September 12, 2014 (see Aug. 26, 2014 Interim IHO Order at p. 2). On September 4, and September 17, 2014, the IHO conducted additional prehearing conferences; at the September 17, 2014 conference, the parties requested and received an adjournment of the proceedings in order for the CSE to reconvene to consider the updated evaluations of the student (see Tr. pp. 106-169; Joint Exs. T at pp. 1-4; U at pp. 1-6; V at pp. 1-9; W at pp. 1-5).³

On November 12, 2014, the parties reconvened at the impartial hearing, which concluded on December 12, 2014 after two days of proceedings (see Tr. pp. 170-384). At the November 12, 2014 hearing date, the parties discussed the remaining issues to be resolved at the impartial hearing (see Tr. pp. 173-85). According to the parent's attorney, the remaining issues included whether the district conceded that it failed to offer the student a FAPE for the 2014-15 school year, whether the student required a comprehensive reading evaluation, and whether the parent was entitled to compensatory educational services in the form of parent counseling and training (see Tr. pp. 173-75). In addition, the parent withdrew the request for an auditory processing evaluation of the student (see Tr. pp. 174-75). Noting that the CSE developed an October 2014 IEP that recommended an 8:1+2 special class placement at a State-approved nonpublic school—relief the parent specifically requested—the IHO did not think that the issue of whether the district conceded that it failed to offer the student a FAPE remained as an issue in this case (see Tr. pp. 175-78). The IHO further explained that she did not "see any reason to take testimony and evidence on a prior disagreement, when that [was] now resolved, [and] when there [was] no action that [she] could take"—noting, "I just think that would be a waste of time" and "I don't see the point of it" (Tr. p. 177).

² The parent requested the same relief in the August 2015 due process complaint notice as set forth in the June 2014 due process complaint notice, with the exception of requesting that the IHO find that the 6:1+1 special class placement was not appropriate and that an 8:1+2 special class placement at a State-approved nonpublic school was appropriate (compare Parent Ex. N at pp. 5-6, with Parent Ex. A at pp. 4-5).

³ The CSE reconvened on October 1, 2014 (see Joint Ex. R at pp. 1, 12). Upon consideration of the new evaluative information, the October 2014 CSE recommended a 12-month school year program in an 8:1+2 special class placement together with the following related services: two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a small group; three 30-minute sessions per week of individual OT; and two 60-minute sessions per month of parent counseling and training (id. at pp. 1, 9-10). At that time, the October 2014 CSE referred the student's case to the Central Based Support Team (CBST) (id. at p. 9). On October 28, 2014, the CSE reconvened and modified the student's IEP to include a recommendation for a State-approved nonpublic school for the 2014-15 school year (compare Dist. Ex. 24 at pp. 9-10, with Joint Ex. R at p. 9-10).

In a decision dated January 23, 2015, the IHO initially noted that while the parent raised a "variety of issues," the "hearing process" resolved "most" of those issues (IHO Decision at pp. 1-4). Consequently, the IHO identified the following as the "only issues remaining" for resolution: whether the student required a comprehensive reading evaluation, and whether the parent was entitled to compensatory educational services in the form of parent counseling and training due to the district's failure to recommend parent counseling and training (id.). Ultimately, the IHO concluded that the student did not require a comprehensive reading evaluation and the parent was not entitled to an award of compensatory educational services (id. at pp. 4-10).

In denying the parent's request for a comprehensive reading evaluation, the IHO noted that although the student exhibited "concomitant behavioral, attentional and speech and language issues" that interfered with his ability to learn, reading was not the student's "primary area of difficulty" (IHO Decision at p. 8). Further noting that while the student exhibited a "significant language disorder characterized by limited comprehension of age appropriate concepts when embedded within the context of language, immature/deviant use of age expected grammatical markers and syntactical rules, limited verbal reasoning, and severe language processing difficulties," the student made progress in "reading letters and words" (id.). The IHO further determined that the student's "below grade level" reading comprehension skills resulted from his language difficulties and would be addressed in speech-language therapy (id.). In addition, the IHO found that the annual goals in the "IEP" addressed the student's needs to improve his expressive, receptive, and pragmatic language skills; to "accurately" respond to "'WH' and yes/no questions;" and through annual goals for reading to develop the student's "phonics/decoding skills and improving reading comprehension skills" (id. at pp. 8-9). As such, the IHO concluded that there was "no reason to suspect that any additional testing would produce greater insights" into the student's "reading difficulties or that additional testing [was] necessary to provide an appropriate IEP" (id. at p. 9). The IHO then indicated that the "current IEP [was] reasonably calculated to provide educational benefits" and the student made progress in reading (id.).

Finally, the IHO indicated that the parent requested a comprehensive reading evaluation in order to know "exactly where the [s]tudent st[ood] on the (sic) reading level so that she c[ould] help him, or obtain help for him" (IHO Decision at p. 9). However, the IHO concluded that the psychoeducational evaluation provided the parent with the student's "reading level," noting further that an evaluation was "not designed to provide specific information related to what the [s]tudent [was] working on in school"—which the parent could obtain from the student's teachers (id.). Furthermore, although the parent testified at the impartial hearing that the student required "individual instruction in reading," the IHO did not find this to be "an issue for this hearing" and further indicated that the "new IEP include[d] reading goals" and the parent did not "appear to disagree with these goals" (id.). Finally, the IHO indicated that the psychoeducational evaluation of the student set forth the student's abilities in "decoding, sight reading and reading comprehension;" accordingly, the IHO found that the evaluation was "adequate to assess the [s]tudent's reading ability" (id.). The IHO also found that the psychoeducational evaluation, "together with the other information regarding the [s]tudent's behavioral, speech and language and management needs, and the reports from the teachers and providers[,] provide[d] adequate information to develop an IEP" (id.).

With regard to compensatory educational services, the IHO noted that based upon the parent's testimony, she did not receive parent counseling and training during summer 2014, or

during "September, October or the first two weeks of November 2014" (IHO Decision at pp. 9-10). However, since "November 12, 2014," the parent received parent counseling and training for "approximately 30 minutes rather than for 60 minutes as now set forth on the IEP" (*id.* at p. 10). In addition, the parent testified that she was "always aware" that the State-approved nonpublic school maintained an "open door policy," which provided her with the "opportunity" to speak with the "teacher, the social worker and the psychologist"—and she took advantage of that policy since November 2014 (*id.*). The parent also testified that she could "contact the school for training and counseling" and had a "telephone number" to call the teacher to "ask questions" (*id.*). In addition, the IHO indicated that while the parent received "less than the two hours per month" of parent counseling and training, she had the "opportunity to have longer sessions with the teacher if she so desired" (*id.*). As a result, the IHO concluded that the "current IEP provide[d] for two hours per month of parent counseling and training," and further, that the parent "could have received additional counseling and training had she taken further advantage of the open door policy" (*id.*). Thus, the IHO further concluded that any failure to "previously provide parent counseling and training w[ould] be remedied by the instruction provided to the [p]arents with the current counseling and training" (*id.*). Accordingly, the IHO determined that "[i]f the [p]arents require additional counseling and training on the IEP, they may request that the CSE reconvene and provide additional counseling and training on the IEP or request a hearing on that issue" (*id.*).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in failing to direct the district to conduct a comprehensive reading evaluation of the student. In addition, the parent alleges that the IHO erred in failing to award compensatory educational services for the district's failure to provide parent counseling and training.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

V. Discussion

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. 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).

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]).

A. Unaddressed Issues—FAPE

A review of the IHO's decision in conjunction with the evidence in the hearing record reveals that the IHO failed to address or make any explicit finding regarding whether the district—and more specifically, the March 2014 IEP—offered the student a FAPE as alleged by the parent in both the June 20, 2014 and August 15, 2014 due process complaint notices (compare IHO Decision at pp. 10-14, with Dist. Ex. 7 at p. 1). As indicated above, the parent's attorney asserted at the impartial hearing that FAPE remained an issue in this case and specifically questioned whether the district conceded that it failed to offer the student a FAPE (see Tr. pp. 173-75). The IHO disagreed with the parent's position, essentially opining that if there was no remedy, there was no purpose in making a finding that the district failed to offer the student a FAPE (see Tr. pp. 175-77). Yet, the IHO continued the impartial hearing to determine whether the parent was entitled to further relief in this matter, and effectively prevented the parties from presenting evidence regarding whether the district offered the student a FAPE (see Tr. pp. 177-384).⁴ Notwithstanding the IHO's position that FAPE was no longer at issue, the district continued to argue in its post-hearing submission to the IHO that the district offered the student a FAPE (see IHO Ex. XI at pp. 1, 6-10). Moreover, in the decision, the IHO included the appropriate legal standard to determine whether the district offered the student a FAPE in the decision, but failed to render any conclusion in this regard and then analyzed whether the parent was entitled to relief (see IHO Decision at pp. 4-10). However, without concluding that the March 2014 IEP failed to offer the student a FAPE,

⁴ Courts have recently indicated that an SRO may remand to an IHO when the IHO has not made determinations on issues raised in the due process complaint notice (see T.L. v. New York City Dep't of Educ., 938 F. Supp. 2d, 417, 436 [E.D.N.Y. 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013]). In this instance, given the IHO's position that she did not "see any reason to take testimony and evidence" on the issue of whether the district offered the student a FAPE, the parties did not develop the hearing record, which may otherwise allow an SRO to meaningfully review and make a determination on this issue for the first time on appeal (see T.L., 938 F. Supp. 2d at 437 [indicating that district court may remand a proceeding for "further development and clarification of the record"], citing Carlisle Area Sch. v. Scott P., 62 F.3d 520, 525-26 [3d Cir. 1995]).

it is unclear how the IHO reached the issue of relief when an award of relief must be predicated upon a finding that the district failed to offer the student a FAPE.⁵

Accordingly, the matter should be remanded to the IHO to determine on the merits and/or clarify in the decision whether the district offered the student a FAPE for the 2014-15 school year, and based upon that conclusion, readdress—if necessary—whether the parent was entitled to the relief requested, namely, a comprehensive reading evaluation of the student and compensatory educational services in the form of parent counseling and training (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 whether the district offered the student a FAPE or if the district conceded that it failed to offer the student a FAPE for the 2014-15 school year. Furthermore, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the remaining issue (see 8 NYCRR 200.5[j][3][xi][a]). Based on the foregoing, I decline to review the merits of the 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

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits regarding whether the district offered the student a FAPE, and if necessary, readdress whether the parent was entitled to the relief requested.

IT IS ORDERED that the matter be remanded to the same IHO who issued the January 23, 2015 decision to determine the merits and/or clarify in the decision whether the district offered the student a FAPE for the 2014-15 school year as set forth in the parent's June 20, 2014 and August 15, 2014 due process complaint notices; and,

IT IS FURTHER ORDERED that, if the IHO who issued the January 23, 2015 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**
 April 23, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER

⁵ Instead, the IHO appeared to conclude that the October 2014 IEP—which was not challenged in this case—offered the student a FAPE, noting that the "current IEP [was] reasonably calculated to provide educational benefits" (IHO Decision at pp. 8-9).