



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-109

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:

Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioners, by Vanessa Jachzel, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Cynthia Sheps, 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 found that respondent's (the district's) issuance of a local diploma to the student in June 2019 was appropriate. The appeal is dismissed.

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 has been the subject of a prior State-level administrative appeal of an interim decision rendered by the impartial hearing officer (IHO) regarding the student's pendency placement (see Application of a Student with a Disability, Appeal No. 19-088). This State-level appeal relates to the IHO's final decision on the issue of whether the district's issuance of a local diploma to the student in June 2019 was appropriate.

By way of background, during the 2018-19 school year, the student attended twelfth grade at a district public high school (see Dist. Ex. 2 at p. 1). A CSE convened on December 3, 2018 and developed an IEP for the student with an implementation date of December 17, 2018 (see *id.* at pp. 1, 19-21, 28). According to the December 2018 IEP, the student presented with cognitive deficits in the areas of verbal comprehension and processing speed (Dist. Ex. 2 at p. 6). In addition, the student had difficulty comprehending spoken and written language (*id.*). Although the student had strong decoding skills, his reading comprehension, writing, and math skills were significantly delayed, whereby he was stronger in mathematics than in literacy-based subjects (*id.* at pp. 2, 6). In addition, the student had difficulty remaining focused and on-task independently (*id.* at p. 6). The student's deficits precluded him from participating in general education academic classes (*id.*). The student required frequent prompting and worked best on a 1:1 basis with his teachers or his 1:1 paraprofessional, or when paired with a stronger student for independent activities, and small classes to follow lessons and learn (*id.* at pp. 2, 6).

Finding that the student remained eligible for special education as a student with autism, the December 2018 CSE recommended that the student attend a 15:1 special class for math, English language arts (ELA), and social studies in a "[n]on-[s]pecialized" school (*id.* at pp. 1, 20, 27-28).¹ The CSE also recommended that the student receive two 40-minute sessions of occupational therapy (OT) per week (one individually and one in a group of three); one 40-minute session of psychological services per week in a group of two; three 60-minute sessions of speech-language therapy per week individually and one 40-minute session of speech-language therapy per week in a group of five; the services of a full-time 1:1 paraprofessional; adaptive physical education five times per week; and assistive technology consisting of a touch-screen tablet with an external keyboard and case for use in school and at home (*id.* at pp. 7, 19-21). For summer 2019, the CSE recommended a program that mirrored the program recommended for the 10-month portion of the school year, with the exception of the special class, which for the summer consisted of a recommendation for an 8:1+1 special class ("ASD Program"), and the addition of school nurse services on an "as needed" basis (*id.* at pp. 19-23). The district provided the parents with prior written notice on December 21, 2018 (Dist. Ex. 3).

On March 4, 2019, the district sent a letter to the parent explaining that the student "may be eligible for graduation following a superintendent's review of [the student's] academic record" (Parent Ex. F at p. 1). The letter further explained that it was the parent's decision whether the student would be reviewed by a superintendent for graduation and what the possible results of the review process would be (*id.*).

On March 11, 2019, the parents met with district staff, including the student's principal and guidance counselor (Dist. Ex. 8). Meeting notes indicated that the parents were made aware of various pathways for graduation available to the student and that the student could graduate with a local diploma in June 2019, if he either passes the remaining Regents exam or through a superintendent review (*id.* at p. 1). According to the meeting notes, the parents were willing to keep the student in the district until he was 21 years old so that he could attempt to obtain a Regents diploma (*id.* at pp. 1-2).

¹ The student's eligibility for special education as a student with autism is not in dispute (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On April 18, 2019, the parents and the student met with district staff, including the student's principal (Dist. Ex. 9). According to meeting notes a portion of the meeting was dedicated to a discussion of the "superintendent review" option for graduation, which required parental consent and that the school submit a request for graduation for the superintendent to review (id.).

The parents met with district staff, including the school principal, on June 21, 2019 (see Parent Ex. I at pp. 5, 6). At that meeting, the parents were advised that the student had passed four Regents examinations and the district would graduate the student with a local diploma if he passed a fifth Regents examination (id. at p. 6). In a June 23, 2019 email letter to the district, the parent expressed disagreement with the school's decision to graduate the student, asserted that they had previously been advised the student would not graduate after the 2018-19 school year, that they did not receive notice of graduation in time to plan for it, and that the student was still "unable to function outside of the school environment" (id. at pp. 5-7).

The parents filed a due process complaint notice dated June 24, 2019 contesting the district's decision to graduate the student with a local diploma (Parent Ex. A at p. 1).

On June 24, 2019, the district notified the parents that the student "will graduate with a local diploma in June 2019"; that he had met all graduation requirements; and that he "achieved a local diploma using the compensatory option" (Dist. Ex. 5 at p. 1). The notice also detailed options for the student and family to consider if the student wanted to pursue a Regents diploma, as well as "[o]ther post-secondary options [that] were discussed" (id. at pp. 1-2).

According to email correspondence between the parents and district staff, the parents were advised during two telephone calls on June 25, 2019 and June 26, 2019 of post-graduation options for the student, including that the student could attend Regents prep courses over the summer and could retake Regents examinations in order to obtain a Regents diploma (id. at pp. 2-3). The parents were further advised that the student received a local diploma because he met the requirements for graduation and that there was "no mechanism to further contest [the parent's] disagreement" (Parent Ex. I at pp. 1, 2).

The district provided the student with an exit summary dated June 24, 2019 (Parent Ex. G).² The exit summary included a description of the student's present levels of performance, the student's current supports, post-secondary goals, recommendations to assist the student in reaching his post-secondary goals, and a list of agencies or organizations that could provide the student with supports (id.).

A. Due Process Complaint Notice

On July 24, 2019, the parents amended their due process complaint notice and alleged that the district denied the student a free appropriate public education (FAPE) by improperly issuing the student a local diploma (Parent Ex. B at pp. 1, 6). Initially, the parents alleged that the student had not met the requirements for a local diploma because he had only passed three Regents examinations and obtained a score of 55 or higher on one other examination (id. at p. 2). The

² The exit summary is dated June 24, 2019 and was signed by the student on June 26, 2019 (Parent Ex. G at pp. 1, 9).

parents alleged that the CSE misled them into believing that the student would not graduate in June 2019 and would remain eligible for special education instruction and related services during the 2019-20 school year but that the district instead unilaterally issued the student a local diploma without providing the parents with prior written notice (id. at pp. 1, 3-5). The parents further argued that the district improperly used a compensatory option or safety net scoring, without the parents' permission, to manipulate the student's scores on his Regents examinations, resulting in the student graduating with a local diploma rather than a Regents diploma (id. at p4). The parents contend that because they did not consent to use of the compensatory option, the awarding of a local diploma was improper (id.). They further allege that the district's decision to graduate the student was discriminatory in that a local diploma is only available to non-disabled students via an appeal process requiring a choice, and therefore the district violated the student's rights under the United State Constitution, the State Constitution, the Americans with Disabilities Act (ADA), and section 504 of the Rehabilitation Act of 1973 (section 504) (id. at p. 6).

The parents also alleged that the student's functional levels, as reported in the December 2018 IEP, called into question the validity of at least some of the high school credits the student earned, as the parents assert it would have been impossible for the student to meet standard criteria in ELA and math and earn high school credit, while functioning at a "fifth grade math level and a fourth grade reading level" (Parent Ex. B at p. 5). Further, the parents argued that the student had yet to achieve many of his IEP annual goals or post-secondary goals (id.). The parents also asserted that the IEP failed to include annual goals "to address many identified areas of need, including maintaining focus and attention or developing higher level math skills" (id.).

The parents "invoke[ed] their pendency rights" and alleged that the student's last-agreed upon placement was pursuant to the December 2018 IEP (Parent Ex. B at p. 6). Related to pendency, for summer 2019, the parents noted that, "[u]pon information and belief," the district had implemented a program for the student but that said program did not align with the program recommended in the December 2018 IEP and that the student "may not [have] be[en] receiving all of his related services" or transportation from the district (Parent Ex. B at p. 5).

For relief, the parents requested that an IHO order the district to rescind the student's local diploma, reconvene a CSE to develop an IEP that would allow the student to work towards achieving a Regents diploma, and place the student in "appropriate vocational programs" aligned with the student's stated post-secondary goals (id. at pp. 6-7). The parents also requested that the district be required to provide or fund compensatory education services for any services required by the December 2018 IEP but not provided to the student during summer 2019 and reimburse the parents for the costs of transportation (id. at p. 7).

B. Pendency Hearing, Impartial Hearing Officer Interim Decision, and State-Level Administrative Decision on Pendency

A pendency hearing was conducted on August 8, 2019 (Tr. pp. 1-20). In an interim decision, dated August 8, 2019,³ the IHO determined that the student's pendency placement

³ The IHO's interim decision addressing pendency was originally mis-dated August 4, 2019 (Aug. 4, 2019 Interim IHO Decision at p. 2). For purposes of this decision, all citations to the IHO's interim decision are to the corrected

consisted of the program and services as indicated on the December 2018 IEP (Interim IHO Decision at pp. 1-2).⁴ The IHO indicated that the district high school (which the student had attended prior to graduation) "ha[d] allowed [the student] to continue at their school for the summer" (id. at p. 1). The IHO further determined that he would "extend the services, as pendency, listed in the December 2018 IEP through the summer and if the high school allows [the student's] attendance past the summer then the pendency will continue until" the IHO issued his final decision (id.).

On September 16, 2019, the parents filed an appeal seeking State-level review of the IHO's interim decision regarding the student's pendency placement. On October 31, 2019, an SRO issued a decision with respect to the parents' appeal of the IHO's August 8, 2019 interim decision (Application of a Student with a Disability, Appeal No. 19-088). The SRO in that review found that the IHO erred in providing a district public school with discretion to determine whether or not the student would receive his stay-put placement and services during the pendency of the underlying proceedings (id.). The SRO further found that the district had continuously failed to implement the student's pendency placement beginning on September 5, 2019 and the student was entitled to compensatory education services to remedy the district's failure to implement pendency (id.). Lastly, the SRO ordered the district to provide the student his pendency placement as set forth in the December 3, 2018 IEP, until a final adjudication of the underlying cause of action was realized (id.).

C. Impartial Hearing Decision

Following the pendency hearing and issuance of the IHO's interim decision, the parties convened and concluded the hearing on September 11, 2019 (Tr. pp. 21-254). In a final decision dated September 22, 2019, the IHO found that the district properly issued a local diploma to the student in June 2019 (IHO Decision at pp. 6-11). Initially, the IHO found the testimony of all of the witnesses credible; however, the IHO also found that portions of the parents' testimony were not relevant to issues presented and that, during the hearing, the parent seemed confused as to dates and what occurred at each meeting (id. at pp. 7, 8).

With respect to the district's issuance of a local diploma to the student, the IHO found that the parents' demand that the student be allowed to continue in a public school to achieve a Regents diploma was "disingenuous" (IHO Decision at p. 8). The IHO noted that this demand was only about the student being readmitted into a public school to receive services and maintain the "structure" of a public school until the student reached the age of 21 (id. at p. 9). Next, the IHO noted that the parents did not contest the student's IEP for the 2018-19 school year, until the district issued the student a local diploma (id.). The IHO also noted that the evidence in the hearing record indicated that the student's scores in a majority of Regents improved after the student took the exams multiple times (id.). Thus, the parents "were aware" or "should have been aware" that the student had the ability to pass Regents examinations (id.). Next, the IHO acknowledged the parents' concerns regarding the student's math and reading levels being well below grade level, but

version, dated August 8, 2019.

⁴ The IHO listed the program and services in total without making a distinction as to which aspects were specific to either the 10-month portion of the school year or the summer program (see Interim IHO Decision at pp. 1-2).

noted that the student's grades were "high" in his academic classes and that there was no claim that the student did not make progress in his program or that the scores the student received in his academic classes were "wrong" or not "deserved" (*id.* at pp. 9-10). Next, the IHO found that the parents' attorney did not present any decision or regulation in which an IHO had the authority to invalidate a school district's own regulation to present a student with a diploma according to that district's regulation (*id.* at p. 10). The IHO also noted that although the parents' attorney was permitted to present evidence during the impartial hearing showing the IHO had the authority to nullify a local diploma issued to a student, the attorney did not show any such authority and the IHO found that he did not have the authority to invalidate the student's local diploma and to order the district to re-admit the student to continue to receive services listed in the student's IEP (*id.*). The IHO also noted that although there were no "additional classes" for the student to take to achieve a Regents diploma, the student could "retake" Regents exams if the student wanted to achieve a Regents diploma rather than a local diploma (*id.*).

Turning to the student's summer 2019 services, the IHO found that there was no testimony that the student did not receive any summer services (IHO Decision at p. 11). The IHO noted that the parents' did not claim that the student actually missed any services (*id.*). However, with respect to the student's transportation during summer 2019, the IHO ordered the district to pay the parents for transportation based on a computation for mileage to and from the student's summer program and directed the parents to provide an attendance record of the student attending that program (*id.*).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred in finding that the district properly issued a local diploma for the student based on State regulation. The parents argue that the IHO was unfairly prejudicial during the impartial hearing. More specifically, the parents argue that the IHO erred by limiting or excluding evidence offered by the parents, by improperly ruling on objections by the district, in allowing duplicative testimony by the district while barring both parents from testifying, by not allowing briefs and interrupting the attorney for the parents during his closing argument, and in his general demeanor during the hearing.⁵

With respect to the district's issuance of a local diploma to the student, the parents argue that the IHO failed to consider the district's lack of prior written notice, the district's failure to fully explain the compensatory option for graduation, and the parent's lack of consent to a local diploma. The parents argue that the plain language of the rules and regulations describe compensatory and safety net pathways as "options" available to the student. The parents also argue that the IHO shifted the burden of proof and that the district failed to prove that it properly issued a local diploma for the student. Additionally, the parents contend that a local diploma is not fully aligned with the State's academic standards and therefore does not qualify as a regular high school diploma and does not terminate the student's eligibility for special education. Next, the parents argue that the IHO did not address the parents' discrimination based claims.

For relief, the parents request that the SRO order the district to rescind the student's local diploma, reconvene a CSE to develop an IEP that would allow the student to work towards

⁵ The parents submit three exhibits, marked as Parent Exhibits T, U, and V, with the request for review that the IHO did not accept into evidence during the hearing (*see* Tr. pp. 34-35).

achieving a Regents diploma. The parents also request a finding that the district discriminated against the student. The parents further request reimbursement for summer transportation expenses and a remand of the case to a new IHO to determine compensatory services to make up for the district's failure to implement pendency.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety, and that the IHO properly found that the student was no longer eligible for special education services because he satisfied the requirements to graduate with a local diploma in June 2019. The district also contends that the parents' request for review should be rejected because it exceeds the maximum page limitations set forth in State regulation. Next, the district argues that the parents' submission of additional evidence should be rejected. The district also argues that the parents' allegations that the student is entitled to compensatory relief has no merit. In addition, the district argues that the parents' Section 504, ADA, and constitutional claims be dismissed as the SRO has no jurisdiction to rule over those claims.

In a reply, the parents respond to the district's contention that the request for review be dismissed and the additional evidence not be accepted.

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district asserts that the parents' request for review must be dismissed for failure to comply with the form requirements for pleadings (8 NYCRR 279.8[a][2]; [b]). In particular, the district asserts that the parents included a caption page on a separate page (before page 1) and added the signature and contact information on page 11, thereby circumventing the 10-page limit set forth in regulation, warranting the dismissal of the appeal.

State regulations provide that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]).

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]).

Here, even if the district correctly asserts that the parents circumvented the 10-page limit set forth in regulation, by adding the signature and attorney information on page 11 of the request for review and the case information on a separate unnumbered page, I decline, as a matter within my discretion, to dismiss the request for review on these grounds. I caution parents' counsel in the future to comply with the pleading requirements.

2. Scope of Review

The parents raised claims related to CSE composition and inadequate annual goals in their amended due process complaint notice that the IHO did not address in his decision, and the parents have not pursued those claims on appeal. Accordingly, those claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

3. Jurisdictional Issues

The parents assert that the IHO improperly refused to address claims based on section 504, the ADA, and the United States and State constitutions.

A State Review Officer lacks jurisdiction to consider the parents' challenge to the IHO's refusal to rule on her section 504, ADA or constitutional claims, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). As courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 or the ADA (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]).

Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding section 504, the ADA, or their claims based on the United States or State constitutions and, to the extent such claims are asserted in this proceeding, they will not be further addressed.

4. Additional Documentary Evidence

The parent attaches additional documentary evidence to their memorandum of law on appeal. The document is labeled "P-1" consisting of the student's psychological, speech and economics progress reports. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Upon review, the parents sought to submit the same documentary evidence at the impartial hearing as Parent Exhibits T, U, and V in an attempt to prove that the student's goals in the December 2018 IEP were not achieved (Tr. pp. 34-35). As the student's goals are not at issue before me, this evidence is not necessary to render a decision in this matter; therefore, it will not be considered.

5. Conduct of Impartial Hearing

The parents argue that the IHO was unfairly prejudicial during the impartial hearing by improperly limiting or excluding evidence offered by the parents, improperly ruling on objections made by the district, allowing duplicative testimony by the district while barring both parents from testifying, improperly denying certain legal briefs and interrupting the attorney for the parents during his closing argument. They also assert that the IHO displayed an improper general demeanor during the hearing.

The IHO is responsible for ensuring the orderly, efficient conduct of the impartial hearing and is afforded broad discretion in doing so. For instance, State regulation explicitly allows an IHO to limit or preclude examination of a witness whose testimony is deemed by the IHO to be "irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Further, an IHO may limit the number of additional witnesses in order to avoid unduly repetitious testimony (8 NYCRR 200.5[j][3][xii][d]).

It is also well settled that an IHO must be fair, impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097) and render their decision based upon the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealing with litigants and others with whom the IHO interacts in an official capacity, and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021). An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations; and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. §1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Upon my independent review of the impartial hearing record, I have found no evidence to support the parents' contention that the IHO displayed a lack of impartiality or otherwise abused his broad discretion regarding the conduct of the impartial hearing. Moreover, my review of the hearing record demonstrates that the parents had the opportunity to present a case at the impartial hearing and that the impartial hearing was conducted in a manner consistent with the requirements of due process by the IHO (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]).

B. Graduation—Issuance of Local Diploma

The parents assert that the district improperly graduated the student over their objections. The parents requested that the student remain eligible for special education programs and services in order to obtain a Regents diploma beyond the 2018-19 school year; however, the district sent

the parents a prior written notice indicating that the student would receive a local diploma on June 24, 2019 (Dist. Ex. 5).

In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she either receives a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];⁶ 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Additionally, "[t]o ensure appropriate transition planning for [a] student, the development of transition goals and services . . . shall include a discussion with the student's parents of: (1) the graduation requirements that apply to the student depending upon the year in which he or she first enters grade nine; (2) how the student is progressing toward receipt of a diploma including: (i) the courses the student has passed and the number of credits the student has earned as required for graduation; (ii) the assessments required for graduation that the student has taken and passed; and (3) the appeal, safety net and superintendent determination pathway options that may be available to the student" (8 NYCRR 200.4 [d][2][ix][b]).

In the instant matter, during the December 2018 CSE meeting, the parents expressed concern as to whether the student would be able to graduate in June 2019 (Dist. Ex. 2 at p. 3). The December 2018 CSE discussed options for the student to graduate through a Career Development and Occupational Studies (CDOS) pathway or through a superintendent appeal (id.). The parents also expressed during the CSE meeting that the student needed more time to build skills before graduating (id.). According to the IEP, the parents "stated that they would like to see available programs and other options that [the student] can participate in if they decide that he is not ready to graduate" (id.). By letter dated March 4, 2019, the district informed the parents that the student may be eligible for graduation with a local diploma based on the superintendent's determination (Parent Ex. F). This letter explained that "at the [parent's] request," the superintendent would determine whether the student has met the academic standards in the remaining subject areas in which they did not receive passing exam scores (id. at p. 2). The letter further indicated that if the student met the learning standards in these subject areas, the superintendent would approve the student for graduation with a local diploma (id.). On March 11, 2019, the parents attended a meeting with district staff, during which the parents were made aware of various pathways available to the student for graduation and that the student could graduate with a local diploma in June 2019, if he passed the remaining Regents exam or through a superintendent appeal (id. at p. 1). On April 18, 2019, the parents met with district staff and were again made aware of the use of the superintendent review for graduation, which requires parental consent (id. at p. 1). After a June 21, 2019 meeting with district staff, during which the parents were advised the student would graduate with a local diploma if he passed the remaining Regents examination, the district sent a notice dated June 24, 2019, to the parents indicating that the student had met all of the graduation requirements for a local diploma (Dist. Ex. 5; see Parent Ex. I at pp. 5-6). The notice further indicated that the student received a local diploma using the compensatory option (Dist. Ex. 5).

⁶ If a student with a disability reaches age 21 during July or August and is otherwise eligible, the student is entitled to continue in a summer program until the earlier of August 31 or the termination of the summer program (Educ. Law § 4402[5][a]).

Overall, the hearing record shows that district staff and the parents discussed the student's graduation pathways, although there was disagreement as to whether the student was prepared for graduation.

The main crux of this matter is whether the district properly issued a local diploma to the student notwithstanding the parents' objection. According to State regulations, a student with a disability can meet graduation requirements and earn a local diploma through a "low pass safety net" option because a score by such student of 55-64 may be considered as a passing score on any Regents examination required for graduation, and in such event ... "the school may issue a local diploma to such student" (8 NYCRR 100.5[b][7][vi][b]). A student can also meet graduation requirements and earn a local diploma through a "compensatory safety net" option if a student's score of 45-54 on a Regents examination required for graduation, other than the English and mathematics examinations, may, for purposes of earning a local diploma, be compensated by a score of 65 or higher on one of the other required Regents examinations; provided that:

(1) each examination for which the student earned a score of 45-54 must be compensated by a score of 65 or higher on a separate examination; a score of 65 or higher on a single examination may not be used to compensate for more than one examination for which the student earned a score of 45-54; and

(2) the student has attained a passing grade, that meets or exceeds the required passing grade by the school, for the course in the subject area of the Regents examination in which he or she received a score of 45-54; and

(3) the student has a satisfactory attendance rate, in accordance with the district's or school's attendance policy established pursuant to section 104.1(i)(2)(v) of this Title, for the school year during which the student took the Regents examination in which he or she received a score of 45-54, exclusive of excused absences

(8 NYCRR 100.5[b][7][vi][c][1]-[3]).

Based on the hearing record, the student received the following scores on Regents examinations: Algebra (57), ELA (66), Living Environment (70), U.S. History (67) and Geometry (48) (Dist. Ex. 6). Thus, the student received over a score of 65 on three Regents exams, including ELA, Living Environment, and U.S. History (*id.*). With respect to Algebra, the student's score of a 57 can be considered a passing score under the "low pass option" and as the regulations indicate, "the school may issue a local diploma to such student" (8 NYCRR 100.5[b][7][vi][b]). With respect to Geometry, using the compensatory option, the district utilized the higher score from one of the three Regents exams the student scored over 65 on to compensate for the student's score of a 48. In addition, the parties do not dispute that the student attained passing grades in the courses related to the Regents exams and had satisfactory attendance. Accordingly, the district was permitted to graduate the student with a local diploma in June 2019 and, thereafter, the student was no longer statutorily eligible for special education programs or related services.

Although State regulation provides that "the school may issue a local diploma to such student" with respect to the "low pass safety net" option, the parents are correct in that State guidance is not as clear, as guidance appears to indicate that it is an "option" whether to use the

safety net, and also sets forth that the safety net option "allows a student with a disability to meet the testing requirements for a local diploma by achieving a score between 55 and 64 on one or more of the required Regents examinations" and "[a] student with a disability who makes use of the Low Pass Safety Net Option may also use the Compensatory Safety Net Option" ("Safety Net Options Available to Students with Disabilities to Graduate with a Local Diploma," Office of Special Educ. [Oct. 2019] available at <http://www.p12.nysed.gov/specialed/gradrequirements/documents/safety-net-options-available-students-with-disabilities.pdf>). Creating more confusion for the parents is the "superintendent's review," in which the student may be eligible for graduation with a local diploma based on the superintendent's determination only with the parent's written request (8 NYCRR 100.5[b][12][iv]). However, while the parents interpret the State guidance as providing an option for the student or parents with respect to whether or not the student will graduate pursuant to the applicable State regulation, such interpretation is in conflict with the regulation itself which provides the district with the option of issuing a local diploma utilizing the safety net without requiring the district to take into account the parents' or student's preferences. Therefore, I do not find any support for overturning the district's issuance of a local diploma to the student in June 2019.

As the student earned and received a local diploma in June 2019, the student's eligibility for special education also terminated in June 2019.

Finally, to the extent that the parents request compensatory education for services the student missed during the pendency of this proceeding due to the district's failure to implement pendency, the district has been directed to provide the student with compensatory education (Application of a Student with a Disability, Appeal No. 19-088). As this award is based on the student's pendency placement, it must continue throughout this proceeding and the district is directed to provide the student with compensatory education for any missed pendency services based on the decision in Application of a Student with a Disability, Appeal No. 19-088 through the date of this decision.

VII. Conclusion

In summary, my review of the evidence in the hearing record reveals no error in the IHO's determination that the district properly graduated the student with a local diploma in June 2019, thereby rendering him ineligible for further special education services. Accordingly, the IHO correctly denied the parents' request for relief.

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

IT IS ORDERED that the district shall provide the student with compensatory education for any missed pendency services based on the decision in Application of a Student with a Disability, Appeal No. 19-088 through the date of this decision.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 December 4, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER