The University of the State of New York

The State Education Department
State Review Officer
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No. 19-009

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

Appearances:
Gina DeCrescenzo, PC, attorneys for petitioners, by Gina DeCrescenzo, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program and related services respondent's (the district's) Committee on Special Education (CSE) recommended for the student were appropriate. For reasons explained more fully below, the matter must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[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

The student in this case was initially referred to the Committee on Preschool Special Education (CPSE) for an evaluation in February 2009 (2008-09 school year) (see Parent Ex. C at p. 1; see generally Parent Exs. C-F). At that time, the student attended the morning session of a universal prekindergarten (UPK) class five days per week (see Parent Ex. C at p. 1; see Parent Ex.

D at pp. 2-3).[1] As a result of the CPSE referral process the student began receiving speech-language therapy, occupational therapy (OT), and physical therapy (PT) (see Parent Exs. A at pp. 3-4; J). For first grade (2010-11 school year) and continuing through sixth grade (2015-16 school year), the student attended a 12:1+1 special class placement in district public schools, where he also received various combinations of related services, including speech-language therapy, OT, PT, and counseling services, during each school year (see Parent Exs. A at pp. 4-5; N at p. 2).

On March 29, 2016, a CSE convened to conduct the student's annual review and developed an IEP reflecting a projected implementation date of April 4, 2016 and a projected date of the student's next annual review as March 28, 2017 (seventh grade, 2016-17 school year) (see Dist. Ex. 6 at pp. 1, 13). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the March 2016 CSE recommended a 12:1 special class placement for instruction in mathematics, English language arts (ELA), social studies, and sciences (id. at pp. 1, 10). The March 2016 CSE also recommended one 40-minute session per week of counseling services in a small group (five students), two 40-minute sessions per week of individual OT, and two 40-minute sessions per week of speech-language therapy in a small group (three students) (id. at p. 10). Additionally, the March 2016 CSE recommended that the student participate in adaptive physical education and further recommended testing accommodations and special transportation services (id. at pp. 10-13).

The student attended the recommended 12:1 special class placement in a district public school for seventh grade during the 2016-17 school year (see generally Parent Ex. A; Dist. Exs. 16; 17 at p. 2).

On March 13, 2017, a CSE convened to conduct the student's annual review and developed an IEP reflecting a projected implementation date of March 27, 2017 and a projected date of the student's next annual review as March 14, 2018 (eighth grade, 2017-18 school year) (see Dist. Ex. 4 at pp. 1, 12). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the March 2017 CSE continued to recommend a 12:1 special class placement for instruction in mathematics, ELA, social studies, and sciences (id. at pp. 1, 8-9). Similarly, the March 2017 CSE recommended one 40-minute session per week of counseling services in a small group (five students) and two 40-minute sessions per week of individual OT, but modified the two 40-minute sessions per week of speech-language therapy in a small group from a group of three students to a group of five students (id. at p. 9). Additionally, the March 2017 CSE recommended that the student participate in adaptive physical education and further recommended testing accommodations and special transportation services (id. at pp. 8, 10-11).

[1] Prior to referring the student to the CPSE, the parents obtained a pediatric neurodevelopmental evaluation of the student in January 2009, which resulted in the following diagnostic impressions: autism spectrum disorder (pervasive developmental disorder, not otherwise specific [PDD-NOS]), developmental language disorder, and developmental motor delays (see Parent Ex. B at p. 1). At that time, the parents reported the student's difficulties as "making or keeping friends"; "[s]tereotypic, repetitive movements"; and "[e]xcessive anxiety/shyness" (id.). As a result of the pediatric neurodevelopmental evaluation and its related recommendations, the parents enrolled the student in a social skills training group beginning in March 2009 (one 75-minute session per week for three months) (see Parent Ex. D at p. 2).

The student attended the recommended 12:1 special class placement in a district public school for eighth grade during the 2017-18 school year (see generally Parent Ex. A; Dist. Exs. 15; 17 at p. 1).

On March 9, 2018, a CSE convened to conduct the student's annual review and developed an IEP reflecting a projected implementation date of March 19, 2018 and a projected date of the student's next annual review on March 10, 2019 (ninth grade, 2018-19 school year) (see Dist. Ex. 2 at pp. 1, 12). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the March 2018 CSE recommended a 12:1 special class placement for instruction in mathematics, ELA, social studies, and sciences (id. at p. 9). The March 2018 CSE also recommended one 40-minute session per week of counseling services in a small group (five students), two 40-minute sessions per week of individual OT, and two 40-minute sessions per week of speech-language therapy in a small group (five students) (id.). Additionally, the March 2018 CSE recommended that the student participate in adaptive physical education and further recommended testing accommodations and special transportation services (id. at pp. 9-10, 12).

A. Due Process Complaint Notice

In a due process complaint notice dated March 28, 2018, the parents alleged identical procedural and substantive violations for three separate school years, each of which the parents contend resulted the district failing to offer the student a free appropriate public education (FAPE) (see Parent Ex. A at pp. 1, 7-8). Specifically, the parents asserted that for the 2016-17, 2017-18, and 2018-19 school years the district, "[d]espite signs of [a]utism and a diagnosis of PDD-NOS," failed to "properly classify" the student as a student with autism (id. at p. 7). The parents further asserted that in each year the district failed to conduct a functional behavioral assessment (FBA) and failed to develop an appropriate behavioral intervention plan (BIP) given the student's "continuing interfering behaviors" (id. at pp. 7-8). Next, in each year the parents alleged that the district neither offered nor informed them of an "appropriate, scientifically-based methodology and/or strategy based on peer-reviewed research" the district intended to use in the student's classroom—applied behavioral analysis (ABA) based or otherwise—despite the student's "continued emotional and behavioral struggles" (id. at p. 8). The parents also alleged that during each year the district failed to offer "appropriate" speech-language therapy and that the student's "deficits, including, but not limited to, social skills deficits remain[ed] to date, and his present levels of performance [were] largely unknown due to insufficient testing" (id.). Finally, the parents contended that for each school year the district failed to recommend social skills training for the student; the district failed to recommend or consider the "support of a SEIT, aide, or behavior-management paraprofessional"; and the district failed to provide "home-based ABA services" or parent training and counseling for "generalization of skills, reinforcement, and ultimately to combat regression" (id.).

As relief, the parents requested an order finding that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years (see Parent Ex. A at p. 8). The parents also requested a determination that the "above-noted violations significantly impeded" their opportunity to participate in the decision-making process and "caused a deprivation of educational benefits" (id.). Next, the parents requested that the district provide an "appropriate IEP" for the remainder of the 2017-18 school year, as well as for the 2018-19 school year, that included

referring the student to a "non-public school ('NPS'), [an] appropriate program, related services, accommodations and supports" and "appropriate, measurable, and meaningful goals and objectives" (id. at pp. 8-9). The parents also requested the following as independent educational evaluations (IEEs): a neuropsychological evaluation, a speech-language evaluation, and an FBA and BIP (id. at p. 9). Finally, the parents requested compensatory educational services consisting of "1:1 speech[-]language therapy, home-based ABA, parent training, social skills training, and 1:1 academic tutoring" for the district's "failures over at least the last two school years" (id.).

B. Impartial Hearing Officer Decision

On May 24, 2018, the IHO held a prehearing conference and identified the issues to be resolved through the impartial hearing for the 2016-17, 2017-18, and 2018-19 school years (see Tr. pp. 2-3; compare Parent Ex. A at pp. 7-8, with Tr. pp. 2-3). On July 12, 2018, the parties met for the impartial hearing, which concluded thereafter on October 15, 2018 after three additional days of proceedings (see Tr. pp. 7-344).[2]

In a decision dated December 12, 2018, the IHO concluded that the district "appear[ed] to have made reasonably calculated program recommendations," specifically noting the student's placement in a "special education class, with related services, that appear[ed] to have addressed his needs" (IHO Decision at p. 7). The IHO further noted that the student "improved in comprehension, decoding and reading levels"; "responded to redirection and verbal prompting"; and the student's March 2018 IEP "noted and explained" his "degree of improvement academically and behaviorally" when compared to the student's March 2017 IEP (id.). According to the IHO, a comparison of the two IEPs demonstrated the student's reading level had improved from a fourth grade level to a sixth grade level (id.). Next, the IHO found that "social skills training was embedded" in the student's "classroom instruction and in the related services" (id.). In addition, the IHO indicated that the student demonstrated "steady progress in academics and related services," he made "social and emotional progress," and the student's guidance counselor testified that he would "transition well to high school" (id.).

Turning next to the matters of an FBA and BIP, the IHO found that—according to the "district's view"—the student's "behavior ha[d] not warranted these techniques as [his] behavior ha[d] been appropriately managed in school" (IHO Decision at pp. 7-8). The IHO concluded that based upon the "information available at the time of the IEP meetings, it appear[ed] . . . that the recommendations were reasonable and in fact [the student] ha[d] progressed" (IHO Decision at p. 8).

The IHO then moved on to note that newly obtained evaluative information existed as a result of the neuropsychological and speech-language IEEs ordered and completed during the

[2] In an interim decision dated July 23, 2018, the IHO ordered the district to "fund" a neuropsychological evaluation and a speech-language evaluation of the student as arranged by the parents; the evaluations were completed in July and September 2018 during the impartial hearing (IHO Ex. I at p. 2; see Tr. pp. 162-69; see generally Parent Exs. M-N). Both of the evaluators who conducted these evaluations testified at the impartial hearing about the respective evaluation results (see Tr. pp. 238-305). In addition, the parents had the student assessed at the Huntington Learning Center (HLC) on July 21, 2018, during the impartial hearing (see generally Parent Ex. L). The director at HLC also testified at the impartial hearing about the results of the HLC testing (see Tr. pp. 192-238).

impartial hearing, and opined that a CSE "should have an opportunity to review these reports, integrate the findings and recommendations with the findings and recommendations of those who have worked with [the student] in school and then make any adjustments to the program going forward, as warranted" (id.). In particular, the IHO indicated that the neuropsychological evaluation of the student revealed "severe deficits in reading comprehension," "age appropriate" decoding and oral reading skills, and "significant delays in mathematics abilities" (id.). In addition, the IHO noted that the evaluator who conducted the neuropsychological evaluation "recommended a structured nonpublic school classroom but also an educational setting in which [the student] '[was] able to participate with peers in the social aspects of the class day in a nurturing environment'" (id.). Finally, the IHO noted that the reconvened CSE "will need to reconsider [the student's] classification as well," given the evaluator's conclusion that the student's "functioning" was "within the autism spectrum" (id.).

Having concluded that the district was not "delinquent in providing an appropriate program thus far," the IHO denied the parents' request for compensatory educational services (see IHO Decision at p. 8). However as relief, the IHO ordered the district to convene a CSE meeting within two weeks of receiving the IHO's decision to review and consider the newly obtained evaluative information and to reconsider the student's "classification" (id. at p. 9). The IHO indicated that although the parents "shall maintain the right to challenge the recommendations" made at the reconvened CSE meeting at a "future impartial due process hearing," the IHO hoped that the parties could work together to develop a program "going forward that addressed the student's needs and t[ook] into account the parents' concerns" (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing generally that the IHO's decision drew conclusions unsupported by the hearing record and improperly disregarded the parents' evidence. More specifically, the parents assert that the IHO disregarded the alleged procedural violations that the district failed to provide them with sufficient evaluative information, which precluded them from fully participating in the development of the student's IEP. Relatedly, the parents contend that the district failed to recommend the administration of an FBA to assist in creating an appropriate IEP, and failed to discuss other available programs and services, sensory breaks, a BIP, or parent counseling and training. As such, the parents argue that they did not have an opportunity to offer "meaningful input into [the student's] ongoing services."

Next, the parents assert that the evidence in the hearing record did not support the IHO's finding that the student made progress academically, but instead, demonstrated that the student "stagnated or even regressed academically." The parents further assert that the IHO disregarded evidence explaining the "little progress" the student made through the IEPs. In addition, the parents assert that the district failed to produce any evidence to conclusively establish that the student achieved any of his annual goals. As a final point, the parents argue that the IHO disregarded their contention that the district's failure to develop BIPs based upon "valid FBAs" denied the student a FAPE.

As relief on appeal, the parents seek findings that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years, as well as a finding that the "[district's] actions significantly impeded" their opportunity to participate in the decision-making process. The

parents also seek an order directing the district to administer an FBA; revise the student's IEP to include a "research-based BIP"; and place the student in an appropriate nonpublic school providing "multi-sensory learning in a small, structured setting, with peers who do not have conduct disorders." In addition, the parents seek an award of compensatory educational services consisting of 985 hours of "1:1 tutoring" at HLC and for the district to provide the student with two 60-minute sessions per week of individual speech-language therapy, as well as two 45-minute sessions per week of speech-language therapy in a small group with no more than three students. Finally, the parents seek an order directing the district to provide them with parent counseling and training with "appropriate in-home behavioral training to allow generalization of skills" the student obtains at school.

In an answer, the district responds to the parents allegations and generally argues 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. 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]).[3]

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).

[3] 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—IHO's Decision and Unaddressed Issues

Upon receipt of the parents' request for review, the undersigned SRO gave serious consideration to rejecting the pleading (with the opportunity to file an amended request for review) for what appeared, at first glance, to be the parents' failure to comply with practice regulations. Notably, State regulations governing practice before the Office of State Review explicitly require that the request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders 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 (8 NYCRR 279.4[a] [emphasis added]). Furthermore, practice regulations require that a request for review shall 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" (8 NYCRR 279.8[c][2]). The same State regulation further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed" by an SRO (8 NYCRR 279.8[c][4]). Here, the request for review contains relatively vague arguments and a complete lack of specificity as to which school year—the 2016-17, 2017-18, or 2018-19 school year—the parents' arguments are directed, which results in an inability to discern which of the IHO's particular findings the parents' challenge, other than the IHO's legal conclusion that the district was not delinquent in providing an appropriate program thus far.

In an effort to determine why the parents' request for review is so vague—especially where, as here, the parents' attorney is experienced in handling appeals before the Office of State Review—a review of the entire hearing record points to the IHO's decision as the underlying source of their pleading issues. In this instance, the parents—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]). The parents asserted the same allegations (as described in section III.A. above) upon which to conclude that the district failed to offer the student a FAPE for the 2016-17, 2017-18 and 2018-19 school years at issue (see Parent Ex. A at pp. 1, 7-8). Despite having clearly articulated the issues to be resolved at the impartial hearing (see Tr. pp. 1-3), the IHO did not analyze any of the identified issues—which mirrored those raised by the parents in the due process complaint notice—within the decision and, more specifically, the IHO failed to analyze whether the district offered the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years based upon the issues raised by the parents (see generally IHO Decision at pp. 7-8). Instead, the IHO generally concluded that the district offered the student a FAPE—without noting which school year(s)—because the district "made reasonably calculated program recommendations" for the student and, according to the IHO, a comparison of two IEPs demonstrated that the student made progress (id. at p. 7).

Without analyzing the issues raised in the due process complaint notice for each school year at issue, the IHO essentially left the parents without specific findings to appeal in a way that would be consistent with State regulations. Absent such findings, it would offend due process to reject the parents' request for review at this juncture and leave the parents without further redress when the inability to formulate well-articulated arguments lay with the IHO's decision, itself. And while the parents do not specifically articulate a challenge regarding the IHO's failure to address each issue raised in the due process complaint notice with regard to each school year challenged,

the parents do challenge—to the extent able—the overall quality and substance of the IHO's decision.[4] For example, the parents argue that the IHO's decision was "deficient because it failed to consider or grapple with the bulk of the record, disregarding crucial documentary and testimonial evidence and relying on testimony that lacked any objective basis" (Req. for Rev. at pp. 2-3). In addition, the parents correctly point out that the IHO's decision had "few detailed findings with which to agree or disagree" and relied "almost exclusively on IEP narrative and . . . second-hand testimony" to find that the student demonstrated "behavioral improvements" (id. at p. 2, citing IHO Decision at p. 7). The parents also correctly argue that the IHO's decision did not "evaluate the testimony" presented through the parents' "experts" with regard to the student's "ongoing social and behavioral concerns and programming needs" (Req. for Rev. at p. 2). Next, the parents assert that the IHO failed to consider testimonial evidence indicating that the student made "minimal progress in reading," and instead, solely relied upon one source of scores assessing the student's reading to conclude that the student made progress in reading (id. at pp. 2-3).

Thereafter in the request for review, the parents assert challenges to the IHO's finding that the district offered the student a FAPE—but without specifying which school year(s)—by arguing that the IHO disregarded and ignored evidence related to the alleged procedural violations (see Req. for Rev. at pp. 3-4). Similarly, the parents assert that—with regard to the alleged substantive violations and the student's lack of progress—the IHO failed to "grapple" with testimonial evidence presented by the director of HLC and the psychologist who conducted an evaluation of the student during the impartial hearing when concluding that the student made progress (id. at pp. 4-5). The parents also point out that the district failed to produce any evidence to support the IHO's "implicit conclusion that [the student] made progress on his IEP goals" (id. at p. 5). Finally, the parents assert that the IHO "disregarded, without comment, [their] argument" that the district failed to develop "BIPs based on valid FBAs" and ignored evidence presented by the parents' "expert witnesses [who] confirmed that the social and behavioral interventions for [the student] were entirely inadequate to address his severe needs" (id. at pp. 5-6).

Generally, when an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; 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]). Recently, a federal district court in another jurisdiction vacated and remanded an IHO's decision when, on appeal to the district court, the parents persuasively established that—based upon a review of the IHO's decision—the IHO failed to consider and weigh evidence in the hearing record that was not otherwise explained by the IHO in his decision or when rendering his ultimate conclusion that the parents' unilateral placement was

[4] The parents and their attorney are cautioned that, in the future, should an IHO fail to address issues in the due process complaint notice as in this matter, and the parents do not specifically appeal the IHO's failure to address such issues, those issues—consistent with State regulations—will be deemed abandoned and will not be remanded to an IHO or addressed in a final decision on the merits. It is, in this case, only due to the absolute paucity of the IHO's decision that the parents' failure to appeal any of the unaddressed issues will not be fatal to those issues.

not appropriate (see I.W. v. Lake Forest High Sch. Dist. No. 115, 2019 WL 479999, at *10-*12 [N.D. Ill. Feb. 7, 2019]).

Here, the parents made both procedural and substantive claims that the evaluations of the student and the present levels of performance in each IEP were inadequate for each school year, that the district failed to conduct an FBA or develop a BIP each school year, that each school year the student should have been found eligible under the autism category, that the district did not offer an appropriate, scientifically-based methodology and/or strategy based on peer-reviewed research covering three school years (including ABA), that the level of speech-language therapy was inadequate for each school year, and that the student should have had a SEIT and/or home-based ABA therapy for each of the school years in question; however, the IHO's decision—in support of finding that the district offered the student a FAPE—relied upon 16 transcript pages, 12 from the district's first witness and 4 from the second district witness to support his findings (see IHO Decision at pp. 7-8). The hearing record transcripts totaled approximately 343 pages of testimony from two district witnesses and four witnesses presented on the parents' behalf (see Tr. pp. 1-343). In addition, the parties offered a total of 34 exhibits, approximately 300 pages of documentary evidence into the hearing record—but the IHO cited in the decision three pages of documentary evidence that were contained in two exhibits, as well as to each party's respective closing brief—in reaching his ultimate conclusion (see IHO Decision at pp. 7-8, 10-11). While the IHO identified the parents position, he did not reference the parents' evidence at all, testimonial or documentary, leaving the parent to wonder whether he considered it.[5] This was likely an oversight on the part of the IHO in the rendering of the decision, as he asked clarifying questions during the parents' case and seemed genuinely concerned about the student's education going forward. While the IHO was not required to exhaustively dissect every fragment of evidence offered by the parents, he should have showed that he weighed it by touching upon the evidence related to the alleged violations in parents' due process complaint notice and explained why he was not convinced by it or why he found the district's evidence more convincing than the parents.

In showing concern for the student, the larger portion of the IHO's two-page analysis is directed at how the CSE should approach consideration of new evaluative information going forward, but it does not adequately address the three years of alleged previous violations. The IHO's decision is especially remiss in failing to analyze the evaluative information regarding the student that was before each CSE, especially in light of the parents' challenges to the present levels of performance in each IEP that are supposed to be based upon the evaluative information.[6] Therefore, under these circumstances and in light of the foregoing, the IHO's decision must be vacated and the matter remanded for further administrative proceedings. This is especially true where, as here, the IHO failed to engage in any analysis whatsoever with respect to the issues presented in the parents' due process complaint notice as those issues related to each school year, 2016-17, 2017-18, and 2018-19, the IHO failed to consider or weigh evidence in the hearing

[5] The IHO did cite to the parents' nine-page due process complaint notice requesting a hearing.

[6] It is illogical to rely on the present levels of performance in an IEP to gauge the student's progress, as the IHO did in this case, when the parents have also alleged in the due process complaint notice that the present levels of performance in each IEP is inaccurate due to inadequate or insufficient evaluation. In these circumstances, the IHO should first explain the extent to which he believes the evaluative information before each CSE was sufficient and, if so, whether the student's present levels of performance in each IEP properly reflect what was contained in the evaluative information.

record, and the IHO failed to set forth any rationale for not addressing the parents' claims related to the three school years at issue (see generally IHO Decision). Upon remand, the IHO should make separate determinations with respect to each issue for each of the three school years at issue. It is left to the sound discretion of the IHO to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the issues described above and/or whether the parties should submit further evidence to otherwise fully develop the hearing record. Furthermore, the IHO is strongly encouraged to conduct a prehearing conference for the purpose of clarifying these issues, as well as the remaining requests for relief, and determining what, if any, further evidence may be required to issue a determination on these issues (8 NYCRR 200.5[j][3][xi]). Therefore, it is appropriate to remand this matter to the IHO for a determination consistent with this decision and based upon sufficient evidence and a complete hearing record (see Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *10-*11 [S.D.N.Y. Jan. 9. 2019] [remanding matter to IHO to supplement hearing record and to issue a pendency determination]; F.B., 923 F. Supp. 2d at 589).

If either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf. D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

VII. Conclusion

In summary, the matter must be remanded to the IHO for a determination on the merits of the parents' claims with respect to the 2016-17, 2017-18, and 2018-19 school years.

IT IS ORDERED that the IHO's decision, dated December 12, 2018, is hereby vacated; and,

IT IS FURTHER ORDERED that this matter is remanded to the same IHO who issued the December 12, 2018 decision to determine, within 45 days of the date of this decision, whether the district offered the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years based upon the issues raised in the parents' due process compliant notice, unless the parties agree otherwise, and what relief, if any, the parents may be entitled to if the IHO concludes that the district failed to offer the student a FAPE for any, or all, of the three school years at issue.[7]

Dated: **Albany, New York**
March 29, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER

[7] The IHO is further reminded that the principle of 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]).