The University of the State of New York

The State Education Department
State Review Officer
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No. 22-009

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

Appearances:
Barger & Gaines, attorneys for petitioners, by Robert M. Tudisco, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, 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 the decision of an impartial hearing officer (IHO) which denied her request for compensatory educational services and to be reimbursed for the costs of her son's tuition at the Rebecca School for the 2018-19 school year.[1] The appeal must be sustained.

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.

[1] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1 [d], 200.7).

§§ 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

Given the limited issues to be resolved in this appeal, a full recitation of the student's educational history is not necessary. Briefly, however, the student attended an out-of-State public school for pre-kindergarten and kindergarten in Texas (Dist. Ex. 4 at p. 1).[2] In December 2017,

[2] The student's mother reported that the student received "early intervention" services consisting of speech-language therapy and occupational therapy (OT) at the age of three to four years old (Dist. Ex. 4 at p. 1). The student had an out-of-State IEP for the 2016-17 school year which reflected that the student met the criteria for

the student moved to New York and began attending first grade in a 12-month 6:1+1 special class in a specialized school pursuant to a comparable services plan while preparations were made to conduct an evaluation of the student (Dist. Exs. 1 at p. 1; 4 at p. 1). Subsequently, between January and March 2018, the district conducted a social history evaluation, a classroom observation, and a psychoeducational evaluation of the student (Dist. Exs. 2-4).

A CSE convened on March 22, 2018 and found the student eligible for special education and related services as a student with autism (Dist. Ex. 5 at p. 18).[3] The March 2018 CSE recommended that the student receive 12-month services with placement in a 6:1+1 special class in a district specialized school (id. at pp. 13-14, 17). The CSE also recommended two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), two 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per year of parent counseling and training, and special transportation, including a full-time transportation paraprofessional (id.).

According to a parent-teacher communication log, on April 25, 2018, the parent requested that the student have a paraprofessional present during his PT sessions because the parent was concerned about the student's safety (Parent Ex. V at pp. 10-11). In a letter to the district dated May 1, 2018, the student's private psychiatrist indicated that the student suffered an unexplained injury from school on April 24, 2018 and, noting that the student was "minimally verbal and unable to explain what occurred" and explained that it would be "beneficial" if the student had a paraprofessional during the school day (Parent Ex. K).[4] According to the district's Special Education Student Information System (SESIS) events log, on May 14, 2018, the district school psychologist met with the parent to discuss the parent's request for a 1:1 paraprofessional for the student (Dist. Ex. 10 at p. 2). The district school psychologist conducted a second classroom observation of the student on May 18, 2018 and May 21, 2018 (Dist. Ex. 6 at p. 1).

On May 24, 2018, the CSE convened and discussed the May 2018 classroom observation and the parent's request for a 1:1 paraprofessional (see Dist. Ex. 7). The May 2018 CSE continued the same program and related services recommendations from the March 2018 IEP (compare Dist. Ex. 5 with, Dist. Ex. 7).

For the 2018-19 school year, the student attended a district school for part of September through November 2018 (Dist. Ex. 9 at p. 1).[5] In a letter to the district dated November 2, 2018, counsel for the parent indicated that she was rejecting the student's IEP for the 2018-19 school

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classifications as a student with autism and as a student with a speech or language impairment (Parent Ex. B at p. 1).

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

[4] The hearing record also includes a letter dated February 7, 2018 from the student's psychiatrist indicating that the student required a 1:1 paraprofessional during class (Parent Ex. F at p. 1).

[5] According to the district's report of the student's attendance history, the student was present for 19 out of the 50 days he was enrolled in the public school for the 2018-19 school year (Dist. Ex. 9 at p. 1).

year because it was not appropriate to meet the student's academic and behavioral needs (Parent Ex. R). The parent also notified the district of her intent to unilaterally place the student at the Rebecca School for the 2018-19 school year and seek funding from the district for the costs of the student's tuition (id.). The student began attending the Rebecca School on November 26, 2018 and continued attending the Rebecca School for the remainder of the 2018-19 school year (Parent Ex. HH).

A. Due Process Complaint Notice

In a due process complaint notice dated July 17, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (see Parent Ex. A at p. 10).[6] Initially, the parent alleged that the district failed to provide her with copies of the student's educational records (id. at pp. 1-2). After reviewing the student's educational history and his program at the Rebecca School, the parent listed a number of allegations related to the 2017-18 and 2018-19 school years (id. at pp. 2-11). In addition to more general allegations, the parent argued that the district denied her meaningful participation in the CSE process for the student's 2017-18 and 2018-19 school years (id.). The parent further argued that the district failed to consider the student's academic, developmental, social, and behavioral needs (id.). The parent argued that the district failed to properly evaluate the student or consider the student's needs when developing a program recommendation for the student (id. at pp. 10-11). The parent also argued that the district failed to provide any "Behavioral Therapy," conduct a functional behavioral assessment (FBA), or develop a behavioral intervention plan (BIP) to address the student's frustrations and maladaptive behaviors (id. at pp. 3, 11). Additionally, the parent argued that the district failed to develop appropriate, meaningful, and measurable annual goals (id. at p. 10). The parent alleged that the district failed to provide the student with appropriate IEPs for the 2017-18 and 2018-19 school years (id.). The parent further alleged that the district failed to recommend appropriate related services for the student (id.). Additionally, the parent alleged that the district failed to recommend a 1:1 aide for the student, despite numerous concerns from the parent and student's doctors that the student's school was an unsafe and dangerous environment for the student (id.). The parent also alleged that the district failed to provide an appropriate "placement" for the student (id.).

With respect to the unilateral placement, the parent asserted that the Rebecca School was an appropriate placement for the student because the student made progress while attending the school (Parent Ex. A at pp. 7-9). The parent also asserted that equitable considerations weighed in her favor because she cooperated with the CSE (id. at p. 9).

For relief, the parent requested the following: (1) a finding that the district failed to offer the student a FAPE for the 2017-18 and 2018-19 school years; (2) a finding that the Rebecca School was an appropriate unilateral placement for the student for the 2018-19 school year; (3) an order directing the district to fund the costs of the student's tuition at the Rebecca School for the 2018-19 school year; (4) an order directing the CSE to develop an appropriate IEP for a 12-month school year; (5) an order directing the district to conduct an applied behavior analysis (ABA)

[6] The due process complaint notice is dated July 16, 2019 on the first page; however, the header on the subsequent pages indicates a date of July 17, 2019 (Parent Ex. A).

therapy assessment; (6) an order directing the district to conduct an FBA and develop a BIP; (7) an order directing the CSE to conduct a "full battery of evaluations" including a psychological evaluation, a PT evaluation, a speech-language evaluation, an OT evaluation, an assistive technology evaluation, an FBA, and a neuropsychological evaluation; (8) an order directing the district to fund independent evaluations in the aforementioned areas should the parent disagree with the district's evaluations; (9) an order directing the district to provide speech-language, OT, and PT services at the expense of the district in coordination with the student's program at the Rebecca School; and (10) an order directing the district to provide a minimum of 100 hours of compensatory ABA special education teacher support services (SETSS) at district expense for the denial of a FAPE for the 2017-18 and 2018-19 school years (id. at pp. 11-12).

B. Impartial Hearing Officer Decision

IHO Edgar De Leon was appointed in July 2019 to hear the matter and he convened an impartial hearing on July 1, 2021 which concluded on November 15, 2021 after four days of hearings(see Tr. pp. 1-347).[7] Among other evidence, two witnesses from the district and one witness from the Rebecca School were called to present testimony (Tr. pp. 40, 223, 296). During the last day of the impartial hearing on November 15, 2021, the parent's attorney made a request on the record to extend the compliance date for the impartial hearing for the purpose of presenting a witness (Tr. p. 346). The district's attorney joined in the application for an extension and the IHO immediately granted the parties' joint request to extend the compliance date (id.).

IHO De Leon issued a final decision dated December 24, 2021, in which he determined that with respect to the parents claims related to the 2017-18 school year, the district had no obligation to defend an IEP that was developed by another school district in another state; however, the IHO next determined that with respect to the programming recommended by the CSE for the 2018-19 school year, the district offered the student a FAPE (IHO Decision at pp. 35-36).

Initially, the IHO noted that the gravamen of the case was whether the district recognized the student's behavioral problems and whether the student required a 1:1 paraprofessional (IHO Decision at p. 24). The IHO ultimately found that the student did not exhibit behaviors that interfered with his learning or the learning of other students and that the absence of a 1:1 paraprofessional for the student in school did not rise to the level of a denial of a FAPE (id. at p. 34). The IHO found that the student's school psychologist "credibly" testified that the student was not assigned a paraprofessional because he was placed in a setting that provided a lot of targeted intervention and support and that the student did not have behaviors that could not be addressed with the interventions the district already had in place (id. at p. 33). Next, the IHO found that the district offered a thoughtful and comprehensive IEP that reflected the results of the evaluations and that the IEP was "adequate and provide[d] more than 'de minimis' benefits" (id. at p. 35). The

[7] The hearing record includes three subpoenas signed by the IHO, dated May 4, 2021. The hearing record also includes a decision made by the IHO in a May 25, 2021 email to the parties regarding the issuance of Subpoenas (IHO Ex. I). The IHO indicated that on May 3, 2021, the district requested three subpoenas; on May 10, 2021, the parent moved to quash the three subpoenas; and on May 17, 2021, the district submitted opposition papers to the parent's motion to quash (id.). In the decision, the IHO identified parameters for how the subpoenas should be modified and requested that the district resubmit them (id.). It is unclear from the hearing record what next occurred or if the May 4, 2021 subpoenas, signed by the IHO, are the original subpoenas or if they were modified.

IHO also found that the annual goals were "detailed, comprehensive, measurable and specified to the student" (id.). Lastly, finding that the district offered the student a FAPE for the 2018-19 school year, the IHO did not address whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations favored the parent and therefore, denied the parent's request for relief (id. at p. 36).

IV. Appeal for State-Level Review

The parent appeals and asserts that IHO De Leon denied her a full and fair impartial due process hearing because the IHO prematurely and arbitrarily closed the incomplete hearing record and issued a final decision.[8] More specifically, the parent asserts that her attorney received the final decision on December 27, 2021 and immediately contacted the IHO and the district's attorney. The parent argues that on the same day, the IHO responded and indicated that the request for continuance of the compliance date was granted on November 15, 2021; however, no further communication was received from either side regarding scheduling the continuance. The parent asserts that IHO De Leon indicated that his office instructed him to write and submit his decision. According to the parent, the IHO also indicated that the IHO's decision is final under law and regulations unless appealed to an SRO and, additionally, that it would be impractical and improper for him to continue as the IHO in this case because the parties would have knowledge of his analysis, reasoning, and determination of the facts of the hearing. The parent further argues that the IHO was premature, arbitrary, capricious, and biased in denying additional witnesses the opportunity to testify and to have additional documents received into evidence. The parent also asserts that she was denied a fair and impartial due process hearing because she was denied the opportunity to make closing arguments or submit a closing brief. In addition, the parent argues that the IHO's decision was one-sided and biased because it was based on an incomplete record which does not contain the full testimony and documentary evidence from the parent, the parent's witnesses, or several documents that would have been submitted into evidence during further testimony. Further, the parent argues that she was not given the opportunity to testify as to the student's extreme anxiety and injuries suffered while he attended the district school. As relief, the parent requests reversal of the IHO's decision and remand of the matter to a different IHO for a full and fair hearing on the merits.

In an answer, the district denies the material allegations contained in the parent's request for review. Further, the district argues that the parent has not appealed the IHO's determination of FAPE in her request for review and therefore the SRO should determine the IHO's finding on FAPE final and binding. The district also requests that the undersigned affirm the IHO's decisions on the basis that no further inquiry was necessary and that the decision finding that a FAPE was offered was more akin to a judgement as a matter of law. The district argues that even if the parent properly appealed the IHO's finding on the district's offer of a FAPE, there would be no relief to

[8] By letter dated February 8, 2022, the parent submitted an amended request for review to the Office of State Review along with a cover letter indicating that the initial request for review was not verified and contained an "error in the birthdate of the student." In a letter dated February 11, 2022, the Office of State Review notified counsel for the parent that the amended request for review would be treated as a request for leave to amend the request for review, granted the parent's request for leave to amend, and granted the district's request for an extension of time to serve an answer to the amended request for review. In a letter dated February 11, 2022, counsel for the parent acknowledged the terms of the Office of State Review's February 11, 2022 letter.

award the parent given the lack of appeal of the latter two prongs. The district also requests that the IHO's finding that the district offered the student a FAPE be upheld. Lastly, the district argues that should the undersigned decide that a dismissal with prejudice is not warranted, the district requests a remand to the IHO for a determination on the appropriateness of unilateral placement and equitable considerations.

In a reply to the district's answer, the parent reasserts her arguments that that she was denied a fair and impartial due process hearing. The parent reiterates her request that the matter be remanded for a full and fair hearing with a new IHO.

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]).[9]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427

[9] 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).

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion—Remand

Based on the parties' pleadings and after a review of the hearing record, it is undisputed that IHO De Leon granted the parties' joint request to extend the compliance date on the last day of the impartial hearing but then prematurely issued his final decision prior to giving the parent the opportunity to present additional witnesses.

The parent argues that the IHO's failure to conduct a full hearing violated her due process rights. Federal and State regulations, set forth the procedures for conducting an impartial hearing and address the minimum due process requirements that shall be afforded to both parties (34 CFR 300.512; 8 NYCRR 200.5[j]). Among other rights, each party "shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses" (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][2]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]).

In the instant case, the IHO granted the parties' joint request to extend the impartial hearing on the last day of the hearing, November 15, 2021 (Tr. p. 371). The parent's attorney specifically requested the extension to call his next witness (id.). The IHO responded by strongly encouraging direct testimony due to "too many cases" and "not enough hearing officers" (id.). However, instead of scheduling another hearing date, the IHO issued a final decision on December 24, 2021.

Consistent with the parent's argument on appeal that her due process rights were violated, a review of the hearing record reflects that the parent was denied the opportunity to call further witnesses or to testify herself. In fact, there were several instances during the impartial hearing in which the parent's attorney indicated that he would be calling witnesses and the parent would be testifying (Tr. pp. 22, 197, 198, 346). Moreover, the IHO indicated that he understood the parent would testify during the hearing (Tr. p. 198). Despite being aware that the parent did not finish presenting her case, the IHO did not provide any indication in his decision of this fact; instead the IHO only noted that "[t]he Parent's only witness [wa]s the private school program director" (IHO Decision at p. 23). In the parent's request for review, counsel for the parent indicated that he communicated with the IHO after issuance of the decision and that the IHO indicated that, after the November 15, 2021 hearing, the IHO's office did not receive any communications from the parties and "[his] office instructed [him] to write and submit the decision" (see Amended Req. for

Rev. ¶ 17).[10, 11] Upon review of the conclusion of the August 26, 2021 and October 4, 2021 hearing dates in this proceeding, it appears that on those occasions the IHO had asked the parties to contact someone from his office in order to schedule the next hearing date (Tr. pp. 211-12, 286). It is assumed that this occurred as the hearings proceeded; however, at the conclusion of the final hearing date, the IHO did not indicate how the next hearing date would be scheduled (Tr. p. 346). In addition, the hearing record did not include a prehearing conference, or an IHO order or set of IHO rules setting forth the procedures for how the hearing would be conducted. Under these circumstances, the hearing record supports a finding that the IHO violated the parent's due process rights by denying her the opportunity to finish presenting her case.

As the parent was unable to complete the presentation of her evidence, the IHO's determination that the district offered the student a FAPE for the 2018-19 school year was based on an incomplete hearing record, and, as the parent asserts, was almost exclusively based on the district's testimony. While the district asserts that the parent has not appealed from the IHO's determination on FAPE, review of the parent's request for review shows that the parent is arguing that she can present evidence to rebut the district's initial case and that she can also point to inconsistencies in the district's presentation of evidence (see Amended Req. for Rev. ¶ 15, 19; Reply ¶ 4). In particular, the parent indicates that she wanted the opportunity to "testify as to the extreme anxiety and injuries suffered by [the student] during his attendance at the [district public school] based on an inappropriate and inadequate IEP and insufficient training" (id. ¶ 15). As stated above, the parent was denied the opportunity to present her evidence on these points. Accordingly, the IHO's decision as to FAPE must be reversed and the parent must be provided with due process.

Here, the appropriate remedy for the IHO denying the parent her due process rights to a full and complete impartial hearing is a remand to continue these proceedings (see 8 NYCRR 279.10[c] [a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings]). In this matter a remand is necessary for development of the hearing record as to whether the district offered the student a FAPE for the 2017-18 and 2018-19 school years, whether the Rebecca School was an appropriate unilateral placement for the 2018-19 school year, and whether equitable considerations favor reimbursement. Upon remand, the parties must be given an opportunity to be heard regarding what materials were relied on by the CSE and whether the CSE had information from the student's physicians that would have changed the student's programming recommendation. The IHO must then render a determination based on a prospective analysis using materials that were available to the CSE.

[10] The parent's amended request for review did not include a copy of the email correspondence between counsel for the parent and the IHO. Instead, it appears that an email chain that is unrelated to this proceeding was included as part of the Amended Request for Review.

[11] An 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]). Extensions may be granted consistent within regulatory constraints, the 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]).

Additionally, with respect to the parent's request for 100 hours of compensatory ABA SETSS at district expense for the asserted denial of FAPE for the 2017-18 and 2018-19 school years, it should be noted that any award of SETSS should take into account where the student is currently being educated. The hearing record reflects that the student attended school out-of-State for the 2020-21 school year; the hearing record was not clear if the parent or student resided in New York, but the parent indicated that she was interested in having the student receive his education in New York for the 2021-22 school year (Tr. pp. 13-15). If it is found that the district denied the student a FAPE, an award of special education instruction provided by district employees may not be feasible if the student is distantly located in another region of the country; however, funding for instruction by a special education teacher or related service provider may be awarded for the student to receive at his current location. Upon remand, the parties should present all of their arguments and evidence on the issue of compensatory education as this proceeding has been pending for far too long and the ability to accurately determine an appropriate compensatory remedy continues to wane over time.

With respect to the IHO's determination that the district was not obligated to defend the IEP created by the Texas school district (see Parent Ex. B), the IHO was correct, notwithstanding any view that may be held by the parent that the Texas IEP was substantively inappropriate.[12] Upon enrolling in the school in this jurisdiction, the district was obligated to implement a comparable services plan (34 CFR 300.323[f]; 8 NYCRR 200.4[e][8][ii]), and the evidence shows that such a plan was created (see Dist. Ex. 1). The parent did not raise any claims in the due process complaint notice regarding the comparable services plan that must be ruled upon in this proceeding upon remand. Accordingly, the matters to be addressed upon remand that are related to the 2017-18 school year are those that relate to the IEP(s) created by the CSE in 2018, and only to the extent they are raised in the parent's due process complaint notice.[13]

The final issue remaining is whether to remand this matter to IHO De Leon or to remand the proceeding to a different IHO. Considering that this matter was pending for well over two years prior to the IHO's issuance of his December 24, 2021 decision and that although the IHO was appointed to hear this matter on or about July 19, 2019, a hearing was not scheduled in this matter until July 1, 2021 (Tr. pp. 1, 7), there is little reason to suspect that remand of this matter to the same IHO will result in anything other than further delays in this proceeding. In light of the

[12] Assuming they would be permissible at this juncture, such claims related to the Texas IEP would have to be brought in the appropriate forum in Texas.

[13] With respect to the March 2018 IEP, the only specific statement in the due process complaint notice is that the student made "little progress" under the March 2018 IEP, and that the CSE continued the same annual goals in the May 2018 IEP (Parent Ex. A at p. 4). It is well settled that a prospective analysis is required and therefore it is not inappropriate for an IHO to rely on a student's progress under an IEP to determine after the fact that it not appropriate (R.E., 694 F.3d at 186-88). Thus, without more, it appears that there are otherwise no claims in the due process complaint notice regarding the adequacy of the programs and services described in the March 2018 IEP and that such statements in the due process complaint notice relate to the continuing adequacy of the May 2018 IEP based upon the student's prior experience under the March 2018 IEP. However, out of an abundance of caution, I will allow the parent a final opportunity before the IHO upon remand to be further heard on that point.

IHO's failure to afford both parties an opportunity to present their cases, despite presiding over this proceeding for over two years, the better course is to remand the matter to a different IHO.

After the parent has been given the opportunity to present her witnesses and testify herself, it is left to the sound discretion of the new IHO on remand to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the parent's claims and/or whether the parties should submit further evidence to otherwise fully develop the hearing record. Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

VII. Conclusion

In summary, the matter must be remanded to a different IHO for a determination on the merits of the parent's claims with respect to the 2017-18 and 2018-19 school years, including whether the Rebecca School was an appropriate unilateral placement, whether the parent is entitled to tuition reimbursement of the student's tuition costs for the 2018-19 school year, and whether the student is entitled to any compensatory educational services.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated December 24, 2021, is modified by vacating those portions which found that the district offered the student a FAPE for the 2018-19 school year; and

IT IS FURTHER ORDERED that the matter is remanded to a new IHO to reconvene the impartial hearing, receive additional evidence, and issue a new determination regarding whether the district's CSE offered the student a FAPE for 2017-18 and 2018-19 school years and, if not, whether equitable relief is warranted in the form of compensatory education services for the time period that he was educated under an IEP in the district or tuition reimbursement relief for the time he was unilaterally placed at the Rebecca School.

Dated: **Albany, New York**
April 1, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER