The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 15-119

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, 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 or mother) appeals from a determination of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice against respondent (the district or NYCDOE) for lack of subject matter jurisdiction. The appeal must be sustained in part, and the matter remanded for further 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

The hearing record reflects that the student was hospitalized from June 2, 2012 through March 5, 2013 and received a diagnosis of schizophrenia, catatonic type (IHO Ex. II at pp. 3, 12, 56; Pet. Ex. G at p. 2). The student was placed in the physical care and custody of the New York City Administration for Children's Services (ACS) based on an order of the Family Court as of June 20, 2012 (Tr. pp. 31, 41; IHO Ex. II at p. 56).[1] On October 24, 2012, while the student was hospitalized, the parent enrolled the student in the NYCDOE (id. at p. 42).[2] The parent requested a special education evaluation on November 28, 2012 and an evaluation was attempted on January 29, 2013; however, the hearing record reflects that due to the student's extreme self-directed

[1] ACS performs role of a local social services district for the City of New York (see Soc. Serv. Law §§ 56, 61).

[2] The hearing record does not indicate what, if any, educational services the student had received in New York State prior to this date.

behavior, the results of formal testing could not be attained (id. at pp. 11-12, 47, 56). The student was discharged from the hospital and transferred to an ACS emergency children's shelter on March 5, 2013 (Tr. p. 14; IHO Ex. II at p. 3).

On April 17, 2013, a CSE of the NYCDOE convened for an initial review and determined that the student was eligible to receive special education services as a student with an emotional disturbance (IHO Ex. II at pp. 3, 11). The parent reported that the student's case was referred to the district's central-based support team (CBST) and that home instruction was provided beginning in May 2013 (id. at p. 3).

The district's CSE convened again on December 5, 2013, reviewed evaluation updates completed by the student's home instructors, and continued to find the student eligible to receive special education and related services; however, the student's disability classification was changed to other health-impairment (IHO Ex. II at p. 11). The December 2013 CSE emphasized the difficulties faced when evaluating the student, and noted that his private psychiatrist reported his diagnosis as being "still very unclear" (IHO Ex. II at p. 13).[3] The December 2013 CSE referred the student to the CBST for placement in a 12-month day program in a nonpublic school with individual and group counseling and individual and group speech therapy and the IEP indicated that ACS was attempting to find a residential placement for the student (id. at pp. 13, 18-19). The NYCDOE CSE further recommended that the student be provided home instruction in the interim (IHO Ex. II at pp. 18, 22).

The hearing record reflects that ACS transferred the student to the Robert J. McMahon Children's Center ("McMahon") in Nassau County on January 15, 2014 (Tr. p. 14; IHO Ex. II at pp. 3, 52-53).[4] The student was registered in the North Shore Central School District (North Shore) on February 6, 2014 and a North Shore CSE convened on March 6, 2014 to review the student's educational needs (Pet. Ex. Q at pp. 1-2). The March 2014 CSE determined that the student was eligible to receive special education services as a student with multiple disabilities and recommended a 6:1+1 special class placement, speech-language therapy and counseling services, with home instruction provided pending placement (id. at pp. 2, 3, 9).[5]

[3] Possibly due to the challenges faced in evaluating the student, the hearing record reflects that the student has received a variety of diagnoses, including: autism, severe mental retardation, anxiety disorder not otherwise specified, psychotic disorder not otherwise specified, receptive and expressive language disorders, and schizophrenia, catatonic type (IHO Ex. II at pp. 11-12). The student's performance on standardized educational tests yielded scores that were significantly below average in the areas of intellectual functioning, adaptive behavior, communication skills, academic skills, and social skills (IHO Ex II at pp. 11-13; Pet. Exs. Q at pp. 3-4; R at pp. 3-7; S at pp. 3-7).

[4] McMahon is part of the SCO Family of Services, an agency subcontracted by ACS (Tr. pp. 29-30; IHO Ex. II at p. 53). McMahon is described as providing a "24 hour comprehensive supervised therapeutic milieu, 24 hour direct care, psychological testing and counseling," and other services for students ages 5-21 who are developmentally disabled (IHO Ex. II at pp. 52, 55).

[5] The student's mother reported that evaluation reports did not accurately reflect the student's actual functioning and, to the contrary, she felt that the student was developmentally "normal" or had selective mutism (Pet. Exs. Q at p. 2; R at pp. 5-6). In contrast, the student's father, service providers, and other members of the CSE felt that evaluation results accurately depicted the student's level of functioning (Pet. Exs. Q at p. 2; R at pp. 5-6).

On May 15, 2014 the student was educationally placed at the Tyree Learning Center, a State-approved nonpublic school located on the same premises as McMahon (Tr. pp. 5, 33; IHO Ex. II at pp. 3, 55). At approximately the same time, the student underwent several evaluations including a May 2014 occupational therapy evaluation, a May 2014 psychological evaluation, a June 2014 educational evaluation, a July 2014 classroom observation, a July 2014 functional behavioral assessment (FBA), a July 2014 speech-language evaluation, and a July 2014 level one vocational assessment (Pet. Ex. R at pp. 3-5). A CSE at the Tyree Learning Center convened on July 21, 2014 and recommended the student for a 6:1+3 special class placement, group and individual counseling, and group and individual speech-language therapy (Pet. Ex. R at pp. 1, 16). On July 21, 2015 the CSE at the Tyree Learning Center convened for the student's annual review and recommended continuing the same special education program and related services as the previous year (compare Pet. Ex. S at p. 14, with Pet. Ex. R at p. 16).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 25, 2015, the parent alleged that the student had "no history of developmental disability" and therefore was placed in a school "that does not fit either of [two] IEPs done by [the district] (IHO Exhibit I at p. 2). The parent alleged that the student had received "no placement" for two years, despite being accepted to Westchester Exceptional Children's School (Westchester), and that ACS had kept the student "in an empty building for [four] months with a cleaning lady" (id.).

As relief, the parent requested that the student be immediately placed at Westchester, that his educational placement at Westchester continue for two years, through age 22, and that Westchester evaluate the student (IHO Exhibit I at p. 2).

B. Impartial Hearing Officer Decision

At a pre-hearing conference on September 30, 2015, IHO Michael K. Lambert raised the question of whether he had jurisdiction to review the appropriateness of the student's current placement and to direct a different placement, given the fact that the student was placed by the Family Court in the care and custody of ACS, who thereafter placed the student in a residential facility located in another district (Tr. pp. 15-18). The IHO directed the parties to address this question at the following hearing date (Tr. pp. 17-18).

An impartial hearing convened and concluded on October 5, 2015 (Tr. pp. 25-54). In a decision dated November 12, 2015, the IHO found that the student had been in the custody and control of ACS since "on or about June 20, 2012" (IHO Decision at p. 4). He further found that none of the documents submitted by the parent provided a basis for concluding that he had jurisdiction over the matter (IHO Decision at p. 4).[6] The IHO concluded that the student's current IEP was not developed by the district, but rather by North Shore (IHO Decision at p. 4).[7] The IHO

[6] The IHO found that although the parent's due process complaint notice indicated that for "an undetermined amount of time" the student was "within the jurisdiction of the Administration for Children's Services," additional documents submitted by the parent "failed to immediately reveal their relevancy to the jurisdictional issue" (IHO Decision at pp. 2-3).

[7] Although the IHO indicated it was unclear who prepared the student's current IEP, he noted that the parent acknowledged it had been prepared by North Shore, unsworn statements which the IHO held to have evidentiary

therefore concluded that he was "without jurisdiction to hear and decide challenges to the appropriateness of the Student's educational placement or to direct that such placement be changed in the manner requested by the parent" (IHO Decision at p. 4).

Furthermore, the IHO noted that he had requested that the parent provide him with a copy of a Family Court order that she had in her possession at the hearing (IHO Decision at p. 3). At the time he made the request to examine the Family Court order, the IHO stated the parent indicated it was not relevant and tore up all but the last page of the document and placed the pieces in her purse (IHO Decision at p. 3). The IHO found that the parent withholding the Family Court order in her possession and destroying it provided "an independent basis for the dismissal of the instant complaint" (IHO Decision at p. 4). Finally, the IHO held that even if he had determined he had jurisdiction to hear and decide the issues contained in the parent's due process complaint notice, he would nonetheless have dismissed the complaint "based upon the actions of the parent during the course of the October 5, 2012 hearing" (IHO Decision at p. 4).

IV. Appeal for State-Level Review

The parent appeals and challenges IHO Lambert's decision to limit the scope of the hearing to the jurisdictional issue and his decision to dismiss the due process complaint notice on that basis. The parent contends that the IHO disregarded "the preponderance of the evidence" and "refused to adjudicate the Due Process complaint."[8] Addressing the student's residential placement, the parent argues that the student's placement was "effected by [ACS] by consent of a…guardian ad litem appointed by Queens Family Court" appointed on August 27, 2013, extending ACS's jurisdiction over the student. The parent further asserts that the student's current residential placement is a community based program, specifically a foster family, agency boarding home, or a group home.[9] The parent maintains that the Family Court order requested by the IHO was properly withheld from his consideration.[10] The parent also raises several challenges with regard to the IHO's conduct during the impartial hearing.[11] As relief, the parent requests the following:

---

value (IHO Decision at p. 3). The IHO further found that, to the extent that the district played any role in the development of IEPs after the student was in the custody and control of ACS, "such action did not serve to provide the IHO with jurisdiction to modify the placement of [the] Student that had been directed by the Family Court" (IHO Decision at p. 4).

[8] The parent asserts that the district had enrolled the student, evaluated him twice, convened two IEP meetings, developed two IEPs, referred the case to CBST twice, obtained two school referrals, and one school acceptance for the student. The parent asserts that the Tyree Learning Center was the student's first educational placement in New York State. The parent asserts that the student remained in a mental hospital for nine months with no educational services, although she also acknowledges that he received home instruction through ACS.

[9] The parent further asserts that the student's current residential placement should not be considered a Child Care Institution, a Special Act School District, an orphan asylum, or a Residential Treatment Facility.

[10] The parent asserts that the document in question was withheld because it was confidential, irrelevant, and immaterial to the proceedings, but alleges that the IHO "repeatedly demanded" the document, that he lunged toward the petitioner, leaned over a table, reached toward the parent, and tried to take the document from her. The parent alleges that this behavior "constitutes assault." The parent states she made a slight tear to the document to discourage the IHO's "aggressive behavior," and afterward the IHO "stopped his physical assault."

[11] The parent challenges as inappropriate the manner in which the IHO handled the exhibits by shuffling them and referring to her submitted documentation collectively as IHO Exhibit II. The parent alleges that the transcript does not reflect several interruptions in recording, and that it was not made clear when the parties were on or off

payment for two 12-month school years in a private special education school, tutoring, related services of psychotherapy, speech-language therapy, art therapy, and other services deemed appropriate and additional relief as is deemed just and proper. The parent also reiterates her request for the student to be immediately placed at Westchester for the remainder of the 2015-16 school year, and an additional year at that school until he reaches age 23, as well as transportation from the student's residential placement.

In an answer, the district generally admits or denies the various allegations of the parent, and requests that the parent's petition be dismissed in its entirety. The district alleges that the parent lacked standing to file the original due process complaint notice, and asserts that the parent does not have custody of the student, but rather that the student is in the care and custody of ACS. The district alleges that the parent destroyed the Family Court order, making it impossible for the district to reference it and determine the current status of the parent's parental rights. The district asserts that it does not currently have the authority or ability to influence the student's educational placement. Finally, the district asserts that the parent's requests for compensatory education are not properly at issue, because they were not included in the due process complaint notice, and further asserts that the parent did not allege in her due process complaint notice that the district did not provide a FAPE to the student.

Upon preliminary review of the pleadings submitted in this appeal and the record developed by the parties before the IHO, I found that clarification of certain issues was necessary. The parties were directed to set forth their positions with respect to who was responsible for developing IEPs for the student and effectuating the student's educational program while the student was in the custody of ACS both before and after the student was placed in a residential facility. The district was further directed to identify its position with regard to the type of facility that the student was placed in and explain how the type of facility affects the district's responsibilities. Additionally, the parties were directed to address the role of the student's father in the student's education, and clarify to what extent the student's parents have had their parental rights subrogated, including the extent to which they may retain educational decision making authority.[12]

In response to these inquiries, the district acknowledges responsibility for the development and implementation of the student's educational program beginning on November 28, 2012, after the parent referred the student to the CSE for evaluation and when the student was hospitalized at Long Island Jewish Medical Center. The district asserts that its responsibility for development

---

the record. The parent also states that the IHO did not provide her with the opportunity to provide sworn testimony, despite repeated requests to do so, but that despite this she was referred to as a "witness" and her statements were considered to have had evidentiary value. The parent further alleges that the IHO was out of compliance by issuing his decision late and without the exhibits.

[12] The term "subrogated" is used in the IDEA to assist in explaining an exception to the requirement that parental consent be obtained prior to an initial evaluation, specifically where "the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law" (20 U.S.C. § 1414[a][1][D][iii][II][ccc]). Without defining the term "subrogated," New York has adopted the term for circumstances involving both parental consent and the need for the appointment of a surrogate parent (8 NYCRR 200.1[ccc]; 200.5[b][6][iii], [n][1][iii]). Accordingly, the term subrogated is used herein to conform to the applicable regulations in IDEA proceedings, despite the otherwise rare usage of the term in family law matters in this State (i.e. Family Court Act).

and implementation of the student's educational program ended on January 14, 2014, the point at which the district alleges the student was residentially placed by ACS outside of the district. The district further asserts that the student's current residential placement falls under the definition of a residential treatment facility for children and youth (RTF), under Mental Hygiene Law § 1.03(33), and the facility is thereby responsible for the provision of education and CSE functions. Finally, the district alleges that, upon information and belief, the student's father lives in Texas, and the student was temporarily removed from the mother's custody and placed with ACS by a Family Court order dated June 20, 2012. The district asserts that it is not aware of any subsequent order altering the custody of the student.

In response to the district's position, the parent disputes the period in which the district was responsible for developing and implementing the student's educational plan.[13] The parent alleges that the district's responsibility to educate the student began on June 6, 2012 and that the district is responsible for an alleged denial of FAPE from that date through the present.[14] Regarding the type of facility the student is residentially placed in, the parent alleges that the facility is neither a Child Care Institution (CCI) nor an RTF, and asserts that she brought a parallel due process proceeding against the North Shore Central School District in which IHO Mindy G. Wolman held, in an interim decision, that the residential placement is not a CCI and that North Shore is the appropriate respondent. Regarding her own parental rights, the parent asserts that she has educational decision-making authority, and that the district has not offered any evidence to the contrary. Regarding the student's father, the parent states that he has not been a party to the current proceeding, that he lives in Texas and refuses to communicate with the parent, and has not had his parental rights terminated or subrogated.

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

[13] The parent also disputes the district's statements with regard to the student's home instruction, and states that his home instruction began on May 20, 2013 and concluded on January 14, 2014.

[14] The parent bases this allegation on three assertions: first, that the student was enrolled in the district at the time he was transferred to McMahon; second, that timely action by the district could have prevented the current educational placement; and third, that the student's current educational placement is not appropriate and does not constitute the least restrictive environment for the student.

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).

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]).

A party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in

accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

VI. Discussion

A. Preliminary Matters

1. Standing

As a preliminary matter, challenges have been made to both whether the parent and whether the district are proper parties in this proceeding. Although framing the issue in terms of jurisdiction, the IHO questioned whether the district was the party against whom the parent's requested relief may be sought. On appeal, the district alleges that the parent lacks standing to have filed the due process complaint notice. I will address each contention below.

a. Petitioner's Standing as the "Parent"

The first question at issue is whether or not the student's mother is the appropriate party to bring a due process proceeding on behalf of the student. Specifically, the district asserts that the parent lacks standing to file a due process complaint notice on behalf of the student because she does not have custody of the student.

Under the IDEA and New York State law, a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531).. In addition to the student's natural parents, the term "parent" can include an adoptive parent, foster parent, guardian, an individual acting in the place of a parent with legal responsibility for the student, and an individual assigned as a surrogate parent (20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 8 NYCRR 200.1[ii]; see Fuentes v. Bd. of Educ., 569 F.3d 46 [2d Cir. 2009]; Fuentes v. Bd. of Educ. 12 N.Y.3d 309, 314 [2009]). However, if the student is a ward of the state, neither the state nor the public or private agency that provides for the education or care of the student may be considered a parent (20 U.S.C. § 1401[23][B]; 34 CFR 300.30[a][3]; 8 NYCRR 200.1[ii][4]).

In New York, the courts have held that although the IDEA provides for a range of individuals who may be considered a parent, it does not require that all such persons must be granted statutory rights (see Fuentes v. Bd. of Educ. of City of New York, 540 F.3d 145, 149 [2d Cir. 2008] Taylor v. Vermont Dep't. of Educ., 313 F.3d 768, 777-78 [2d Cir. 2002]). When confronted with situations where multiple individuals may meet the definition of a parent, courts have deferred to state law to determine who retains educational decision-making authority and statutory rights under the IDEA (Fuentes, 540 F.3d at 148; citing Taylor 313 F.3d at 779). Federal regulations have further clarified that when more than one party qualifies as a parent, the biological or adoptive parent is presumed to be the parent for purposes of exercising statutory rights under the IDEA, unless that individual does not have legal authority to make educational decisions for the student, or if a judicial order or decree specifically identifies another specific person as the parent or as having educational decision-making authority (34 CFR 300.30[b]; see also 8 NYCRR 200.1[ii][3]-[4]).

At the hearing in this case, the district presented no documentary evidence and the testimonial evidence of one witness, the Director of the Office of Educational Support and Policy Planning at ACS ("the ACS director"). The ACS director testified that ACS filed an abuse and neglect petition against the parents, also called an "Article 10 proceeding," in Family Court (Tr. p. 28). However, an Article 10 proceeding under the Family Court Act does not necessarily terminate a parent's parental rights altogether—rather, it is designed to provide due process of law for determining when the State "may intervene against the wishes of a parent on behalf of a child so that his needs are properly met" (Fam. Ct. Act § 1011).

The ACS director testified that in order to comply with "Social Service Law and confidentiality provisions" she was prevented from disclosing the circumstances that led to the student's removal from the parent's custody, however she explained that the student had been placed in the care and custody of ACS due to a finding of imminent risk to the child by the Family Court (Tr. p. 28). However, the director was not asked and did not address to what extent the parent's rights had been subrogated, or whether the parent retained any rights with regard to educational decision-making (id.). Furthermore, the comments attached to the March 2014 North Shore IEP indicate that the student's "mother and father have not had their legal parental rights terminated and so their consent for educational purposes is required" (Pet. Ex. Q at p. 2). Finally, the district acknowledges that because it could not reference the most recent Family Court order, the district could not "determine the exact nature of the Parent's legal relationship with the student" (Answer ¶ 21). The district thereby acknowledges that it has, so far, been unable to provide documentary evidence to challenge or identify the legal relationship between the student and the parent. The district has, therefore, failed to present evidence sufficient to overcome the presumption that the parent is a parent within the meaning of the IDEA (34 CFR 300.30[b][1]-[2]; see also 8 NYCRR 200.1[ii][3]-[4]). The fact that a student is in the physical custody of ACS due to an Article 10 proceeding does not, standing alone, create an evidentiary presumption that the parent lacks the ability to participate in the IDEA evaluation and planning procedures or educational decision making authority. At best, it establishes a compelling reason to clearly identify the contours and boundaries of the parent's rights to information, participation, and educational decision making. As the available evidence in the record is inadequate to reach a conclusion regarding the parent's legal rights with respect to educational decision-making, the district's argument that the parent does not have standing to file a due process complaint notice on behalf of the student must be rejected at this juncture and the matter remanded to an IHO to make further evidentiary findings regarding the parent's rights. Additionally, should the IHO conclude that the parent does have standing to have brought this proceeding on behalf of the student, the IHO must then determine the district's responsibility during the various time periods at issue and what relief may ultimately be warranted and available.

b. The Respondent District's Responsibility to Provide Services

I next turn to the issue upon which IHO Lambert relied in finding that he lacked jurisdiction, whether any relief is available against the district after the student was placed outside of the district by ACS. In making his determination, it appears that the IHO only considered the parent's request to change the student's educational placement from Tyree to Westchester; however, as discussed further below, the parent's due process complaint notice is also broad enough to include a request for compensatory education to address an alleged failure on the part of the district to provide the student with an educational placement prior to the student being placed outside of the district by ACS. In addition, as the district acknowledged responsibility for

developing an IEP and effectuating the student's program for the period beginning on November 28, 2012, through January 14, 2014 (District February 10, 2016 Submission at pp. 1-2), and the parent has challenged the district's provision of a FAPE during that period as further discussed below, the parties should be provided with the opportunity to develop a record on the substance of the parent's claims with respect to that time period (again assuming that the IHO concludes that the parent has standing). Accordingly, remand of this matter for further proceedings is required. However, a number of initial matters can be resolved at this juncture, such as the manner in which the proceeding has been conducted and the issues presented in the due process complaint notice. Additionally, given the complex factual and procedural nature of this proceeding, further discussion of some of the issues being contested, including the district's responsibilities after the student was placed outside the district, may be of some assistance the IHO in both identifying the parties' claims and defenses and the resulting questions that may need to be addressed in order to adequately resolve this matter.

2. Timelines of the Impartial Hearing

The parent asserts that the IHO failed to comply with the timelines for conducting a due process hearing. An IHO "may not accept appointment unless he or she is available . . . to initiate the hearing within the first 14 days" following written receipt of the parties' waiver of the resolution period; written confirmation that the parties did not resolve their dispute through resolution or mediation; expiration of the 30-day resolution period; or 14 days after written notification that a party has withdrawn from mediation (8 NYCRR 200.5[j][3][i][b], [iii][b]). Parties may request a specific extension of time that the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). An IHO may grant a request for a specific extension of time orally so long as "discussions are conducted on the record" and the IHO's decision is "provide[d] . . . in writing and include[d] . . . as part of the record" (8 NYCRR 200.58[j][5][iv]).

The IHO was appointed on July 28, 2015, there is no indication that extension requests were requested or granted, and a pre-hearing conference did not take place until September 30, 2015 (Tr. p. 1; Pet. Ex. L). There is also no indication in the hearing record that the parties agreed to extend the resolution period. As the parent filed the due process complaint notice on July 25, 2015 (IHO Ex. 1), the 30-day resolution period expired on August 26, 2014, and a pre-hearing conference or hearing should have been initiated by September 7, 2015 (see 8 NYCRR 200.5[j][3][i][b], [iii][b]).[15] Documentation that establishes compliance with the timelines should appear in the administrative hearing record, and in this instance it appears, based upon the available information in the hearing record, that the IHO was not compliant with the applicable timelines for commencement of the impartial hearing, especially in the absence of any written documentation entered into the hearing record that the parties requested and the IHO granted an extension of time. I caution the IHO to comply with applicable timelines for convening and completing impartial hearings or, if permissible extensions of the timeline were granted, that the attendant documentation requirements in the administrative record are adhered to.

[15] As the due process complaint notice was filed on a Saturday and the parent counted the 30-day resolution from the following Monday in her petition, the same computation is made herein (Pet. ¶32); however, for purposes of this decision, I need not resolve the question of whether the timeline commenced on that Saturday or the following Monday.

3. Conduct of Impartial Hearing

In addition to dismissing the parent's due process complaint notice for lack of jurisdiction, the IHO found the parent's conduct during the hearing to be an independent basis for dismissal. In particular, the IHO found the parent's withholding of a Family Court order from the IHO during the hearing warranted dismissal of the proceeding on its own (IHO Decision at p. 4). The parent contends that the IHO's actions were improper, and asserts that the IHO attempted to "snatch" the Family Court order from her hands (Pet. ¶44).

During the IHO and parent's interactions regarding the Family Court order, the transcript indicates that the parent mentioned the order while reviewing her documents, the IHO asked to look at the order, the parent refused indicating that the order was not relevant because it did not address the student's education, and the parent tore and returned the document to her purse—except for one page, which the parent provided the IHO and the IHO returned to the parent (Tr. pp. 44-50). The transcript also indicates that the IHO went off the record when the parent began to read the one page of the document into the record and that the IHO reviewed the parent's documents (not including the Family Court order) while off the record (Tr. pp. 47-48).

Although admission of the Family Court order into evidence may have helped clarify or even resolve the issue related to the parent's standing to initiate this proceeding, the there is no indication appearing anywhere in the record that the IHO warned the parent that her failure to turn over the document could result in the sanction of outright dismissal of her due process complaint notice (see, e.g., Tr. pp. 45-50). Accordingly, even considering that an IHO has the authority to ask questions of counsel or witnesses to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]) and the broad discretion granted to IHOs in conducting impartial hearings, I find that the IHO's reasoning in decision finding that the sanction of dismissal of the parent's due process complaint notice was warranted based on the parent's refusal to turn the order over during the hearing was, in the absence of any prior warning, an improvident exercise of his authority. Additionally, as it is the district's assertion that the parent lacks standing, it is incumbent on the district in the first instance to bring forth the evidence to support its claims (testimonial or otherwise), or in the event it is unable to do so, the district may seek to compel the production of the Family Court order from the parent or possibly another governmental agency through the subpoena process.

The parent asserts that the interaction involving the Family Court order and the IHO's decision to dismiss her due process complaint notice on jurisdictional grounds are indications of bias on the part of the IHO. 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. 12-066). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings 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 Student with a Disability, Appeal No. 12-064).

In this case, the parent's action of tearing up the order after the IHO made a reasonable request to examine it was no doubt a frustrating moment for the IHO, and as described above, the IHO could have taken a better course of action regarding the production of the Family Court order; however, it does not appear from the hearing record that the manner in which the IHO conducted

the hearing provides a basis to find that the IHO acted with bias (Tr. pp. 45-50). In addition, although the IHO ultimately dismissed the parent's due process complaint notice based on jurisdiction, he provided the parties the opportunity to present their positions on that issue before rendering his decision (Tr. pp. 15-18, 28-29, 37-38, 51-53). To the extent that the parent disagreed with the conclusions reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by an IHO (see Application of a Student with a Disability, Appeal No. 13-083; Application of a Child with a Disability). Examination of the hearing transcript also reveals many instances in which the parent improperly talked over the IHO. The parent is reminded that the IHO in a due process proceeding is vested with broad discretion when conducting the proceeding, and she should comply with all reasonable directives of an IHO, regardless of whether or not she personally agrees with them. Overall, an independent review of the hearing record demonstrates that the parent was provided with a reasonable opportunity to address the question of jurisdiction at the impartial hearing, and the hearing on that issue was conducted in a balanced manner that did not offend requirements of due process (see 34 CFR 300.512; 8 NYCRR 200.5[j]).

4. Scope of Impartial Hearing

Prior to identifying some of the questions that must be addressed on remand, I will first identify what claims are properly raised. In her petition, the parent requests a variety of compensatory awards to remunerate the student for an alleged deprivation of FAPE. The district contends that the parent's due process complaint notice did not include an allegation that the district failed to provide a FAPE to the student, and further argues that the parent did not request compensatory education.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]).

As recently noted in N.K. v. New York City Department of Education, 2016 WL 590234, at *4-5 (S.D.N.Y. Feb. 11, 2016)"[r]eading a complaint over-broadly also hinders the district's ability to prepare for a hearing, and may expand the district's burden of proof improperly." Furthermore, "[w]hile there is some room for latitude, the issues at the hearing are generally confined to the 'problem' raised in the complaint" (id. at *5). However, "the waiver rule is not to be mechanically applied" and "the IDEA itself contemplates some flexibility" (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 78 [2d Cir. 2014])).

In this matter, the district alleges that the parent's due process complaint simply alleged that the student's current educational placement does not match previous IEPs developed by the district and only requested the student be transferred to Westchester. The district's view is inconsistent with a reasonable reading of the due process complaint notice. In addition to the

language noted by the district, the parent's due process complaint notice asserts that the district drafted two IEPs for the student, who had "no placement for 2 years," that the student was "denied placement," and that the student was kept "in an empty building for 4 months with a cleaning lady" (IHO Ex. I at p. 2). The basis for these claims is not entirely clear (in particular the allegations that the student was "denied placement" and was "kept in an empty building" may relate to the period after the student was placed outside of the district by ACS); however, the allegation that the student was denied placement for two years is sufficient to place the district on notice that the parent challenged the district's provision of a FAPE to the student. Furthermore, in addition to immediate placement at Westchester, the parent requested that the student's "placement should be for [two] years, to age 22" (id.). While it is clear that the parent did not enumerate in her due process complaint notice the specific forms of compensatory relief she details in her petition, she did place the district on notice that she was seeking an additional year of education for the student to compensate the student for an alleged failure to provide an educational placement.[16] Considering the circumstances of the case, that the parent proceeded pro se and the IHO only permitted the hearing to proceed to the point of considering jurisdictional questions, I find that the parent is entitled to some latitude in the interpretation of her due process complaint notice, and that the district had "fair notice" of the parent's allegation the student was denied placement, for which compensatory education was a potential remedy (see C.F. ex rel. R.F. v. New York City Dept. of Educ., 746 F.3d 68, 78 [2d Cir. 2014]). Accordingly, in the event the IHO finds the parent has standing to bring this proceeding and, after a hearing on the merits, concludes that the district failed to offer the student a FAPE , the IHO may proceed to determine an award of appropriate compensatory relief (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]).

B. The Matters on Remand

1. Issues Relating to the Parental Rights of the Natural Parents

a. The Student's Mother as a Non-Custodial Parent

There remain a variety of issues with which the IHO must grapple, the first of which is the status of the parent as the petitioner in this proceeding. While, as discussed above, there is insufficient information in the hearing record to support finding that the parent lacks standing to proceed, the hearing record does provide a basis for concern regarding the parent's right to control educational decisions on behalf of the student. The lack of evidence in the hearing record places the IHO in the unenviable position of creating one of two possible unjust outcomes. In the first hypothetical, where the parent has had her right to make educational decisions subrogated by the Family Court and it is not made apparent during the proceedings, the IHO could possibly grant the parent relief on behalf of the student without her having the authority to represent his interests, or possibly even against his interests. Alternatively, a dismissal of the parent's due process complaint

[16] The district also cites to the "gross violation of the IDEA" standard, requiring denial of or exclusion from educational services for a substantial period of time (Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]). As the parent is requesting compensatory services to be provided after the student's eligibility for services will have expired, a "gross violation" standard may be appropriate; however, the parent's allegation that the student went as much as two years without an educational placement or services would amount to a gross violation, if found to be true.

notice, if she retains some educational decision-making authority, could unjustly penalize the student by denying a claim for relief brought by an appropriate party. Given the unusual nature of these circumstances, the IHO should carefully consider the following in analyzing the parent's claims on remand.

The district asserts that the student is in the custody of ACS, not the parent, and alleges that because of this shift in custody, she does not have standing to bring this appeal. Although the parties' have not presented any cases where this issue has been directly addressed, courts have grappled with disputes over educational decision making between parents navigating the process of divorce or separation. Pertinently, in Fuentes v. Board of Education of the City of New York, 12 N.Y.3d 309, 314 (2009), the Court of Appeals distinguished between a noncustodial parent's right to "participate" in the student's education and the right to "control" that education and held that "unless the custody order expressly permits joint decision-making authority or designates particular authority with respect to the child's education, a noncustodial parent has no right to 'control' such decisions."[17] Additionally, in Taylor, 313 F.3d at 779, the Second Circuit found that allowing all of the persons listed as possible parents under the IDEA to possess standing to bring a claim under the IDEA until their parental rights are permanently revoked would produce the "absurd result that natural parents, guardians, and persons acting in the place of a parent may *all* exercise the same rights under the IDEA simultaneously." However, unlike in Fuentes and Taylor, which dealt with the competing interests of divorced parents, in this matter, if ACS is found to have exclusive custody and control over the student's educational decision-making, there would be no apparent party who would have the authority to bring a proceeding under the IDEA on behalf of the student. ACS cannot act as the student's parent as "a public agency that provides education or care for the student, or a private agency that contracts with a public agency for such purposes, shall not act as the parent" (8 NYCRR 200.1[ii][4]).

The IDEA includes procedural safeguards "to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents" (20 U.S.C. § 1415[b][2]A]; see 8 NYCRR 200.5[n]). In determining the need for a surrogate parent, State regulations provide that a board of education shall appoint a surrogate parent "in order to ensure that the rights of a student are protected if… the student is a ward of the State and does not have a parent as defined in section 200.1(ii) of this Part or the rights of the parent to make educational decisions on behalf of the student have been subrogated by a judge in accordance with State law" (8 NYCRR 200.5[n][1][iii]). Accordingly, the regulations allow for a scenario where the student may be a ward of the state, but the student's parent may still retain educational decision-making authority (see 8 NYCRR 200.5[n][1]) Therefore, a fact specific inquiry must take place to determine whether the parent's rights to make educational decisions have been subrogated. If they have not, the parent has the right to maintain this proceeding on behalf of the student, and if they have, the board of education must take steps to ensure that the

[17] "Displeased with the outcome of his original action," the same noncustodial parent in Fuentes filed another action, and the District Court acknowledged that there is a possible unfairness in excluding a noncustodial parent from educational decision-making, but ultimately held that "[t]he easiest solution, where a state court has already given custody and decision-making authority to one parent, is for a school administrator or teacher to trust that the custodial parent will act on behalf of the child, and exclude the non-custodial parent from interfering with the custodial parent's decision-making [sic]" (Fuentes v. New York City Dep't of Educ., 2012 WL 1078779, at *5 [E.D.N.Y. Mar. 30, 2012]).

rights of the student are protected.[18] Appointment of a surrogate parent is one way of ensuring the rights of the student are protected; however, others, as discussed below, may include directing the district to contact the student's father and/or the guardian who was appointed to represent the student's interests in the Family Court proceeding.

b. The Student's Natural Father

In her supplemental submission, the student's mother asserts that the student's father is not a party to this proceeding, resides out of the State, and is an "abandoning" parent who will not respond to her attempts to contact him (Parent February 16, 2016 Submission at p. 5). Notwithstanding the mother's assertion, the available information at this juncture leads to the conclusion that it is premature to discount the student's father. According to the documents proffered by the student's mother, the student's father has been involved with the development of the student's IEPs at least by telephone, and the documents suggest that he may not agree with the mother's position with regard to descriptions of the student's level of functioning (Pet. Exs. Q at p. 2; R at pp. 5-6; S at p. 1). Additionally, the mother asserts that the student's father was not a party to the Article 10 proceeding in Family Court, and that his rights have not been terminated or subrogated (Parent February 16, 2016 Submission at p. 5).

In the event that the mother's rights over educational-decision making have been subrogated, inquiry as to the father's legal rights regarding control over the student's education may be appropriate. For example, in Navin v. Park Ridge School District 64, 270 F.3d 1147, 1149 (7th Cir. 2001), the Seventh Circuit held that the rights of a noncustodial parent should be balanced against the preferences of the custodial parent and in the event that they are compatible, the noncustodial parent would be permitted to proceed. Here, although the student's father does not have physical custody over the student, he may retain some rights with respect to making educational decisions. Accordingly, it is incumbent upon the district to notify the father of the proceedings regarding the student, and in attempting to navigate the minefield of rights and obligations in this case, it may behoove the IHO to seek the father's input on the record to ascertain if he is willing to authorize the production of information regarding the child's custodial situation and if he is in favor of, indifferent, or opposed to the mother's course of action in initiating the impartial hearing. Additionally, if the father's viewpoints differ from the mother, the IHO may inquire in what ways the parents differ, and whether such differences pose a fundamental conflict between the parents in educational decision making.

c. Guardian ad Litem

The student's father is not the only person who may ultimately be found to have rights or responsibilities regarding the student's education. For instance, in her submission on appeal, the parent indicates that the student had a CPLR Article 12 guardian ad litem appointed by the Queens Family Court on August 27, 2013, one month prior to the student's eighteenth birthday (Parent Mem. of Law ¶43). The parent indicates that "[r]esidential placement was effected by [ACS] by consent of a CPLR Article 12 guardian," an act which the parent asserts was not appropriate and is under appeal (id.). The parent also asserts that the student does not have a guardian of the person

[18] As set forth in Fuentes, 12 N.Y.3d at 314, even if the parent is a noncustodial parent and lacks control over the student's educational decisions, the parent may retain some rights to request information and otherwise remain involved in the student's educational progress.

appointed under the Mental Hygiene Law (id.). Although the hearing record does not include a copy of the Family Court order appointing a guardian and the parent's pleadings do not specify the guardian's powers or duties, it is possible that the guardian may have been granted some educational decision-making authority on behalf of the student.

Additionally, after considering the points above, the IHO may find it necessary to appoint a guardian ad litem for the purposes of representing the student's interests in the due process proceedings. An impartial hearing officer is empowered to appoint a guardian ad litem; "[i]n the event the [IHO] determines that the interests of the parent are opposed to or are inconsistent with those of the student... the [IHO] shall appoint a guardian ad litem to protect the interests of such student" (8 NYCRR 200.5[j][3][ix]). State regulation defines a guardian ad litem as "a person familiar with the provisions of [8 NYCRR Part 200] who is appointed from the list of surrogate parents or who is a pro bono attorney appointed to represent the interests of a student in an impartial hearing . . . [who] shall have the right to fully participate in the impartial hearing" (8 NYCRR 200.1[s] [emphasis added]). Thus, State regulation expressly contemplates that the IHO has the authority to appoint a guardian ad litem to protect the interests of the student during the impartial hearing. This provision supports the objective of ensuring that a student's rights are adequately represented during an administrative due process proceeding.

The IHO, after considering the positions of the various parties interested in the student's education, as discussed above, must determine whether the student's interests are adequately being represented. Although it would not be appropriate at the juncture of this appeal to make any substantive findings with respect to the student's levels of performance, it should be noted that the parent's position with respect to the student's abilities and level of functioning is in stark contrast with the information provided in the student's March 2014 IEP (see Pet. Ex. Q at p. 2). This vast discrepancy between the parent's estimation of the student's abilities and the evaluative information available during the hearing may be one factor to consider in determining whether the student's interests are adequately represented by the parent. Other factors may include, whether the students' parents are in agreement as to his needs, whether another party (such as a surrogate parent or guardian) has already been appointed to represent the student's interests, as well as the specific allegations raised regarding the district's alleged failure to provide the student with services and the relief sought to rectify the alleged failure.

2. District's Obligations Regarding the Provision of FAPE

a. Period During Which Student was Placed Within the District

Having addressed some of the preliminary concerns, I next turn to the relief requested by the parent, and the related issues which must be addressed on remand. The district alleges that the parent is prohibited from requesting compensatory relief. For the reasons detailed above, a hearing should take place to determine first, whether the student's mother has standing, then, if so, whether the district provided the student with a FAPE for the period that the district was responsible for developing the student's educational program and, what type of compensatory relief would be appropriate if it is determined that the district did not provide a FAPE to the student.

As an initial matter, the IHO must determine the appropriate time period. The parties are in agreement that the district was responsible for developing and implementing the student's IEP for times relevant to this proceeding. The district contends its responsibility began on November

28, 2012, and continued through January 14, 2014. The parent disagrees, contending the district's duty began on June 2, 2012, and continues through the present. The IHO must therefore make factual findings determining the district's obligations during the periods June 2 through November 28, 2012 and January 2014 through the present, and whether the services provided during the entire period that the district was responsible for the student's education constituted a FAPE.

During the hearing, the documentary or testimonial evidence should be produced to clarify when the student was first referred to the district for special education programs and services, when the district should have been aware of the student's needs prior to referral, when the student's initial evaluation was conducted, when the student's first IEP was developed, if and when the student's IEPs implemented, whether the April 2013 IEP was finalized or implemented, what services the district provided to the student with during the period(s) in question, including whether the student received home or hospital instruction while in the custody of ACS, whether there was undue delay in the CSE process, and why the student was not placed in an approved private school as recommended by the April 2013 CSE.

b. Placement in a Residential Facility Outside of the District

Throughout the proceedings, the parent has requested that the district immediately remove the student from his current educational placement, and place him at Westchester. The district alleges, and the IHO agreed, that once the student was physically placed in a residential facility outside of the district, the district no longer had control or authority over the student's educational placement. The parent's primary argument that the district has control and authority over the student in order to grant the relief requested rests on her allegations that the student resides in a community-based non-restrictive setting, that the district is responsible for development of the student's IEP, and that the district is ultimately financially responsible for the student's education.[19]

The parties dispute the classification of the student's current residential placement, and how that impacts the district's responsibility to educate the student. The parent asserts that the student is housed in a community based program, with a foster family, in an agency boarding home, or a group home. The parent contends that the placement is not a CCI. The district, by contrast, alleges in their supplemental submission that the student's placement should be considered an RTF.[20] However, the parent does not appear to realize or at least grapple with the distinction between the district's statutory responsibility to fund the student's education, and the responsibility to provide

[19] The parent makes several additional assertions as an apparent basis for her belief that the district has continuing control and authority over the student, including that he was previously enrolled there, that the district evaluated him twice, convened two IEP meetings, developed two IEPs, referred him to the CBST on two occasions, and obtained two referrals to schools and one acceptance. However, as the student has been residentially placed outside of the district by ACS and the parent does not appear to have the authority to physically move the student back into educational programs that are programmatically conducted by or contracted through the district, the parent has not identified how these facts might be relevant to a discussion of whether the district currently has the responsibility for or even the ability to influence the educational programming for the student after ACS placed the student at McMahon and the student began receiving an educational services at Tyree. Even assuming that at some future point in time the student's mother were to become successful in her judicial appeal seeking to overturn the order of the Family Court, until such time the administrative authorities would be required to act consistently with the authority vested with the Family Court.

[20] The definition of a child care institution (CCI) is inclusive of a residential treatment center for children and youth (RTF) (Educ. Law § 4001[2]).

for and ability to exert control over the student's educational placement and services. In fact, under each of the classifications discussed by the parties, the district, as the district where the student resided at the time of placement, is not responsible for the development and implementation of an educational program for the student, (see "Education Responsibilities for School-Age Children in Residential Care," at pp. 6, 8-9, 17-20, 24-25, 27-28, 47-48, Office for Special Educ. Servs. [Jan. 2000], available at http://www.p12.nysed.gov/specialed/publications/EducResponsSchoolAgeResidence.pdf). Rather, the district in which the residential facility is located, or the facility itself, bears responsibility for the development and implementation of the student's educational program (id.). This holds true whether the facility is considered to be a community-based residence consistent with the parent's assertions, a CCI, or an RTF (see Educ. Law §§ 3202[4]; 4002[3], 4005[2][a]). Regardless of which of these frameworks the student's residential facility is analyzed under, either the district of location or the facility itself is responsible for the development and implementation of the student's program (id.). However, the district may not be absolved of all responsibilities with respect to the student's education. If the facility is in fact a CCI or RTF, as alleged by the district, the district would have born the responsibility for evaluating the student and holding an initial CSE meeting to determine the student's eligibility for special education and making a written recommendation for appropriate educational services (Educ. Law §4005[1][b],[d]). In addition, if the student was placed in a CCI or RTF, the district of origin, retains some financial obligations for the provision of the student's education, and the CSE of the district of origin is entitled to receive a copy of the student's annual IEP (Educ. Law §§ 4004[2][a], 4005[2][a],[iv]). Accordingly, while the role of the district of location (or the facility) in developing and implementing the student's program is well defined, the role of the district of residence and district of origin is not as certain. Considering the potential fiscal responsibilities and right to continuing information regarding the student's program recommendations, those districts are not completely relieved from being involved in the student's education. On the other hand, the relief requested by the parent, immediate transfer of the student to an approved private school, is outside of the reach of the district at this juncture and the IHO was correct in finding that he did not have the authority to order the district change the student's educational placement. Nonetheless, on remand the IHO should address the nature of the facility in which the student was placed in order to better determine the party currently responsible for the development and implementation of the student's IEP, especially if it is determined that the student is owed compensatory education by the district.

In consideration of the importance of determining the party responsible for developing and implementing an IEP for the student, in a supplemental submission, the parent included an IHO decision from an impartial hearing based on a due process complaint she filed against North Shore on October 21, 2015 (Parent February 16, 2016 Submission Ex. C). In that decision, IHO Wolman denied the district's motion to dismiss the due process complaint notice against North Shore, finding that a determination as to whether or not the residential facility was a CCI or another type of facility was a factual dispute requiring a hearing and ordered that the hearing would proceed (id. at pp. 7-8). As an impartial hearing is currently proceeding with the parent an North Shore, or may have already taken place, regarding the issue as to the type of institution the student is placed in, and as the impartial hearings in the two proceedings may include overlapping issues and facts, remand to IHO Wolman serves the interests of expediency and judicial economy as she can be brought up to speed most quickly in light of the scant factual record in this case . IHO Wolman would be accorded the discretion to determine whether to hear this matter in parallel with the other proceeding, to conduct a joint hearing with separate timelines on each due process complaint

notice, or to consolidate this matter into the North Shore proceeding and issue a single decision, but regardless, it would be best, if at all possible, for a single IHO to hear both cases.

VII. Conclusion

This case raises factual and legal issues that are neither frequently nor easily grappled with, and illuminates some of the limitations of the administrative due process system when multiple authorities and jurisdictions are involved. The questions raised when a non-custodial parent asserts the right to plan for the student's education are complicated and require a balancing of the parent's interests along with what is in the best interests of the student. This situation is further complicated by a limited record as to the both the rights of the parent with respect to control over the student's education and the responsibilities of the district in evaluating the student and developing and implementing an educational program. In this case, the record was not sufficiently developed to ascertain the parties' rights and responsibilities and therefore, this matter must be remanded in accordance with the guidelines and directives set forth above.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 12, 2015 is modified, by reversing those portions which determined that the IHO lacked jurisdiction to hear the parent's claims generally, except for the determination that the IHO could not order the district to change the student's educational placement going forward, and those portions which found the parent's actions during the hearing provided an independent basis for dismissal of the proceeding;

IT IS FURTHER ORDERED that the matter is remanded to IHO Mindy G. Wolman to determine whether to have a joint hearing or to consolidate this matter with the parent's due process complaint notice filed on October 21, 2015 against the North Shore Central School District;

IT IS FURTHER ORDERED that if IHO Wolman is either unavailable or declines to hear this matter, this matter shall be remanded to IHO Michael K. Lambert.

Dated: **Albany, New York**
March 18, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER