The University of the State of New York

The State Education Department
State Review Officer
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No. 17-039

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

Appearances:
Guercio & Guercio, LLP, attorneys for respondent, Randy Glasser, 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 granted respondent's (the district's) motion to dismiss the parent's due process complaint notices, dated May 23, 2016 and August 18, 2016, with prejudice. The appeal must be sustained, and for reasons explained more fully below, this matter must be remanded to the IHO for further administrative proceedings.[1]

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

[1] In September 2016, Part 279 of the Practice Regulations was amended, which became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although most of the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

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[a]). 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 this case, the student first received special education programs and related services through the Early Intervention Program (see generally Dec. 16, 2016 Tr. pp. 850-51; Dist. Exs. 3

at p. 1; 28-32; 98).[2, 3, 4] On June 5, 2014, a Committee on Preschool Special Education (CPSE) convened for an initial eligibility determination and annual review meeting and found the student eligible for special education and related services as a preschool student with a disability (see Dist. Ex. 3 at pp. 1-3). Generally, for both the 2014-15 and 2015-16 school years—as well as summer 2015 and summer 2016—the student attended the same preschool location in a 6:1+2 special class together with school-based related services of speech-language therapy (four 30-minute sessions per week) and occupational therapy (OT) (four 30-minute sessions per week) and the following home-based related services: speech-language therapy (two 30-minute sessions per week), OT (two 30-minute sessions per week), special education itinerant teacher (SEIT) services (five 120-minute sessions per week), and parent counseling and training services (see generally Dist. Exs. 3-15; 17-18; 20-27; 34-96; 99; 100-01; 104-07). In preparation for the 2016-17 school year, a CPSE convened on February 1, 2016 to conduct the student's annual review and to develop an IEP for summer 2016 (see Dist. Exs. 17 at pp. 1-2, 10; 18 at pp. 1-2, 13).[5]

A. Due Process Complaint Notice

By due process complaint notice dated May 23, 2016 (May 2016 due process complaint notice), the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the "last [two] years due to a lack of meaningful progress, instructional control and direct related services" (Dist. Ex. 1 at p. 4).[6, 7] Initially, the parent alleged that the district failed to provide the student with "much needed" services (id. at p. 3). As one example,

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[2] The transcripts in the hearing record were not consecutively paginated throughout the entirety of the impartial hearing. Therefore, for ease of reference, the impartial hearing date will precede the transcript page citations in order to identify the relevant testimony.

[3] In March 2013, the student received a diagnosis of pervasive developmental disorder-not otherwise specified (PDD-NOS) (see Dist. Ex. 30 at p. 2).

[4] It appears from the evidence in the hearing record that the student began attending a "full day special education program five days a week" from 9:00 a.m. until 3:30 p.m. in February 2014 (Dist. Ex. 29 at p. 1). The student's preschool classroom used "applied behavior analysis (ABA) and perform[ed] discrete trials during the first half of the day" (id.). During discrete trials, the student's class consisted of "eight students, eight assistants, and the lead teacher" (id.). For the afternoon, the student's class consisted of "eight students, [the lead teacher], and three assistants" (id.). The student also received the services of a "one to one aide throughout the entire day" due to her "aggressive behaviors (i.e. biting of herself and others)" (Dist. Exs. 29 at p. 1; 30 at p. 1). During the school day, the student also received related services of speech-language therapy (two 30-minute sessions per week) and occupational therapy (OT) (two 30-minute sessions per week) (see Dist. Ex. 30 at p. 1). Additionally, the student received one session per week of home-based OT, as well as home-based parent training and counseling (id.).

[5] The hearing record includes approximately 17 IEPs generated for the 2014-15 and 2015-16 school years (including summer 2016) documenting annual reviews, program reviews, and modifications made to the student's IEPs via amendments without meetings (see Dist. Exs. 3-15; 17-18; 100-01). For example, on April 20, 2016, the student's IEP was amended without a meeting to add "uninterrupted [OT] and Speech/Language services at home during school breaks to prevent substantial regression" (Dist. Ex. 12 at p. 1). In addition, the same IEP amendment allowed the student to receive "make-up services . . . on weekends and evenings up to 8:00 pm when necessary" (id. at pp. 1-2).

[6] Unless otherwise noted, the term "parent" used throughout this decision refers solely to the student's mother.

[7] The parent incorporated the student's February 1, 2016 IEP into the May 2016 due process complaint notice (see Dist. Ex. 1 at pp. 7-18).

the parent noted that when she requested home-based ABA services at the student's "transition meeting" for the receipt of preschool services, the CPSE informed her that "it would be impossible or illegal to provide" such services (id.). As a result of receiving this information, the parent asserted that the district and "county representative" provided her with "intentionally misleading" information, which "negatively impacted" the student (id.). Similarly, the parent alleged that the CPSE denied her requests for increased levels of related services (i.e., speech-language therapy, OT, and "1:1 ABA therapy during the school day") for the student based upon a "lack of staffing in the [preschool] program" (id.). The parent further characterized the student's "IEP" as "deficient" because it failed to address the her "individualized" needs and "deficits" (id.). As an example, the parent alleged that the CPSE denied her request for the services of a "1:1 SEIT" within the school-based program because the "program would not allow or supply a 1:1 SEIT" and further informed the parent that if the student required "such supports," the parent would need "to seek out a new program" (id. at pp. 3-4).

Turning more specifically to the issue of related services, the parent asserted that the CPSE failed to "properly supply needed related services and proper instruction . . . based on the severity of the student's disability" (Dist. Ex. 1 at p. 4). Describing the student as "non-verbal with no functional language," the parent alleged that she requested that the student receive five 30-minute sessions per week of speech-language therapy (id.). The parent further alleged, however, that the CPSE denied this request—as well as her request for the student to receive five 30-minute sessions per week of OT—because "programmatically it [was] not possible" to offer this level of related services at the preschool (id.). According to the May 2016 due process complaint notice, the parent was informed that "related services [were] capped for all preschool students" because therapists "must have a day during the week to provide make-up sessions for student who missed a regularly scheduled session during the week" (id.).

Next, the parent alleged that the district failed to offer the student a FAPE due to its failure to fully implement the student's home-based services (see Dist. Ex. 1 at p. 5). Here, the parent asserted that the student received home-based ABA through one agency from November 2014 through June 2015, but "accrued a total of 140 missed hours" (id.). When another agency began providing services in August 2015, the parent alleged that a "gap in home service [occurred] at this time" (id.). The parent also alleged that the student "amassed in excess of 58 hours" from August 2015 through May 2016 (id.). According to the May 2016 due process complaint notice, the parent received misleading information from district and county personnel—which "negatively affected [her] child"—when they advised her that "absences due to the child d[id] not have to be made up" (id.). The parent indicated that based upon information provided to her by the district, the hours "still owed" to the student would "expire August 31, 2016 due to billing difficulties" (id.). Consequently, the parent requested an order from the IHO directing the district to provide the student with "all owed hours and compensatory hours for the failure to timely deliver services and make up services" (id.).

With respect to summer services, the parent alleged that the district denied her request for a "summer program longer than 6 weeks" because "all summer programs [were] 6 weeks" and longer programs were not available (Dist. Ex. 1 at p. 5). The parent asserted that the summer services and program did not "appropriately address" the student's needs, and further, that the district failed to offer an "individualized full summer program . . . based on [the student's] disability" by recommending a "one size fits all preschool education program offering" (id.).

According to the parent, the student required a "continuance of service" and amassed "several weeks off" due to two summer breaks (id.). As a result, the parent requested "compensatory instruction hours, related services (Speech and OT) and ABA therapy as relief," in an amount to be determined by the IHO (id.).

Next, the parent asserted that despite acknowledging at a "Winter CPSE meeting" that the student experienced "regression," the district denied the parent's request for "additional" discrete trials to be performed with the student during the school day (Dist. Ex. 1 at p. 5). The parent indicated that the district denied this request based upon a "lack of staffing at the preschool" (id.). The parent asserted that the district should have provided a "SEIT to attend the program with [the student] to supplement staffing and provide more intense and more frequent ABA" discrete trials (id. at pp. 5-6). As relief, the parent requested "compensatory SEIT hours" (id. at p. 6).

Finally, the parent alleged that due to the "misleading information" she received from the district, she had to hire an educational advocate, "which cost [her] an undue financial burden and stress" (Dist. Ex. 1 at p. 6). As relief, the parent requested $500,000 in monetary damages, as well as noting that she incurred "out of pocket" expenses for "private ABA therapy, [OT] as well as sensory gym sessions" (id.). The parent also requested "compensatory services and instruction" in the form of 90 hours of speech-language therapy and 90 hours of OT (id.).

In addition to the foregoing, the parent included a "Proposed Solution" in the May 2016 due process complaint notice (Dist. Ex. 1 at p. 19). Here, the parent specifically requested the following as the relief "to the extent known and available at the time of filing": all the relief in the due process complaint notice, 400 hours of compensatory ABA instruction, 90 sessions of compensatory speech-language therapy, 90 sessions of compensatory OT, 198 hours of home-based ABA SEIT make-up hours, and $500,000.00 to "compensate for stress and out of pocket expenses and the cost of bringing this action" (id.).

B. Events Post-Dating the Due Process Complaint Notice

On June 15, 2016, a CSE convened to conduct a "[p]lacement meeting" for the student's transition from receiving CPSE (preschool) services to receiving CSE (school-age) services and to develop an IEP for the 2016-17 school year (kindergarten) beginning September 2016 (Dist. Ex. 101 at p. 1). Finding the student eligible to receive special education and related services as a student with autism, the June 2016 CSE recommended a 6:1+2 special class placement in a Board of Cooperative Educational Services' (BOCES) program (id. at pp. 1, 3, 8).[8, 9] The June 2016 CSE also recommended related services consisting of four 30-minute sessions per week of individual speech-language therapy in a therapy room, one 30-minute session per week of individual speech-language therapy in the classroom, two 30-minute sessions per week of individual OT in a therapy

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

[9] According to the comments reflected in the June 2016 IEP, the "parent requested a placement that provide[d] opportunities for interaction with typical peers and a 1:1 [teaching assistant]" (Dist. Ex. 101 at p. 1). The comments further reflected that "BOCES provided a rationale to support the appropriateness of the recommended placement based on [the student's] social/emotional and behavioral needs" and that the parent did not agree with the recommended placement (id.).

room, two 30-minute sessions per week of individual physical therapy (PT) in a therapy room, and two 60-minute sessions per month of individual parent counseling and training at home (id. at pp. 1, 8). In addition, the June 2016 CSE recommended the student's daily use of an augmentative communication device as assistive technology (id.). As noted in the IEP, the June 2016 CSE reviewed the annual goals and short-term objectives, which BOCES' staff created for the student (id. at pp. 1, 3; see generally Nov. 7, 2016 Tr. pp. 653-56, 677-80, 682-97; Dist. Ex. 97). Finally, the June 2016 CSE indicated in the IEP that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (Dist. Ex. 101 at p. 6). The June 2016 CSE also indicated in the IEP that the student required a behavioral intervention plan (BIP) (id.).

C. Impartial Hearing and Intervening Events

On July 12, 2016, the IHO held a prehearing conference (see generally IHO Ex. 1).[10] Shortly thereafter, the district prepared and filed a motion to dismiss, dated July 19, 2016, within which the district argued that certain allegations in the parent's due process complaint notice were barred by the statute of limitations, the student was not entitled to compensatory educational services, the IHO had no authority to award monetary damages, and the parent was not entitled to be reimbursed for the costs associated with hiring an educational advocate (see generally IHO Ex. 2).[11] In an interim decision dated August 6, 2016, the IHO determined that "to the extent that any allegation refer[red] to an event prior to the two-year period preceding the complaint," such allegations must be dismissed as untimely (IHO Ex. 3 at pp. 4-5).[12] Similarly, the IHO found that to the extent that the parent's claims for compensatory educational services "f[e]ll outside the two-year statute of limitations," those claims must also be dismissed (id.).[13] Finally, the IHO noted that the parent's request for monetary damages—namely, "undue financial burden and stress in

[10] State regulation provides that an IHO may schedule a prehearing conference with the parties for the purposes of: "(a) simplifying or clarifying the issues; (b) establishing date(s) for the completion of the hearing; (c) identifying evidence to be entered into the record; (d) identifying witnesses expected to provide testimony; and/or (e) addressing other administrative matters as the [IHO] deems necessary to complete a timely hearing" (8 NYCRR 200.5[j[[3][xi][a]-[e]). Despite summarizing the prehearing conference, the IHO did not specifically identify any issues to be addressed and resolved at the impartial hearing, other than indicating, in part, that the parent's due process complaint notice sought "compensatory instruction and services" for the student and that the parent's advocate "confirmed that claim [was] based on 2 years denial of FAPE by the district" (IHO Ex. 1 at p. 1). The IHO also noted in the summary that while the IHO could not award "attorney" or "advocate fees," the parent's advocate "asserted other compensation was requested" (id.).

[11] On August 5, 2016, the student's June 2016 IEP was modified via amendment without a meeting (see Dist. Ex. 100 at pp. 1, 8). Specifically, the modifications added the following services to the student's IEP: five 120-minute sessions per week of home-based ABA services, two 30-minute sessions per week of individual home-based OT, and two 30-minute sessions per week of individual home-based speech-language therapy (id.).

[12] The IHO noted that although the parent's due process complaint notice alleged a failure to offer the student a FAPE "'for the last 2 years,"' "several claims" lacked "specificity . . . without dates referenced in the complaint" (IHO Ex. 3 at p. 4).

[13] In the decision, the IHO specifically dismissed both the parent's claims and requests for compensatory educational services arising prior to "June 9, 2014" (IHO Ex. 3 at p. 5).

hiring an educational advocate"—must be dismissed because the IHO lacked authority to award monetary damages (id.).

On August 8, 2016, the parties proceeded to an impartial hearing, which concluded on April 5, 2017 after 12 days of proceedings (see generally IHO Ex. 1; Aug. 8, 2016 Tr. p. 1; April 5, 2017 Tr. p. 1449).[14] On August 8 and 12, 2016, the district began presenting witnesses for its case-in-chief (see generally Aug. 8, 2016 Tr. pp. 1-268; Aug. 12, 2016 Tr. pp. 269-456).

After the parties convened on August 12, 2016 for the impartial hearing, the parent prepared and filed a second due process complaint notice, dated August 18, 2016 (August 2016 due process complaint notice) (see IHO Ex. 5 at p. 1). In the August 2016 due process complaint notice, the parent alleged that the district failed to offer the student a FAPE for the 2016-17 school year because the "BOCES placement recommended" did not offer the student access to nondisabled peers and thus, was not the student's least restrictive environment (LRE) (IHO Ex. 5 at p. 3). The parent also alleged that the student's "program" failed to include "2.5 hours a day, 5 days a week" of discrete trials; the district failed to recommend sufficient levels of related services; and the district failed to recommend a "1:1 teaching assistant" (id.). As relief, the parent requested that the district provide the student with a "full day program" within the district, including "2.5 hours of ABA [discrete] trials" on a daily basis; daily sessions of speech-language therapy, OT, and PT; and the services of a full-time, 1:1 teaching assistant (id. at p. 4). In an interim decision dated August 26, 2016, the IHO granted the district's request to consolidate the two proceedings (the May 2016 due process complaint notice and the August 2016 due process complaint notice) pursuant to State regulations (see IHO Ex. 7 at pp. 2, 4).

Reconvening for the impartial hearing on September 16, 2016, the district informed the IHO that despite the previous order establishing the student's pendency placement at the student's preschool, the preschool could not secure the variance necessary to allow the student to attend the preschool as a school-aged student (see Sept. 16, 2016 Tr. pp. 4, 7-8). Therefore, the IHO held a pendency hearing; at that time, the district suggested the 6:1+2 special class placement at BOCES—as recommended in the student's June 2016 IEP and which the parent alleged was not appropriate due to LRE concerns in the August 2016 due process complaint notice—as the student's pendency placement (see Sept. 16, 2016 Tr. pp. 4, 8-9; IHO Ex. 5 at p. 3). The parent suggested a district 8:1+4 special class placement as the student's pendency placement (see Sept. 16, 2016 Tr. pp. 14-16). After hearing testimony concerning the parties' positions, the IHO indicated that she would not issue a pendency decision until the parent's advocate had an opportunity to proffer additional testimonial evidence and establishing a briefing schedule on the issue (see Sept. 16, 2016 Tr. pp. 25-151).

[14] As part of the proceedings on August 8, 2016, the parties agreed that the student's April 20, 2016 IEP constituted the student's pendency (stay-put) placement and services during the instant proceedings (see Aug. 8, 2016 Tr. at pp. 89-97; Dist. Ex. 12 at pp. 1-2, 12). The IHO issued an interim decision on pendency, dated August 10, 2016, which set forth the special education program and related services from the student's April 20, 2016 IEP (compare IHO Ex. 4 at p. 4, with Dist. Ex. 12 at pp. 1-2, 12). Notably, the IHO—upon agreement of the parties—identified the student's then-current preschool as part of the student's pendency placement and services (compare IHO Ex. 4 at p. 4, with Aug. 8, 2016 Tr. pp. 90-92). At the impartial hearing, the parties acknowledged that the student could only remain at the preschool if the preschool secured a "variance" for the student's attendance, as she had reached "school age" (Aug. 8, 2016 Tr. pp. 90-92).

Over the course of the next three impartial hearing dates—September 23, October 28, and November 7, 2016—the district continued presenting witnesses for its case-in-chief (see generally Sept. 23, 2016 Tr. pp. 164-398; Oct. 28, 2016 Tr. pp. 399-572; Nov. 7, 2016 Tr. pp. 573-757). At the November 7, 2016 impartial hearing date, the IHO set a briefing schedule for the parties to address the outstanding pendency placement issue (see Nov. 7, 2016 Tr. pp. 585-87). The parent's brief was due November 16, 2016, and the district was given until November 22, 2016 to submit a response; the IHO anticipated issuing a decision upon receipt of both parties' briefs (see Nov. 7, 2016 Tr. p. 586).

Prior to the next scheduled date for the impartial hearing, the CSE convened on November 9, 2016 for a "[p]rogram [r]eview" pursuant to the parent's request (see Dist. Ex. 108 at p. 1; IHO Ex. 12 at p. 5). As reported in the comments section of the November 2016 IEP, the student had "not attended school this year" due to the parent's "disagreement with the recommended placement" (Dist. Ex. 108 at p. 1). Acknowledging the parent's concerns, the November 2016 CSE discussed "sending additional packets" to other BOCES locations, as well as "resending packets" to outside school districts that "may have appropriate openings" for the student (id.). According to the comments in the IEP, the parent agreed to "send out the packets but stated that she want[ed] [the student] educated in the district's 8:1:4 class" (id.). The CSE discussed "how an in district placement [was] not appropriate" given the student's "current functioning levels and needs" (id. at pp. 1-2). As a result, the parent "requested home instruction with related services as an interim placement while packets [were] being sent out to other programs," which the CSE agreed to and memorialized in the November 2016 IEP (id. at pp. 1-2, 12). Based upon the IEP, the student would receive five 60-minute sessions per week of individual home instruction; four 30-minute sessions per week of individual, home-based speech-language therapy; and four 30-minute sessions per week of individual, home-based OT (id.). The parent agreed with the provision of these services (id. at p. 2).

On November 21, 2016, the IHO held a telephone conference with the parties (see Nov. 21, 2016 Tr. pp. 3-4). Initially, the IHO explained that the district requested the conference call because the parties had agreed to a "change in placement" for the student (id. at p. 3). The district's attorney then explained that since the parties met on November 9, 2016 for a CSE meeting, the previously recommended placement for the student at BOCES was "no longer on the table," and therefore, it no longer appeared necessary for the parent's advocate to prepare a "letter brief . . . analyzing whether or not [the preschool] was substantially similar to the BOCES [] program" (id. at pp. 4-5). The district's attorney recounted the special education and related services recommended for the student as an "interim placement" while the district applied to the "programs" discussed at the November 2016 CSE meeting (id.). The IHO then asked the parent's advocate whether he agreed with what the district's attorney described as a "placement for [the student] right now . . . pending sending out these applications"—and the parent's advocate responded: "Absolutely, ma'am" (id. at p. 6). The parent's advocate also indicated that he no longer wanted to prepare a brief (id.).

On or about December 12, 2016, the IHO was appointed to a matter initiated by the student's father through a due process complaint notice dated December 12, 2016 (see IHO Ex. 9

at p. 2; see also IHO Ex. 10 at Ex. A at pp. 2, 18).[15] Shortly thereafter, on December 16, 2016, the parties returned for the next scheduled impartial hearing date (see IHO Ex. 12 at p. 5; Dec. 16, 2016 Tr. p. 758). At that time, the parties initially discussed the "new complaint" filed by the student's father, and thereafter, the district continued to present witnesses on its case-in-chief (Dec. 16, 2016 Tr. pp. 760-64). In an interim decision dated December 20, 2016, the IHO declined to consolidate the December 2016 due process complaint notice filed by the student's father with the current proceedings (see IHO Ex. 9 at pp. 1, 3-4).[16]

On the next date of the impartial hearing, January 20, 2017, the parties addressed several issues with the IHO, including but not limited to, the district's motion to disqualify and remove the parent's advocate and to appoint a guardian ad litem, the absence of a "formal determination on pendency," whether the cases should be bifurcated, whether certain issues raised by the parent were now "moot," and eventually, subpoenas prepared by the district seeking information from the parent regarding "communications" between the parent and her advocate, as well as to obtain "records regarding services that were provided" to the student by the parent (Jan. 20, 2017 Tr. p. 1076; see generally Jan. 20, 2017 Tr. pp. 956-1091; IHO Exs. 10-11).[17] The parent's advocate objected to the district's request, and noted that the IHO ruled that "money" was not an "issue in this case" (Jan. 20, 2017 Tr. pp. 1077-78). The IHO clarified that she had only ruled on—and dismissed—the issue of the advocate's fees (see Jan. 20, 2017 Tr. p. 1078). At that point, the district's attorney stated that the IHO had dismissed "any claims for monetary damages;" but because the issue of compensatory educational services remained, the district sought information about "service providers" the parent obtained to provide services to the student (Jan. 20, 2017 Tr. pp. 1078-79).

The IHO then asked the parent's advocate whether he "expect[ed] to show that [the service providers] have been paid or [if] there [was] money due for them" (Jan. 20, 2017 Tr. p. 1079). In response, the parent's advocate asked the IHO if the IHO had jurisdiction to "award money to pay back [] those fees," which the IHO affirmatively confirmed, noting that the parent would "have to actually show the records" (id.). The parties continued to discuss the information sought through the subpoenas; at one point, the IHO explained that if the parent had requested "reimbursement for speech services" covered by insurance, the parent would not be "entitled to money for it" (Jan. 20, 2017 Tr. pp. 1080-82).[18]

Prior to the next impartial hearing date, the CSE convened on February 2, 2017 for a "program review/parent request" (IHO Ex. 16 at p. 2). At that time, the February 2017 CSE

[15] The student's father incorporated the student's November 2016 IEP into the December 2016 due process complaint notice (see IHO Ex. 10 at Ex. A at pp. 5-17).

[16] It appears that the student's father may have withdrawn the December 2016 due process complaint notice prior to the IHO's issuance of the interim decision dated December 20, 2016 and that the parent—i.e., the student's mother—later filed a third due process complaint notice that was virtually identical to the December 2016 due process complaint notice filed (and withdrawn) by the student's father (see Feb. 27, 2017 Tr. pp. 1096-1100, 1125-26; compare IHO Ex. 10 at Ex. A, with IHO Ex. 13 at Ex. B).

[17] No witnesses testified on this date (see generally Jan. 20, 2017 Tr. pp. 956-1091).

[18] Confirming the IHO's lack of enforcement power over the district's subpoenas, the parent's advocate indicated that they were "still considering if [they] [were] going to honor the subpoenas" (Jan. 20, 2017 Tr. pp. 1076-77).

discussed at least one BOCES' program option in an 8:1+1 special class placement with related services and the services of a "1:1 teacher aide," which the parent ultimately requested more time to consider (id.). Having not reached a final recommendation, the February 2017 CSE "tabled" the meeting and agreed to send applications to "every" school district in the neighboring county (id.).

The parties next met on February 27, 2017 for the impartial hearing (see Feb. 27, 2017 Tr. p. 1092). As the first order of business on that day, the district withdrew its motion to disqualify and remove the parent's advocate and to appoint a guardian ad litem since the IHO declined to consolidate the December 2016 due process complaint notice filed by the student's father (see Feb. 27, 2017 Tr. pp. 1094-99). Next, the IHO acknowledged that the parent filed another due process complaint notice, which the parent hand delivered to the district's attorney that day (see Feb. 27, 2017 Tr. pp. 1098-1100). After some discussion on the hearing record about the district's anticipated witnesses for that day and whether the parent intended to present witnesses on the same day, the district's attorney asked to speak privately outside the IHO's presence with the parent and her educational advocate (see Feb. 27, 2017 Tr. pp. 1100-12).

Upon returning from a short recess, the district's attorney announced that she wanted to "make a statement on the record," and stated that the "district [was] agreeing to provide the following program and services to [the student]" (Feb. 27, 2017 Tr. p. 1112). The parent's advocate promptly objected to placing what he characterized as a "settlement negotiation" on the hearing record; the district's attorney contended that it was "not settlement negotiations," but rather, what the district was "agreeing to provide" (Feb. 27, 2017 Tr. pp. 1112-13). Eventually—and over the strenuous arguments and objections voiced by the parent's advocate—the district's attorney indicated that while the district "continue[d] to deny any liability or wrongdoing," the district was prepared to "provide the following program and services to [the student]" (Feb. 27, 2017 Tr. pp. 1113-21). Specifically, the district agreed to provide the student an in-district, 8:1+4 "program" with 2.5 hours per day of discrete trials; a 1:1 teaching assistant; 750 hours of make-up ABA instruction; 136 30-minute sessions of make-up speech-language therapy; 198 hours of make-up, home-based "ABA SEIT" services; 140 30-minute sessions of make-up OT; and 5 30-minute sessions per week of individual speech-language therapy (see Feb. 27, 2017 Tr. pp. 1121-22).

At this point, the IHO interrupted the district's attorney, stating that this did not "sound [like] what the district [was] going to offer," but instead, it "sound[ed] like a settlement offer"—which the IHO indicated the parent had "not accepted" (Feb. 27, 2017 Tr. p. 1122; see Feb. 27, 2017 Tr. pp. 1122-25). In response, the district's attorney explained that because the district was "prepared to provide the parents with everything they ha[d] requested for [the student] . . ., the issues in the three due process complaints . . . no longer exist[ed] and [were], therefore, moot" (Feb. 27, 2017 Tr. p. 1125). The district's attorney also indicated that since there were "no remaining issues in dispute because requests for money ha[d] been dismissed and/or the [IHO] d[id] not have subject matter jurisdiction to address these issues, it [was] appropriate to dismiss the due process complaint notices" (Feb. 27, 2017 Tr. pp. 1125-26). Finally, the district's attorney stated that the district was ready to "hold an immediate CSE [meeting] to memorialize" the terms stated on the hearing record (Feb. 27, 2017 Tr. p. 1126). Among other things, the parent's advocate indicated that they were "not prepared to sign an IEP amendment in lieu of . . . a signed stipulation of settlement"; the parent had the "right to establish an administrative record on the way to going to court"; and furthermore, the parent no longer wanted an in-district program, but instead, had

"found an out-of-district placement" for the student—which the district already knew (Feb. 27, 2017 Tr. pp. 1126-27, 1135-39; see IHO Ex. 16 at p. 2). The parties continued to dispute the appropriateness of the offer made by the district's attorney (see Feb. 27, 2017 Tr. pp. 1128-35; see also Feb. 27, 2017 Tr. pp. 1139-52).

Ultimately, the district's attorney moved to dismiss the case based on mootness (see Feb. 27, 2017 Tr. p. 1135). However, the IHO determined that she could not issue a ruling on the district's motion to dismiss because the parent's third due process complaint notice presented to the district on that very day was not yet "before [her]" (Feb. 27, 2017 Tr. pp. 1135-41, 1143-44, 1148-49). Considering the IHO's determination, the district indicated that it could not "risk resting" its case that day and presented additional witnesses on its case-in-chief (Feb. 27, 2017 Tr. p. 1141; see Feb. 27, 2017 Tr. pp. 1152-1307). The district's attorney agreed to provide the IHO with a "formal motion to dismiss," which the parent's advocate could respond to in writing (Feb. 27, 2017 Tr. pp. 1148-50). Near the conclusion of the February 2017 impartial hearing date, the parties set a briefing schedule for the district's motion to dismiss (due March 7, 2017) and the parent's response (due March 16, 2017), and the parent's advocate identified witnesses he intended to present (see Feb. 27, 2017 Tr. pp. 1294-98, 1300-03).

In an interim decision dated March 2, 2017, the IHO declined to consolidate the parent's third due process complaint notice presented at the February 27, 2017 impartial hearing date (see IHO Ex. 8 at pp. 1, 3-4; Feb. 27, 2017 Tr. pp. 1098-1100).

On March 8, 2017, the parties continued with the impartial hearing, and the district presented its final witness for its case-in-chief and rested its case (see Mar. 8, 2017 Tr. pp. 1308, 1314-54). Thereafter, the parent's advocate presented two witnesses for direct examination without cross-examination by the district (see Mar. 8, 2017 Tr. pp. 1367-1403). Near the conclusion of the impartial hearing for this day, the parent's advocate indicated that the parent would also testify and he would identify other witnesses for the parent's case by March 17, 2017 (see Mar. 8, 2017 Tr. pp. 1407-09).[19]

Consistent with the assertion made by the district's attorney at the February 27, 2017 impartial hearing date, the CSE convened on March 24, 2017 for a "program review" to memorialize the special education program the district was prepared to provide to the student (compare Feb. 27, 2017 Tr. pp. 1121-22, 1126, with IHO Ex. 13 at p. 5, and IHO Ex. 16 at p. 1). The parent and the parent's advocate attended the March 2017 CSE meeting (see IHO Ex. 16 at p. 1). At the CSE meeting, the parent rejected the BOCES 8:1+1 special class discussed at the February 2017 CSE meeting (compare IHO Ex. 16 at p. 1, with IHO Ex. 16 at p. 2). As noted in the comments section of the IEP, the March 2017 CSE then discussed and proposed an in-district, 8:1+4 special class placement and related services, as well as updated evaluations of the student "in all areas of suspected disability" when she began transitioning into the "new school environment" (IHO Ex. 16 at p. 1). The parent rejected the in-district, 8:1+4 special class

[19] It appears that the parent did not call another witness at the March 8, 2017 impartial hearing because the parent's advocate needed to attend to a medical issue (see Mar. 8, 2017 Tr. pp. 1403-04, 1409; IHO Ex. 12 at p. 9; see also April 5, 2017 Tr. p. 1427). At that time, the parties were already scheduled to reconvene on March 21, 2017 (see Mar. 8, 2017 Tr. p. 1404; IHO Ex. 12 at pp. 7-8). However, the March 21, 2017 impartial hearing date had to be adjourned due to "personal emergencies" of the district (April 5, 2017 Tr. pp. 1415-16).

placement and the updated evaluations of the student, but she asked the CSE to "consider [the student's] acceptance" into a program in another school district (id. at p. 2). The director of special education from the other school district, who attended the CSE meeting, discussed the student's acceptance into a "12:1:1 integrated class," which the parent agreed with and accepted (id.). The March 2017 CSE also recommended the following related services: five 30-minute sessions per week of individual speech-language therapy; five 30-minute sessions per week of individual OT; five 30-minute sessions per week of individual PT; the services of a full-time, 1:1 teaching assistant; the use of an augmentative communication device; and 10 hours per week of behavior consultant services (direct and indirect services) to assist the student's transition into the new school environment (id. at pp. 1-2, 11-12). The March 2017 IEP also included recommendations for the following home-based services: five 120-minute sessions per week of individual ABA services, two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and two 60-minute sessions per month of parent counseling and training (id. at pp. 1-2, 11).

In addition to the foregoing, the CSE noted within the comments section of the March 2017 IEP that it "discussed make up hours for previously missed sessions" for the student (IHO Ex. 16 at p. 2). The March 2017 CSE further noted in the comments section of the IEP that the "make-up services will not expire until completed," and thereafter, indicated that the "make-up hours" included the following: "750 makeup hours of ABA instruction; 136 [30-]minute make up sessions of speech therapy; 198 hours of makeup ABA SEIT services in the home; [and] 140 [30-]minute sessions of makeup [OT]" (id.). In addition, the March 2017 CSE indicated that the "[m]akeups" could be "completed at home and . . . on weekdays up to 8 pm; on weekends and on school breaks, with the exception of federal holidays" (id.).

On April 5, 2017, the IHO held a telephone conference with the parties to discuss the district's motion to dismiss and the parent's response to the motion to dismiss (see April 5, 2017 Tr. pp. 1412-15; IHO Exs. 13 at pp. 1-6; 14 at pp. 1-2). The district's attorney described for the IHO the special education program and related services recommended at the March 2017 CSE meeting, noting that the CSE included make-up services within the March 2017 IEP and further noting that this did not constitute a "settlement offer" (see April 5, 2017 Tr. pp. 1417-22). The district's attorney also indicated that the district's board of education would be meeting the following evening, and she anticipated that the board of education would approve the IEP as written (see April 5, 2017 Tr. pp. 1423-26). Throughout this discussion, the parent's advocate objected and argued, generally, that it was not appropriate to be discussing "ongoing" settlement offers and that it was not a foregone conclusion that the board of education would approve the March 2017 IEP (April 5, 2017 Tr. pp. 1417-26). The parent's advocate also stated that the parent had a right to "put on the case because the [d]istrict" had not conceded that it failed to offer the student a FAPE, as alleged by the parent (April 5, 2017 Tr. pp. 1425, 1434; see IHO Decision at Appx. A [noting corrections for April 5, 2017 transcript]). Before issuing a decision on the district's motion to dismiss, the IHO asked the district's attorney to forward a copy of the March 2017 IEP, a copy of the corresponding prior written notice, and a letter "confirming" that the district's motion to dismiss also applied to the parent's February 27, 2017 due process complaint notice (April 5, 2017 Tr. pp. 1428-31, 34-35; see IHO Exs. 15-17).

Next, the IHO asked the parent's advocate about his "objection" to the student "getting everything that was requested by the [p]arent" (April 5, 2017 Tr. p. 1432). The parent's advocate

stated that the IHO had to "rule" on the issue of FAPE so that the parent could "go to court and get attorney fees later" and so that the question did not remain "unanswered" (April 5, 2017 Tr. p. 1433). The parent, herself, also asked the IHO as to why the question of whether the district offered the student a FAPE would "just go[] without being ruled upon" (April 5, 2017 Tr. p. 1436). The parent continued to ask the IHO questions, indicating that she was not certain she would "have another opportunity" to do so (April 5, 2017 Tr. pp. 1437-44). Near the conclusion of the telephone conference, the parent's advocate stated that the parent had a "few more witnesses" to call—including the parent—and that he would seek a "remand" to complete the impartial hearing (April 5, 2017 Tr. pp. 1445-46).

D. IHO Decision

In a decision dated May 4, 2017, the IHO granted the district's motion to dismiss the parent's consolidated May 2016 and August 2016 due process complaint notices with prejudice (see IHO Decision at pp. 1-2, 6-7).[20] After setting forth the procedural history and other related actions still pending, the IHO analyzed whether "any underlying dispute" remained by separately examining the "[s]urviving claims" in the May 2016 and August 2016 due process complaint notices, as well as the relief specified in each pleading (id. at pp. 1-4). The IHO then set forth the special education program, related services, and "makeup" services the district offered to provide to the student in advance of preparing and submitting its written motion to dismiss the action as moot (id. at p. 4; compare IHO Ex. 13 at pp. 1-6, with IHO Ex. 13 at Ex. A at pp. 1-2).

With respect to the motion to dismiss, the IHO indicated that the district argued for dismissal based upon mootness, basing its argument solely on the contention that the district had "agreed to provide the parent with everything demanded" in the due process complaint notices (IHO Decision at p. 4). The IHO also noted that, in response to the district's motion, the parent's advocate argued that the IHO did not have "authority to uphold decisions made at a CSE meeting"; the consolidated due process complaint notices "could not be dismissed in advance of [the] March 24, 2017 [CSE] meeting, based on a promise of an offer to be made at the meeting"; and finally, the parent was "entitled to a ruling on the accusation" that the district failed to offer the student a FAPE (id. at pp. 4-5).

Based upon the documentation provided to the IHO following the April 5, 2017 telephone conference call, the IHO concluded that the district's "action at the March 24, 2017 [CSE] meeting operate[d] to address all the parent's demands for programmatic and service relief" in the due process complaint notices (IHO Decision at pp. 5-6). While noting the parent's objection to dismissal as the "district's failure to concede that it had not provided FAPE to [the student]," the IHO ultimately determined—relying solely upon an SRO decision cited by the district—that the district's offer to provide all of the relief requested by the parent left "no remaining dispute regarding the student's identification, evaluation, eligibility, or educational placement" (id. at pp. 6-7). Finally, the IHO noted that although the district did not "admit failure on its part," this was

[20] By separate decision of the same date, the IHO granted the district's motion to dismiss the parent's February 2017 due process complaint notice (see IHO Ex. 18 at pp. 1-2, 6-7).

"not relevant to a decision concerning the relief sought by the parent" (id. at p. 7). Consequently, the IHO dismissed the parent's consolidated due process complaint notices with prejudice (id.).[21]

IV. Appeal for State-Level Review

The parent appeals, and initially asserts that the student has been denied "access to a placement/program which provided her access to non-disabled peers." The parent argues that the IHO failed to issue a pendency decision. Additionally, the parent asserts that "until November, the only school day academics/therapies [the student] received [were] those that [the parent] employed." Relatedly, the parent argues that although the district agreed to provide a "less than adequate amount of home service in November," she continued to "personally supplement [the student's] school day with ABA, [s]peech and OT therapists." Next, the parent argues that the district failed to provide the student with an appropriate placement or program for an "overwhelming majority" of the 2016-17 school year, noting that the student only began attending a school-based program in "late April," and that she sought "relief deemed appropriate by an IHO."

The parent also disagrees that the IHO should have granted the district's motion to dismiss based solely on the fact that the district "finally agreed to provide [the student] with an appropriate placement" as of April 2017. The parent alleges that the IHO's decision to rely on this rationale and to dismiss the parent's case demonstrated a "huge bias toward the district" and allowed the district to continue to deny the student a FAPE, it prevented the student from attending an appropriate placement or program for an "extended period of time," and it caused the parent to expend more money to pursue claims against the district without receiving a determination regarding whether the district offered the student a FAPE.

Turning to the enumerated issues in the request for review, the parent alleges that the IHO violated her "due process rights by dismissing the complaint without allowing the parent to testify" or to present additional witnesses, but the IHO allowed the district to complete its case-in-chief. Next, the parent alleges that the IHO erred by failing to grant relief to the student, who had been without an appropriate program from August 2016 through April 2017. The parent also alleges that the IHO erred in dismissing her request for "monetary damages" as outside of the IHO's authority, when the IHO admitted at the impartial hearing that she possessed the "authority to rule on out of pocket expenses." The parent next argues that the IHO erred in consolidating the "two cases" without sufficient "time in her schedule as seen by the infrequent hearing dates." Additionally, the parent argues that the IHO erred in declining to issue a determination regarding whether the district failed to offer the student a FAPE, which was the "crux of the case." The parent also argues that the IHO erred by dismissing the case based upon the CSE's decision to provide services to the student, which the IHO had "no authority to enforce" and which the parent would be forced to "re-exhaust [through] the administrative process instead of being able to go straight to court." Finally, the parent reserves her right to challenge the program and placement

[21] As a reminder to the IHO, amendments to Part 279 of the Practice Regulations became effective for appeals initiated on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Upon reviewing the IHO's decision in this case, it appears that the appeal notice on the last page continues to reflect appeal timeframes and practices that were in effect prior to the effective date of the new regulations, and thus, may no longer accurately set forth timeframes or practices for appeals (compare IHO Decision at p. 8, with 8 NYCRR 279.2, 279.4, 279.5, 279.8, 279.9, 279.11, and 279.13).

recommendations in the March 2017 IEP, which the parent acknowledges were beyond the scope of the parent's "initial hearing request."

As relief, the parent seeks to overturn, annul, or reverse the IHO's decision and requests that the matter be remanded to the same IHO to establish an "appropriate hearing record for review, allow the completion of testimony and to receive a ruling on the allegation of [a] denial of [a] FAPE." The parent also seeks "additional relief of compensatory special education instruction hours, monetary reimbursement," and any other relief deemed appropriate by the IHO.

In an answer, the district responds to the parent's allegations. Primarily, the district asserts that the parent's request for review must be dismissed for failing to comply with the regulations governing practice before the Office of State Review.[22] In addition, the district objects to the parent's submission of additional documentary evidence for consideration on appeal.[23] The district also argues that the parent's request for review must be dismissed on the bases of improper forum shopping, raising issues for the first time on appeal, a remand to the IHO is not appropriate or necessary to complete the hearing record, the IHO's decision was appropriate, the parent's case is moot, and any delay in the impartial hearing process resulted from the behavior of the parent's advocate.[24] Overall, the district generally argues to dismiss the parent's request for review and to uphold the IHO's decision in its entirety.

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, 180-83, 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

[22] As one argument on this point, the district asserts that the parent's request for review must be dismissed because it failed to include the required verification pursuant to 8 NYCRR 279.7(d). However, contrary to the district's assertion, the parent's request for review filed with the Office of State Review did include the necessary verification; thus, the district's argument is without merit and will not be further addressed.

[23] It is altogether unclear what additional documentary evidence the district refers to in its answer, as no such letter accompanied the parent's request for review filed with the Office of State Review. As such, the district's argument is without merit and will not be further addressed.

[24] The district contends, in part, that the parent's reservation of rights to challenge the program and placement recommendations in the March 2017 IEP must be disregarded on appeal or deemed abandoned since the parent did not raise this claim in the underlying due process complaint notices. However, the parent recognized that these issues were beyond the scope of her "initial request" and that, generally, the hearing record did not include evidence upon which to make a determination on these issues. In addition, a plain reading of this portion of the parent's request for review does not reveal that the parent sought any determination on these issues on appeal, but rather, sought only to reserve her right to challenge the same. As such, this argument, too, is without merit and will not be further addressed.

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]). The Supreme Court recently indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see

Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[25]

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]). 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; 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).

VI. Discussion

A. Preliminary Matters—Compliance with Practice Regulations

The district contends that the parent's request for review must be dismissed because it does not include the proper notice with the specific regulatory language (8 NYCRR 279.3) and fails to include the proper endorsement with the parent's name, mailing address, and telephone number (8 NYCRR 279.7[a]). The district further asserts that the request for review must be dismissed because it does not clearly indicate the reasons for challenging the IHO's decision (8 NYCRR 279.4[a]), and fails to comply with the requirements set forth in 8 NYCRR 279.8(c).

Each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to

[25] The Supreme Court recently stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

the request for review (8 NYCRR 279.3).[26] State regulations further provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). In relevant part, all papers—including a request for review—submitted to the Office of State Review related to an appeal must "be endorsed with the name, mailing address, and telephone number of the party submitting the same" (8 NYCRR 279.7[a]).

Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in relevant part, that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c][1]-[3]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Turning to the district's specific contentions, although the district correctly indicates that the parent did not serve a "Notice of Request for Review," it is unclear how the absence of such notice requires a dismissal of the parent's request for review when the district timely prepared, served, and filed an answer responding to the allegations in the parent's request for review (8 NYCRR 279.3). Moreover, the district does not otherwise allege how the absence of such notice compromised or prejudiced its ability to timely prepare, serve, or file an answer. With regard to the district's contentions relative to the form and content of the request for review, I decline to dismiss the parent's request for review on these grounds, given that the district was able to respond

[26] This is a separate filing from the notice of intention to seek review (compare 8 NYCRR 279.2, with 8 NYCRR 279.3).

to the allegations raised in the request for review in an answer and there is no indication that it suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058). In this instance, while the failure to comply with practice regulations will not ultimately result in a dismissal of the parent's appeal, the parent is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).[27]

B. Unaddressed Issues and Remand

Because the IHO determined that the "district action" at the March 2017 CSE meeting "operate[d] to address all the parent's demands for programmatic and service relief" in the due process complaint notices—which left "no remaining dispute regarding the student's identification, evaluation, eligibility, or educational placement" or in other words, rendered the parent's case moot—the IHO did not address any of the specific issues raised by the parent in either the May

[27] For future reference, the parent is reminded that newly enacted regulations governing the practice before the Office of State Review were amended and became effective for appeals filed on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Instructions about the amended practice regulations—as well as forms consistent with the amended practice regulations—have been provided on the Office of State Review's website under the links titled "Revised 2017 Appeals Process" and "Revised Regulations (effective 1/1/2017)" (see http://www.sro.nysed.gov).

2016 or August 2016 due process complaint notices (IHO Decision at pp. 2-7).[28] However, upon closer examination and as explained more fully below, the parent correctly argues that the IHO erred in granting the district's motion to dismiss because, contrary to the IHO's finding, the "district action" at the March 2017 CSE meeting did not operate to address "all" of the parent's demands for relief.

Initially, when comparing the relief requested by the parent in the May 2016, August 2016, and February 2017 due process complaint notices with the "make-up hours" set forth in the March 2017 IEP, it appears that the March 2017 CSE offered make-up hours or services that directly corresponded to the compensatory educational services and/or make-up services quantitatively identified by the parent (compare IHO Ex. 16 at pp. 1-2, with Dist. Ex. 1 at pp. 1, 19, and IHO Ex.

[28] Notwithstanding this determination, the IHO did not refer to any legal standard she applied in order to reach this conclusion (see generally IHO Decision). The relevant law establishes that a dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Toth v. New York City Dep't of Educ., 2017 WL 78483, at *9 [E.D.N.Y. Jan. 9, 2017]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering question of the "potential mootness of a claim for declaratory relief"]). Furthermore, while the parent claims that the district's failure to admit that it did not offer the student a FAPE is "the crux of the case," a party's "unwillingness to admit liability is insufficient, standing alone, to make [a] case a live controversy," where the party has otherwise agreed to fully resolve the dispute (McCauley v. Trans Union, L.L.C., 402 F.3d 340, 341-42 [2d Cir. 2005]). However, in most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; but see Toth, 2017 WL 78483, at *10 [finding the matter moot where the student had been receiving at-home therapy pursuant to resolution agreements, which was "the very compensatory education that [the parent] sought"]). Additionally, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1987]; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1040 [5th Cir. 1989]). The "capable of repetition, yet evading review" exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; see also L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 102 [2d Cir. Jan. 19, 2017]). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; but see A.A., 2017 WL 2591906, at *7-*9 [finding that the controversy as to "whether and to what extent the [s]tudent can be mainstreamed" constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]).

5 at pp. 1, 4, and IHO Ex. 13 at Ex. B at pp. 1, 19).[29] For example, the parent requested 400 hours of compensatory ABA instruction in the May 2016 due process complaint notice and 350 hours of compensatory ABA instruction in the February 2017 due process complaint notice, for a total of 750 hours of compensatory ABA instruction (see Dist. Ex. 1 at pp. 1, 19; IHO Ex. 13 at Ex. B at pp. 1, 19). In the March 2017 IEP, the CSE indicated that the student would receive "750 makeup hours of ABA instruction" (IHO Ex. 16 at p. 2). The same analysis holds true for the parent's request for speech-language therapy, where she sought 90 sessions in the May 2016 due process complaint notice and 46 sessions in the February 2017 due process complaint notice for a total of 136 sessions, and the March 2017 CSE indicated that the student would receive "136 [30-]minute make up sessions of speech therapy" (see Dist. Ex. 1 at pp. 1, 19; IHO Ex. 13 at Ex. B at pp. 1, 19; IHO Ex. 16 at p. 2). In the May 2016 due process complaint notice, the parent requested 198 hours of ABA SEIT make up hours in the home, and in the March 2017 IEP, the CSE indicated that the student would receive "198 hours of makeup ABA SEIT services in the home" (see Dist. Ex. 1 at pp. 1, 19; IHO Ex. 16 at p. 2). As for OT, the parent requested 90 sessions in the May 2016 due process complaint notice and 50 sessions in the February 2017 due process complaint notice for a total of 140 sessions, and the March 2017 CSE indicated that the student would receive "140 [30-]minute sessions of makeup [OT]" (see Dist. Ex. 1 at pp. 1, 19; IHO Ex. 13 at Ex. B at pp. 1, 19; IHO Ex. 16 at p. 2).

In addition, the March 2017 IEP included recommendations—consistent with the relief requested in the August 2016 due process complaint notice—for programmatic changes to the student's IEP: namely, school-based related services consisting of a total of five 30-minute sessions per week each of speech-language therapy, OT, and PT; as well as the services of a full-time, 1:1 teaching assistant (see IHO Ex. 5 at pp. 1, 4; IHO Ex. 16 at pp. 1-2, 11). Finding that the foregoing relief constituted all of the parent's demands, the IHO granted the district's motion to dismiss (see IHO Decision at pp. 4-7).

But the parent's May 2016 and August 2016 due process complaint notices also included requests for relief that were not quantitatively identified, which the district did not identify or address in its motion to dismiss and which the IHO also did not identify or address in the decision.[30] For example, the parent alleged in the May 2016 due process complaint notice that she paid "out of pocket for private ABA therapy, [OT] as well as sensory gym sessions," and she sought reimbursement for the "out of pocket expenses" (Dist. Ex. 1 at pp. 6, 19). And at the impartial hearing, the IHO confirmed that she had the authority to award such relief (Jan. 20, 2017 Tr. pp. 1079-82). The parent also requested compensatory educational services "as determined by the IHO" to remedy the district's alleged failure to provide the student with appropriate summer 2015

[29] While the IHO declined to consolidate the issues raised in the parent's February 2017 due process complaint with the impartial hearing already in progress, it is necessary to include references to the relief requested in the February 2017 due process complaint notice for the sole purpose of illustrating the relief contemplated by the district as the basis for its motion to dismiss and the IHO's decision to grant such motion.

[30] To be clear, although the parent's February 2017 due process complaint notice also included requests for relief that were not quantitatively identified, the February 2017 due process complaint notice was not consolidated with the May 2016 and August 2016 due process complaint notices. As such, any similarly outstanding requests for relief in the February 2017 due process complaint notice will not be analyzed in the instant appeal, but rather, will be addressed in another appeal filed simultaneously by the parent with the Office of State Review (see Application of a Student with a Disability, Appeal No. 17-040 [decided herewith]).

services, as well as compensatory SEIT services for the district's alleged failure to provide supplemental staffing at the student's preschool to provide the student with "more intense and more frequent" ABA discrete trials at school (Dist. Ex. 1 at pp. 5-6). It does not appear that the March 2017 IEP addressed compensatory educational services or "make-up" services corresponding to either of these requests for relief (see IHO Ex. 16 at pp. 1-2). In the August 2016 due process complaint notice, the parent also requested that the student's program include "2.5 hours a day, 5 days a week" of ABA discrete trials (IHO Ex. 5 at p. 3-4). While it appears that the March 2017 CSE discussed this recommendation within the context of offering the student a placement in an in-district, 8:1+4 special class with related services—which the parent ultimately rejected—it remains uncertain at this juncture whether the parent continues to seek this as an item of relief (see IHO Ex. 16 at p. 1). In light of the due process complaint notices identifying additional demands for relief that remained unaddressed by the March 2017 IEP—and which the parent continues to press on appeal, including her request to be reimbursed for out-of-pocket expenses and additional compensatory educational services—the IHO's decision granting the district's motion to dismiss must be vacated.

Next, and contrary to the district's arguments, the matter must be remanded for further administrative proceedings. This is especially true where, as here, the IHO dismissed the parent's case without providing her with a full opportunity to testify, to present additional witnesses, or to present additional documentary evidence, and thus, the hearing record is bereft of any evidence on these issues (see April 5, 2017 Tr. pp. 1425, 1434, 1445-46; see IHO Decision at Appx. A [noting corrections for April 5, 2017 transcript]).[31] Absent such evidence, a meaningful review of the parties' dispute is not possible with the current state of the hearing record. Therefore, I find it appropriate to remand this matter to the IHO for a determination on the merits of these remaining issues and requests for relief set forth in the parent's May 2016 and August 2016 due process complaint notices (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]). Furthermore, the IHO is strongly encouraged to conduct a prehearing conference for the purpose of clarifying and narrowing these issues, as well as the remaining requests for relief (8 NYCRR 200.5[j][3][xi]). Additionally, the IHO is reminded that any relief awarded to the parent must be predicated upon a finding that the district did not offer the student a FAPE. Should the IHO ultimately conclude that the district failed to offer the student a FAPE, it would be reasonable for the IHO to consider the make-up services and/or compensatory educational services the district offered to provide to the student—as set forth in the March 2017 IEP—when crafting an award of compensatory educational services as an equitable remedy that is tailored to meet the unique circumstances of this case (see Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]).

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

[31] As a reminder, while impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]), State regulation requires that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

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

As discussed above, while the district offered to provide the parent with much of the relief she sought in the May 2016 and August 2016 due process complaint notices, the IHO erred in finding that no dispute remained relating to the relief sought by the parent in these due process complaint notices. In particular, as detailed above, the makeup services offered by the district in the March 2017 IEP did not clearly address the parent's requests for compensatory relief that were not quantified in her due process complaint notices or her request for reimbursement of out-of-pocket expenses. Accordingly, the matter must be remanded to the IHO for a determination on the merits of the parent's claims with respect to whether the district offered the student a FAPE with respect to the issues set forth in the parent's May 2016 and August 2016 due process complaint notices. If the IHO determines that the district failed to offer the student a FAPE, she must then determine what, if any, relief is warranted under the circumstances of this case, keeping in mind the principle that equitable considerations are relevant to fashioning relief under the IDEA (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 454 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the matter be remanded to the same IHO who issued the May 4, 2017, decision to determine whether the district offered the student a FAPE based upon the issues set forth in the parent's May 2016 and August 2016 due process complaint notices, and therefore, whether the parent is entitled to the outstanding relief identified herein; and

IT IS FURTHER ORDERED that, if the IHO who issued the May 4, 2017 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**
July 19, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER