The University of the State of New York

The State Education Department
State Review Officer
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No. 18-028

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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her requested relief. The appeal must be sustained in part.

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 student demonstrated difficulty processing information and developing language skills as a toddler (Dist. Ex. 5 at p. 2). The student received speech-language therapy services through the Early Intervention Program, after which he attended a preschool special education program (id.). Beginning in kindergarten, the student was enrolled in a charter school and remained there until April 2017, when the parent began to homeschool the student (Parent Ex. H at p. 1; Dist. Exs. 5 at p. 2; 6 at p. 1). A March 2015 psychoeducational evaluation reflects that at that time, the student was six years old, in first grade at the charter school, and recommended to receive special education teacher support services (SETSS), integrated co-teaching (ICT) services, and speech-language therapy (Dist. Ex. 4 at p. 1).[1] The psychoeducational evaluation report indicated that the

[1] SETSS is not specifically identified in State regulations describing the continuum of services, nor was it defined by the parties in the hearing record (see 8 NYCRR 200.6 [d], [f]).

student's concentration and attention levels were influenced by his inability to sit still for longer than 45 seconds and his expressive and receptive language skills were judged to be underdeveloped (id. at p. 2). A March 2015 social history update noted that the parent sought reevaluation due to the student's significant delays in processing and retention, and to determine the student's need for additional supports (Dist. Ex. 5 at p. 1).

On May 27, 2015, a CSE convened to develop the student's IEP for the 2015-16 school year (see Dist. Ex. 2).[2] In attendance was a district school psychologist who also served as district representative and, by telephone, the student's parent, classroom teacher, and a related service provider/special education teacher also attended (Dist. Ex. 2 at p. 16; see Tr. p. 55). The May 2015 CSE recommended a 10-month program in a community school including 30 periods per week of ICT services, five periods per week of group SETSS, and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 10-11,13). In addition, the CSE developed 11 annual goals, and several environmental and human or material resources to address the student's identified needs (id. at pp. 5-9).

By prior written notice dated June 4, 2015, the district identified the program recommended by the May 2015 CSE, the date special education services would commence according to the May 2015 IEP, the evaluations considered by the CSE, the other program option considered for the student, and the reason the other program was rejected by the CSE (Parent Ex. D at pp. 1-2).[3] The student continued to attend the charter school for the 2015-16 (second grade) school year; the student was retained in second grade at the charter school for the 2016-17 school year (Tr. pp. 80-81; Parent Ex. E at p. 1).

In a letter to the district dated January 26, 2016, the parent requested the following evaluations: "speech evaluation," "language evaluation," and "assistive tech evaluation"; and asserted that these evaluations were "necessary to address some developmental concerns that have and continue to become apparent over the course of the school years" (Parent Ex. E at p. 1).

By meeting notice dated February 18, 2016, the district notified the parent that it had scheduled a CSE meeting for March 22, 2016 (Dist. Ex. 3 at p. 1).[4] Approximately one year later, the parent sent an email to the CSE dated March 20, 2017, asserting that the district had not evaluated the student in response to her January 2016 letter and requesting independent educational evaluations (IEEs) including speech-language, assistive technology, and psychoeducational evaluations (Parent Ex. F at pp. 1-2). By letter dated April 5, 2017, the parent notified the district that she intended to homeschool the student beginning April 10, 2017 for the remainder of the

[2] The parent copy of the May 2015 IEP that was admitted into evidence does not include a signed attendance page while the district copy does; for the purposes of this decision, citation will be to the district exhibit (compare Dist. Ex. 2 at pp. 1-16, with Parent Ex. B at pp. 1-14).

[3] Although the IEP indicated that it would be put into place beginning June 20, 2015, the prior written notice indicated the services would be in effect beginning June 19, 2015 (compare Dist. Ex. 2 at pp. 1, 10, with Parent Ex. D at p. 2).

[4] The hearing record indicates that this meeting never took place (Tr. pp. 36, 42-44; Parent Ex. C at pp. 1-3).

2016-17 school year (Parent Ex. H at p. 1). The parent gave consent to the district to conduct evaluations on April 13, 2017 (Parent Ex. G at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated October 31, 2017, the parent requested mediation and an impartial hearing (Parent Ex. A at p. 1).[5] The parent alleged that the student's IEPs for the 2015-16 and 2016-17 school years "were deficient" and did not provide the student a free appropriate public education (FAPE) (Parent Ex. A at p. 3). Regarding both school years, the parent contended that the student's disability classification was not correct, the student failed to make progress in his then-current placement at the charter school, and that the student did not receive appropriate services (id.). For the 2016-17 school year, the parent further alleged that the district failed to develop an individualized education services program (IESP) once she began homeschooling the student during the 2016-17 school year (id.). The parent also asserted that she suspected the student should have been diagnosed with a neurodevelopmental disorder and requested "authorizations" for speech-language, psychiatric, and neuropsychological IEEs (id.). The parent further claimed that the district did not develop an IESP for the 2017-18 school year (id.).

As relief, the parent requested that once the IEEs were completed, the CSE reconvene and recommend an appropriate disability classification, develop a program consistent with the results of the requested independent evaluations, and refer the student for placement in a State-approved nonpublic school (Parent Ex. A at p. 4). The parent also requested "all recommendations for evaluations and services" necessary (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to a one-day impartial hearing on January 12, 2018 (see Tr. pp. 1-111). At the impartial hearing, the district conceded that it had not conducted an annual review of, or developed an IEP for, the student since May 2015 (Tr. pp. 7-8). The district contended that although it had made attempts to schedule evaluations and CSE meetings, the parent had not cooperated (Tr. p. 8). The district also indicated its willingness to provide the parent with authorizations for speech-language and neuropsychological IEEs and to convene a CSE meeting once the evaluations were completed (Tr. pp. 7-8, 10, 31-33, 36).

By decision dated January 30, 2018, the IHO determined that, based on the information available to the May 2015 CSE, the student was appropriately classified as a student with a speech or language impairment (IHO Decision at pp. 5-6). The IHO noted that the student was due for a triennial review in May 2018, and then determined that because the district had offered the parent authorizations for the two evaluations requested in her due process complaint notice, there were no remaining issues relative to the requested evaluations before her (id. at p. 6). The IHO then determined that the district did not violate federal or State law when it did not develop an IESP for the student because the parent failed to make a timely written request for services (id. at pp. 6-7). The IHO then considered the parent's request that the IHO retain jurisdiction while the independent

[5] The parent marked a check box—on a form apparently developed by the district—indicating "I request an Impartial Hearing, but request Mediation instead of the Resolution Session" (Parent Ex. A at p. 1).

evaluations were conducted, held that she was not authorized to retain jurisdiction, and noted that the parent could file a new due process complaint notice or "pursue other alternative dispute resolution options" when the evaluations were completed and the CSE had made its recommendation (id. at p. 7). Turning to the parent's claims that the student was denied a FAPE for the 2015-16 and 2016-17 school years, the IHO found that the student received services pursuant to the May 2015 IEP during the 2016-17 school year, until April 2017, when the parent removed the student from a charter school (id. at p. 8). The IHO further determined that failing to develop an IEP was a "serious violation of the IDEA"; however, she indicated that the parent "may have contributed" to the district's failure (id.). In addition, the IHO noted that the parent sought a compensatory remedy of referral for placement in a nonpublic school, rather than a request for compensatory educational services (id.). The IHO determined that the parent's remaining requests for relief relied on completion of the IEEs and a CSE review (id. at p. 9). With regard to pendency, the IHO determined that the student's then-current placement at the time the parent filed the due process complaint notice was homeschooling. Because the student remained in that setting during the hearing, the IHO determined that no pendency order was necessary (id.).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO failed to timely commence the hearing, failed to hold a pendency hearing, and failed to issue a determination on pendency. The parent also contends that the IHO failed to order any relief, despite the student having been without services since April 2017. The parent also alleges that the IHO erred by not retaining jurisdiction while the IEEs were conducted and a CSE meeting held.

The parent contends that the district erroneously scheduled a resolution meeting and failed to hold a mediation session until December 22, 2017. The parent next argues that the district failed to timely respond to the parent's requests for IEEs and denied the student a FAPE because the student was not timely reevaluated in response to the parent's request, was incorrectly classified, and did not receive appropriate programming from May 2016 through the present. The parent also alleges that the student has been without services since she began homeschooling him in April 2017, and that the district had an obligation to ask the parent if she wanted the student to receive services while she was homeschooling him. For relief, the parent requests a determination that the student's pendency placement consists of the special education and related services recommended in the May 2015 IEP, and that the district provide "make-up services from April 2017 going forward." The parent also requests that the district immediately convene a CSE to review the speech-language and neuropsychological IEEs, and compensation in the form of a recommendation for a nonpublic school or an authorization for the student to attend a nonpublic school.

In an answer, the district responds to the parent's allegations with denials. The district initially asserts that the parent's request for review should be dismissed for failure to comply with the practice requirements. The district next agrees with the parent that the student's pendency placement is that set forth in the May 2015 IEP, and that the IHO erred by not issuing a pendency order. However, the district contends that since the parent is homeschooling the student, any relief should be limited to the provision of speech-language therapy. The district argues to uphold the IHO's decision in all other respects. The district also alleges that the parent did not request that the district develop an IESP when she began homeschooling the student, that she did not request

compensatory educational services in her due process complaint notice, and she therefore cannot request make-up services in this appeal for the period between when the parent began homeschooling the student and when she initiated the impartial hearing.

In a reply, the parent argues against dismissal and reiterates the claims set forth in her request for review.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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 has 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. of the Chappaqua Cent. Sch. Dist., 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 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).

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]).[6]

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).

[6] The Supreme Court has 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).

VI. Discussion

A. Preliminary Matters

1. Form Requirements for Pleadings

The district requests dismissal of the parent's appeal for failure to comply with the practice requirements as set forth in State regulations. More specifically, the district argues that the request for review does not set forth 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 (see 8 NYCRR 279.8[c][2]). State regulation also provides 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 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 in 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], aff'd, C.E. v Chappaqua Cent. Sch. Dist., 2017 WL 2569701 [2d Cir. June 14, 2017], quoting Foman v. Davis, 371 U.S. 178 [1962]).

While the district correctly submits that the parent failed to comply with the form requirements for pleadings as set forth in State regulation, I decline to dismiss the parent's request for review on these grounds. The district was not prevented from answering in a timely manner and there is no indication that it suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

2. Mediation and Resolution Session

The parent claims that the district erroneously scheduled a resolution session and failed to hold a mediation session until December 22, 2017. The IHO did not make any findings regarding mediation or a resolution session.

School districts are required to establish and implement procedures to offer parties the opportunity to resolve disputes that may be subject to the impartial hearing process through mediation (34 CFR 300.506[a]; 8 NYCRR 200.5[h][1]). However, the mediation process must be voluntary on behalf of the parties and may not be used to delay or deny a parent's right to an impartial hearing (34 CFR 300.506[b][1][i], [ii]; 8 NYCRR 200.5[h][1][i], [ii]). State and federal regulations also provide that within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint, and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint,

including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (8 NYCRR 200.5[j][2][i]; see 34 CFR 300.510[a]). The parent and school district may agree in writing to use the mediation process in lieu of the resolution process to attempt to resolve their dispute (34 CFR 300.510[a][3][ii]; 8 NYCRR 200.5[j][2][iii]).

The hearing record supports the parent's position that she requested mediation instead of a resolution session (Parent Ex. A at p. 1). However, it is not possible to determine from the hearing record whether mediation or a resolution session occurred or on what date either might have been scheduled (see Tr. pp. 10, 24, 31, 32, 38-41). In any event, while the district-created due process complaint notice included a check box providing an opportunity to request mediation instead of a resolution meeting (Parent Ex. A at p. 1), the hearing record contains no indication when the district agreed to use the mediation process.

The parent's due process complaint notice was filed on November 3, 2017 (Parent Ex. A at pp. 2, 5). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B]; 8 NYCRR [200.5[j][2][v]). The parent testified that mediation occurred on December 21, 2017 (Tr. p. 79). A district placement officer indicated that the district initially scheduled a resolution meeting, before scheduling mediation on either November 17 or 21, 2017 (Tr. pp. 39-41). Accordingly, it is unclear from the hearing record whether the district failed to either schedule a resolution meeting or agree to engage in mediation within 15 days after its receipt of the due process complaint notice. The district is cautioned to ensure that it complies with State and federal regulations in this regard.

3. Impartial Hearing Process

The parent alleges that the IHO failed to timely commence the hearing and erred by not retaining jurisdiction over the hearing. The parent's argument for retaining jurisdiction is based on her position that the district repeatedly ignored her requests for reevaluation, an argument tantamount to a request for enforcement, better suited to a State complaint (see 8 NYCRR 200.5[*l*]). An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Dep't of Educ., Appeal No, 17-009; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; see also J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The IHO correctly determined that she was not authorized to retain jurisdiction over future matters.

When a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period; unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-

[4]). The IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]).

An IHO may grant extensions beyond these timeframes; however, such extensions may only be granted consistent with regulatory constraints and an IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). According to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

The parent does not indicate the basis for her untimeliness claim. The parent's due process complaint was filed on November 3, 2017 (Parent Ex. A at p. 2). The impartial hearing was held on January 12, 2018 and the IHO issued her decision on January 30, 2018 (Tr. p. 1; IHO Decision at pp. 2, 10). The hearing record does not include any information regarding whether any extensions were requested or granted. The record also does not conclusively demonstrate when a mediation or resolution session was held (Tr. pp. 39-41, 79). Additionally, the hearing record contains no written notice to the IHO that the parties were waiving the resolution period or were unable to reach an agreement. Accordingly, there is an insufficient record basis to determine that the commencement of the impartial hearing was untimely. In any event, as described below, to the extent the parent asserts harm as a result of delays in the mediation and hearing processes, the parent is not precluded from raising these claims in a future proceeding.

4. Pendency

The IHO declined to issue an order on pendency but determined that the student's pendency placement was homeschooling. The parent asserts, and the district agrees, that the IHO incorrectly determined the student's pendency placement and erred by failing to issue an order on pendency. The parties agree that the student's pendency placement is the program set forth in the student's May 2015 IEP.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y.

2005]). Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

During the hearing, the parent requested pendency services based upon the May 2015 IEP (Tr. p. 104; see Parent Ex. B). The district did not object during the hearing and has agreed with the parent in its answer. According to the May 2015 IEP, the student was recommended to receive direct and group SETSS five times per week for one class period each; direct and group ICT services 30 times per week for one period each; and individual speech-language therapy two times per week for one 30-minute session each (Dist. Ex. 2 at p. 10).

In its answer, the district argues that pendency should consist of two 30-minute sessions of speech-language therapy due to the student's current homeschool setting. However, while the district may be correct that the parent may not insist that it provide ICT services and SETTS to the student in his home absent a request for an IESP under Education Law § 3602-c, the parties have agreed that pendency lies in the May 2015 IEP. Accordingly, while the parent may not insist that the student receive all of the services set forth in the May 2015 IEP in his home, the district is responsible for making those services available to the student during the pendency of the impartial hearing proceedings.

B. Denial of a FAPE

1. Classification

The parent challenges the student's current classification and argues that the student was denied a FAPE as a result of the district's failure to respond to her requests for reevaluation, on the basis that the student had an incorrect classification and did not receive appropriate educational programming. In her request for review, the parent cites a diagnosis from the neuropsychological

IEE obtained after the impartial hearing as a rationale for a change in classification. The IHO determined that the student was properly classified as a student with a speech or language impairment (34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]). The hearing record supports the IHO's determination that at the time of the May 2015 CSE meeting, the student was properly classified as a student with a speech or language impairment. Additionally, the district has agreed to provide authorizations for two IEEs and to convene a CSE to review them. A CSE meeting following the completion of the IEEs is the proper forum for the CSE, including the parent, to discuss changes to the student's classification based on current evaluative data.

2. Failure to Develop IEPs

The parent next contends that the district failed to develop an IESP for the student during the 2016-17 school year and that the student has not received any special education services since April 2017. The parent requests "make-up special education and related services the Student was entitled to" while being home schooled. The district argues that the parent failed to cooperate with its attempts to obtain her consent to schedule evaluations and CSE meetings. The IHO determined that the district violated the IDEA by failing to offer a timely IEP, but did not award any relief because the parent did not request compensatory educational services.

The district conceded that it had not developed an IEP for the student for the 2016-17 school year through the time of the hearing. The hearing record shows a parent request for reevaluation on February 12, 2016 and meeting notices sent on February 18, 2016 (Parent Ex. C at p. 1). There is no evidence of further activity until April 13, 2017, when correspondence and requests for consent to evaluate were sent to the parent (id.). This coincides with the parent's notice of her intention to homeschool the student (compare Parent Ex. C at p. 1, with Parent Ex. G, and Parent Ex. H). The IHO indicated that the parent contributed to the district's failure to develop an IEP, but also found that the CSE was required to evaluate the student.

The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). In addition, federal and State regulations also require a CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). State regulation further provides that, if appropriate, an IEP must be revised to address "any lack of expected progress toward the annual goals and in the general education curriculum," "the results of any reevaluation conducted . . . and any information about the student provided to, or by, the parents," or "the student's anticipated needs" (8 NYCRR 200.4[f][2][i-iii]).

Additionally, State regulation requires that the district must arrange for appropriate special education programs and services to be provided within 60 school days of the referral for review of a student with a disability (8 NYCRR 200.4[d], [e][1]). The hearing record reflects that the parent provided consent for new assessments on April 13, 2017 (Parent Ex. G). Subsequent to this date, no assessments were conducted, no CSE meetings were held and no IEP was developed. Therefore, the district's failure to develop an IEP for the 2016-17 school year or thereafter constituted a denial of a FAPE (see Doe v. E. Lyme, 790 F.3d at 450 [finding that "a school

district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP"], quoting Forest Grove, 557 U.S. at 238-39).

The parent also claims that the district failed to develop an IESP for the student beginning in April 2017 and for the 2017-18 school year. The hearing record supports the IHO's determination that the parent did not request an IESP by June 1, 2017 in accordance with Education Law § 3602-c. Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities in a home instruction program to file a written request for such services in the district in which the home school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2][a], [2-c]).

VII. Conclusion

In summary, the evidence in the hearing record establishes that the district failed to timely evaluate the student, convene a CSE meeting, and develop an IEP for the 2016-17 school year. According to the parent, the IEEs have been completed; however, the CSE has not yet reconvened. I find that the district failed to offer the student a FAPE for the 2016-17 school year; however, the hearing record does not establish what relief is appropriate to remedy the district's failure to recommend an appropriate program. In particular, the parent testified that the charter school continued to implement the May 2015 IEP during the 2016-17 school year (Tr. pp. 83, 90-92). The parent's due process complaint notice largely asserted that the student was not receiving appropriate services and that further evaluations were necessary to determine the student's educational needs. As IEEs have now been conducted, the CSE will be directed to reconvene, consider the IEEs and whatever additional evaluative information it finds necessary, and develop a program for the student on a going forward basis. If the parent intends to continue to home school the student, she should comply with Education Law § 3602-c by submitting a written request for special education services to be provided in the home. If the parent believes that the CSE's recommendation going forward does not sufficiently remediate its failure to recommend appropriate services for the 2016-17 school year, she may bring a subsequent proceeding requesting compensatory educational services for the denial of a FAPE during the 2016-17 school year based on the recommendations contained in the IEEs (see, e.g., K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16-*19 [E.D.N.Y. Aug. 6, 2014]).

While my findings resolve the instant proceeding, the student's educational status going forward remains unresolved. It is unsurprising that the district's failure to respond to the parent's requests for reevaluation prompted her to pursue a remedy through due process. The hearing record reflects that once the district began to respond—after the parent provided notice of her intent to homeschool the student—communication between the district and the parent has been compromised to such an extent that it is unclear what, if any, services the student is currently receiving. Indeed, the hearing record reflects that the student has been out of school since April 2017, and there is no evidence as to whether the student has received any home-based special education services since that time. I remind the parties that the student remains without an IEP, well into the 2017-18 school year, and that the district remains bound to its obligations to the student, as provided for under the IDEA, until such time as the student's eligibility expires. The parent is similarly reminded that, to the extent she seeks special education services for her son

from the district, she is obligated to cooperate with the district in its efforts to provide a FAPE to the student going forward.

I have considered the parent's remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 30, 2018, is reversed in part, by modifying so much thereof as determined the student's pendency placement was homeschooling; and

IT IS FURTHER ORDERED that the student's pendency placement is the program set forth in the May 2015 IEP, unless the parties otherwise agree; and

IT IS FURTHER ORDERED that, if it has not already done so, the district shall convene a CSE within 45 days of the date of this decision to review the independent evaluations obtained by the parent and develop an IEP or IESP for the student in accordance with the student's present levels of performance and special education needs.

Dated: **Albany, New York**
April 23, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER