



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-021

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

### **Appearances:**

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 to remove and expunge allegedly false information from the student's educational records and ordered the district to evaluate the student. The appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

#### **A. Due Process Complaint Notice**

By due process complaint notice dated July 27, 2021, the parent alleged that the district violated her right to review the student's educational records pursuant to the "Chancellor Regulations" (Dist. Ex. 3 at p. 2).<sup>1</sup> The parent also alleged that the district continued to incorrectly reflect the student's enrollment at a particular public school since July 2021 (*id.*). As relief, the parent requested an opportunity to review the student's educational records, for the district to disenroll him from the identified public school location, and to "[e]xpunge all false and

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<sup>1</sup> The parent denoted on the July 2021 due process complaint notice that "another due process complaint [was] in process for this student" (Dist. Ex. 3 at p. 1).

misguide[d] information" about the student, as he "never" attended "any [s]ummer programs nor receiv[ed] [s]ummer [r]elated [s]ervices either" (id.).

In addition to the foregoing, the parent sent an email, dated July 28, 2021, to the district forwarding the due process complaint notice as an attachment (see Dist. Ex. 3 at p. 3). Within the body of the email, the parent repeated the allegations from the due process complaint notice (id. at pp. 2-3). The parent also asserted that the district violated the "Chancellor Regulations, IDEA and [the] F[amily] E[ducational] R[ights and] P[rivacy] A[ct]" (FERPA) by denying her access to the student's educational records (id. at p. 3). Next, the parent indicated that the student's "account" was inaccessible and prevented the student from "us[ing] the programs that school and teachers use[d] in class" (id.). As relief, the parent appeared to request a finding that, as a result of her inability to review the student's educational records, the district failed to offer the student a free appropriate public education (FAPE) for the following periods of time: October 30, 2018 through June 26, 2019, and November 15, 2019 through June 28, 2020 (id.). The parent also requested access to the student's related services records (id.).

## **B. Impartial Hearing Officer Decision**

On August 19, 2021, the parties proceeded to an impartial hearing, which concluded on January 20, 2022, after five days of proceedings (see Tr. pp. 1-286).<sup>2</sup> In an interim decision dated October 8, 2021, the IHO ordered the district to provide the parent with access to the student's educational records, including the provision of the names and reports generated by the student's related services providers (see generally Interim IHO Decision).<sup>3</sup>

In a decision dated February 8, 2022, the IHO initially noted that the parent had alleged that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years, clarifying in a footnote, however, that the parent's allegations regarding the 2020-21 school year were "non-specific" (see IHO Decision at pp. 2, 8).<sup>4</sup> With respect to the 2021-22 school year, the IHO indicated that the student had attended two different public school locations, and noted that, at the second public school site, the student "did very well until his mother removed him and requested permission from the [district] to home-school him due to COVID concerns" (id. at pp. 3-4). The IHO also indicated that, as a student with a disability who was homeschooled, the district remained obligated to provide special education services to the student via an individualized educational services plan (IESP), as opposed to an IEP (id. at p. 4). However, in this case, the IHO found that the parent "refused to meet with the CSE to create an IESP," and that although the student's then-current IEP remained in place, the parent "insist[ed] that the [student] no longer

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<sup>2</sup> Before meeting for the first impartial hearing date, the IHO issued a consolidation order, dated August 12, 2021, within which the IHO declined to consolidate a second matter initiated by the parent with the impartial hearing already in progress related to the parent's July 2021 due process complaint notice (see generally Aug. 12, 2021 Consol. Order).

<sup>3</sup> The IHO issued a second consolidation order, dated November 3, 2021, within which the IHO declined to consolidate a third matter initiated by the parent with the impartial hearing already in progress related to the parent's July 2021 due process complaint notice (see generally Nov. 3, 2021 Consol. Order).

<sup>4</sup> The IHO's decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-16).

need[ed] special education services" (*id.*). In addition, the IHO noted that the parent was not "asking for any 'educational services' or compensatory services" (*id.*).

Next, the IHO reviewed the allegations in the parent's July 2021 due process complaint notice (*see* IHO Decision at p. 4). According to the IHO, the parent alleged that she had been denied access to the student's educational records by the district, and "specifically information about his one month stay" at the first public school site the student attended during the 2021-22 school year (*id.*). The IHO further noted that the parent sought to "review [the student's] records from various months in 2019 and 2020 for an unspecified reason" or without explanation as to "how they relate[d] to any claim that [the student] was denied a FAPE" (*id.*). The IHO explained that the parent had filed two prior due process complaint notices, which alleged that the district had failed to offer the student a FAPE for the 2019-20 and 2020-21 school years (*id.*). The IHO further explained that in "each of those decisions, after taking extensive testimony both from the parent, the [district] witnesses and after reviewing the documentary evidence, the IHO found that the [district] did not deny the [student] a FAPE" (*id.* at pp. 4-5, citing Dist. Exs. 4-5). According to the IHO, the parent appealed those decision to an SRO and those appeals were "still pending" (IHO Decision at p. 5).<sup>5</sup>

Turning to the impartial hearing held in this matter, the IHO indicated that, after much discussion concerning subpoenas submitted by the parent, the IHO declined to sign the subpoenas, and instead, issued an interim decision "permi[t]ing the parent access to certain records in direct response to her [due process complaint notice] allegation that [the district] denied her access" (IHO Decision at p. 5; *see generally* Interim IHO Decision). When the impartial hearing resumed in November 2021, "the parent testified under oath on her direct testimony that she believed that [the two district offices subject to the IHO's interim decision] were still withholding records from her" (IHO Decision at p. 5). When asked to describe those records she considered as being withheld, the parent "listed a number of things from several other school districts that she had never requested before and that were not in her [due process complaint notice]" (*id.*).<sup>6</sup> The IHO denied the parent's "belated request for access to those additional records . . . because they involved school districts where the [student] attended . . . school in previous years not relevant to this current case" (*id.*).

In addition, the IHO indicated that, on the final date of the impartial hearing, the district produced two witnesses to rebut the parent's testimony alleging that records had been withheld (IHO Decision at p. 5). The first witness testified that he met with the parent to review records at

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<sup>5</sup> During the hearing, the IHO denied the district's request to dismiss the parent's due process complaint notice in this proceeding on the ground of *res judicata* (Tr. pp. 44-45). According to the IHO, the prior IHO decisions were awaiting appeal and were therefore not final and did not have any *res judicata* effect (*id.*). Initially, although it appears that the parent served the district with notices of intention to seek review of prior IHO decisions (Parent Ex. 3), she did not file requests for review with the Office of State Review and, accordingly, did not pursue State-level administrative review of prior IHO decisions. Additionally, it does not appear that the IHO applied the correct legal standard as it has been held that a pending appeal does not deprive a decision of *res judicata* effect (*see Straus v. Am. Publishers' Ass'n*, 201 F. 306, 310 [2d Cir. 1912]; *In re Adelpia Communications Corp.*, 2006 WL 2463355, at \*4 [S.D.N.Y. Aug. 23, 2006]).

<sup>6</sup> To be clear, the parent sought records related to the student's attendance at several different public schools situated in various regions within the district, not from different school districts.

his office and he "shared all of the [student's] records maintained in S[pecial] E[ducation] S[tudent] I[nformation] S[y]stem (SEGIS) relating to the [student]" (*id.*). The same witnesses testified that "no paper files were stored" at his office location (*id.*).<sup>7</sup> The witness also testified that he "printed all of the SEGIS records and offered to review them with the parent but she declined" (*id.*). In addition to his offer to review the student's records, the witness testified that he spoke to the parent about creating an IESP for the student, but the parent did not consent (*id.* at pp. 5-6). The second witness produced by the district testified that she also met with the parent and provided her with "copies of the [student's] enrollment and attendance records which were the only records maintained" at her office (*id.* at p. 6). The IHO found that "[n]othing was withheld from the parent," and she should contact the student's then-current public school site to access the student's "permanent record" (*id.*). The IHO concluded the impartial hearing on that date "over the parent's objection," and noted that the parent "stated that she was denied the right to testify and state her case" (*id.*).

In conclusion, the IHO found that the parent's July 2021 due process complaint notice did not "challenge th[e] appropriateness of the [student's] IEP or his placement at [a public school location]," and the parent voluntarily removed the student from public school due to her concerns about COVID (IHO Decision at p. 6). The IHO also found that, absent the parent's consent to create an IESP for the student, the district was "not responsible for providing him with anything related to special education" (*id.* at p. 7). Next, the IHO further found that, while the parent alleged the student was denied a FAPE "at the very beginning" of the 2021-22 school year because "she was denied access to his educational records," the parent was given the opportunity during the impartial hearing to "visit the offices" that had been ordered to "produce records in their possession for her review" (*id.*). According to the IHO, the parent visited both offices and was given "printouts of all the records maintained in those offices" (*id.*). The IHO also found that the "credible" evidence in the hearing record rebutted the parent's claim that records had allegedly been withheld, and thus, the IHO concluded that the parent's request to access the student's records had been "satisfied" and the IHO dismissed the parent's July 2021 due process complaint notice with prejudice (*id.*). As relief, the IHO ordered the district to evaluate the student's eligibility for special education as a student with a disability (*id.*).

#### **IV. Appeal for State-Level Review**

The parent appeals. Initially, the parent disagrees with the IHO's decision ordering the district to evaluate the student, as this relief was not requested in the July 2021 due process complaint notice. The parent argues that the IHO did not address her claims that six different public school locations failed to offer the student a FAPE prior to the parent removing the student to be homeschooled. The parent also argues that she requested the impartial hearing to address the public school's "non-compliance" in providing the "Basic, Elementary, General Curriculum Academics" set forth in the student's IEPs. The parent also asserts that the IHO could not override a parent's lack of consent to change the student's IEP, the district never provided prior written

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<sup>7</sup> At the impartial hearing, the witness explained that all of the student's educational records were stored electronically in SEGIS (*see* Tr. pp. 226-30).

notice to develop a new IEP, and she had never requested an IESP or a school placement for the 2022 school year.

As can generally be discerned from the remainder of the assertions in the request for review, the parent asserts that the IHO violated her due process rights and the district substantively denied the student a FAPE on the following grounds: failing to advise that the parent's due process complaint notice would be dismissed with prejudice, denying the parent an opportunity to be heard, failing to comply with timelines (an impartial hearing was not scheduled within 30 days), barring the parent from submitting documents as evidence, litigating the IHO's own "agenda," declining to issue subpoenas, making "several personal attacks" on the parent, lacking knowledge of the laws (including district-specific procedures, protocols, and programs), failing to address issues in the July 2021 due process complaint notice not previously raised (such as disenrollment from a child assistance program and one public school location, "SSO-Blocking and SAML Block error"), and failing to find that the district failed to offer the student a FAPE because the student was not provided with "Books, Homework, Assignments, Learning Applications Usernames/and passwords, Ipads for Educational/Academic Instruction by the Classroom teachers" at six different public school locations. In addition, the parent contends that the district provided the student with an "inoperable" iPad for remote learning because it was "assigned to another student and [the] Classroom Teacher . . . simply blocked all access" to Google Classroom for September and October 2020.

As relief, the parent seeks to vacate the IHO's decision ordering the district to evaluate the student and to reopen the IHO's decision to address her claims that the district continues to embezzle and "funnel[] funding" to a public school location where the student remained improperly enrolled, which the parent alleged prevented the student from being "fully registered to public schools every year." The parent also seeks an order directing the district to "[f]ully [r]egister[]" the student in "his mandated General Education Classes" and to "ensure that [the student] will be provide[d] with Curricular and extracurricular activities as his peers" and as set forth in his IEP. Next, the parent seeks reimbursement for the "Academic Tuition and Therapies, Instructional books, School supplies" she provided to the student when the six different public school locations denied the student a FAPE for the 2017-18, 2018-19, 2019-20 school years, and for one month—September to October—during the 2020-21 school year. In addition, the parent seeks an order directing the district to remove the student from the "Child Assistance Program" and from the "In-Risk List." The parent also seeks an order directing the district to expunge false information related to the student's enrollment that the district allegedly misrepresented in order to receiving funding (citing to a prior impartial hearing), noting further that the student never attended summer programs or received any related services during summer. Next, the parent seeks to correct enrollment data that the district allegedly used to "gain funding" while depriving the student of a FAPE because one public school teacher was allegedly not certified. Finally, the parent requests a decision on the issues the IHO failed to address, namely, removing and expunging the student's records of enrollment and registration dates and "SSO-Blocking and SAML Block" that prevented the student from accessing learning applications and the school library.<sup>8</sup>

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<sup>8</sup> The parent has not appealed from the IHO's interim decision, dated October 8, 2021 (see generally Req. for Rev.).

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.<sup>9</sup>

In a reply to the district's answer, the parent responds to the district's allegations. Overall, the parent reargues the same allegations from the request for review in her reply.<sup>10</sup>

## 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

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<sup>9</sup> With its answer, the district submits two documents for consideration on appeal as additional documentary evidence (see Answer ¶¶ 6-7; see generally Answer Exs. 1-2). Given the ultimate disposition of the parent's appeal, it is not necessary to decide whether this additional documentary evidence should be considered.

<sup>10</sup> To the extent that the parent argues in her reply that the 2021-22 school year was not raised as an issue to be resolved in her due process complaint notice, a broad reading of that document reflects that the parent raised concerns that the student's educational records incorrectly reflected his enrollment at a particular public school since July 2021 and that he had never received any summer programs or summer related services (see Dist. Ex. 3 at pp. 2-3). In addition, discussions at the impartial hearing reflected that the parent continued to express concerns about summer 2021 and summer services (see, e.g., Tr. pp. 52, 54, 83-86). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). Therefore, the parent's due process complaint notice could be construed to include claims pertaining to the 2021-22 school year by virtue of the allegations related to summer 2021, the start of the 2021-22 school year.

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" (Andrew 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 Andrew 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]).<sup>11</sup>

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<sup>11</sup> 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



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—Jurisdiction**

The IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). The relevant federal and State regulations make provisions for permitting parents' access to "inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part" (34 CFR 300.613[a]; see 8 NYCRR 200.5[d][6] [limiting a parent's review and inspection of a student's educational records to those "with respect to the identification, evaluation, and educational placement of the student and the provision of a [FAPE] to the student, in accordance with the requirements" of 34 CFR 300.613 through 300.625]).

In addition, a separate portion of the IDEA (20 U.S.C. § 1417[c]) requires the Secretary of Education to promulgate regulations for the protection of the rights and privacy of parents and students in accordance with the provisions of FERPA (see 20 U.S.C. § 1232g). Federal regulations promulgated pursuant to 20 U.S.C. § 1417[c] prescribe a specific procedure for challenging alleged inaccuracies in a student's educational records (see 34 CFR 300.618-300.621).<sup>12</sup> The regulations provide that such hearings are to be conducted in accordance with the procedures specified in 34 CFR 99.22—federal regulations pertaining to FERPA—rather than an impartial due process hearing conducted under 34 CFR 300.511 (see 34 CFR 300.621; see also Amendment of Records at Parent's Request [§ 300.618] and Opportunity for a Hearing [§ 300.619], 71 Fed. Reg. 46735-36 [Aug. 14, 2006]). Hearings held pursuant to FERPA for the purpose of challenging alleged inaccuracies in educational records may be conducted by "any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing" (34 CFR 99.22[c]), rather than an IHO, who, as noted above, conducts a trial-type hearing regarding matters relating to the identification, evaluation or educational placement of students, or the provision of a FAPE (see 8 NYCRR 200.5[i], [j]).<sup>13</sup>

In this case, in her July 2021 due process complaint notice, the parent sought, as relief, access to and amendment of the student's educational records (Dist. Ex. 3 at pp. 2-3). The IHO

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chance to meet challenging objectives" (Andrew E., 137 S. Ct. at 1000).

<sup>12</sup> As reflected in the "Procedural Safeguards Notice," which the parent submitted as evidence in the hearing record, a "hearing to challenge information in education records must be conducted according to the procedures for such hearings under FERPA" (Parent Ex. 1 at p. 11, citing 34 CFR 300.321).

<sup>13</sup> If, after a hearing held pursuant to FERPA, a district declines to amend a student's records, the parent would have the right to place a statement in the student's records disagreeing with the decision (34 CFR 300.620[b]). However, there is no State-level review of a decision made after such a hearing (see Letter to Parent re: Amendment of Special Education Records, Family Compliance Office Aug. 13, 2004, available at [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/lrttoparent.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/lrttoparent.pdf)). A parent may file a complaint with the Family Policy Compliance Office of the U.S. Department of Education, pursuant to 34 CFR 99.63

ordered the district to provide the parent with access to records, thereby resolving that portion of the parent's requested relief (Interim IHO Decision), and that interim order has not been appealed. The parent seeks no further meaningful relief that is within the authority of the IHO or the undersigned to grant. On appeal, the parent urges the undersigned SRO to address the same issues concerning the student's educational records, i.e., inaccuracies, enrollment information, disenrolling the student from certain programs, and misrepresenting enrollment information to improperly receive funding.<sup>14</sup> However, neither the IHO nor the undersigned has any authority or jurisdiction to grant the parent's request that the district review, expunge, and amend parts of the student's educational and enrollment records as such request does not relate to the identification, evaluation or educational placement of the student, or the provision of a FAPE to the student (20 U.S.C. § 1415[b][6]; Educ. Law § 4404[2]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1] 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"]). Accordingly, since the IHO had no jurisdiction to grant the remaining relief sought in the parent's July 2021 due process complaint notice, the IHO should have dismissed the parent's July 2021 due process complaint notice with prejudice on this basis alone.

This is especially true where, as here, the IHO explored the parent's claims at the impartial hearing, during which time the parties and the IHO examined and discussed at length—and the parent testified about—the information she specifically sought through her two subpoenas and the relief sought (see Tr. pp. 1-99, 101-56; see generally Parent Ex. 2; Dist. Ex. 1). During the extensive discussions held on the record, the IHO discerned that the student had not received special education teacher support services (SETSS) or speech-language therapy services for approximately two months at the start of the 2020-21 school year, and was similarly without proper computer access for approximately two weeks during remote instruction (see Tr. pp. 68-79; Dist. Ex. 6). As relief, the IHO offered to award compensatory educational services to the parent to make up for these violations, but the parent declined any such relief (see Tr. pp. 79-82).

As part of the discussions at the impartial hearing, the IHO noted the parent's claims pertained to FERPA and clarified that she had no jurisdiction over such claims (see Tr. pp. 117-19). In an attempt to provide some guidance to the parent, the IHO pointed out that in order for the parent to access and review the student's educational records—or to make changes or corrections to those records—she must use the procedures outlined in the "Procedural Safeguards Notice" under FERPA, and affirmatively stated that "[t]his [wa]s not a FERPA proceeding" and that, as the IHO, she was "not assigned to the case to enforce FERPA" (Tr. pp. 117-19, 124; see Parent Ex. 1 at pp. 9-11). However, to the extent that the parent asserted that she had been denied access to review the student's records, the IHO carefully gleaned what educational records the parent sought access to and issued an interim decision, dated October 8, 2021, directing the district to "arrange with the parent a date and time for [her] to go and review" the educational records described therein (see generally Interim IHO Decision).

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<sup>14</sup> In her request for review, the parent requests reimbursement of tuition, therapies, books, and supplies; however, as the parent did not seek reimbursement as relief during the impartial hearing (see Dist. Ex. 3), I will not address such a request interposed for the first time on appeal.

At the next impartial hearing held on November 3, 2021, after the IHO issued the interim decision, the parent asserted that, although she had received copies of the "transcript from the school that [the student] ha[d] been enrolled in, and some attendance logs," she had not been provided with any other educational records and she was not given the "opportunity to review any educational records at all" (Tr. pp. 158, 161). The parent further insisted that the district offices had not complied with the IHO's interim decision because there were "missing records" from the student's providers who had been secured through related services authorizations (RSAs) (Tr. pp. 161-63). On January 20, 2022, the parties met for the final day of the impartial hearing, and the district presented two witnesses who testified that, contrary to the parent's contentions, the parent received copies of any and all of the student's educational records maintained in or by their respective offices (see Tr. pp. 225, 227-32, 235-38, 258-64, 270-71, 273).<sup>15</sup>

On appeal, the parent does not pursue her allegations that the district impeded her access to the student's records, which was the only plausibly cognizable claim before the IHO. In any event, the district is required to comply with requirements under the IDEA and FERPA and, to the extent it has not done so, it should permit the parent the right to inspect and review the student's education records (see 34 CFR 99.3; 99.10[a]; 600.613[a]; 8 NYCRR 200.5[d][6]). Beyond this, as noted above, neither the IHO nor the undersigned has jurisdiction to grant the parent's request for amendments to the student's educational records and, as such, the IHO did not err in dismissing the parent's due process complaint notice with prejudice.

As a final point, the parent argues that the IHO erred by directing the district to evaluate the student to determine whether he remained eligible for special education because she did not request an evaluation as relief for the district's alleged violations. Given that the IHO did not find that the district committed any substantive or procedural violations and was "not responsible for providing [the student] with anything related to special education" because the parent would not consent to the creation of an IESP (IHO Decision at p. 7), there was no basis upon which to award any relief to the parent. Consequently, the IHO's decision directing the district to evaluate the student must be vacated.

## **VII. Conclusion**

In summary, after ordering the district to provide the parent with access to the student's records, the IHO had no remaining jurisdiction to order the relief sought in the parent's due process complaint notice. In addition, to the extent that the hearing record contains no evidence that the district failed to offer the student a FAPE for the 2020-21 or 2021-22 school year, the IHO had no basis upon which to award relief in the form of ordering the district to evaluate the student. However, overall, there is no reason to disturb the IHO's ultimate decision, which dismissed the parent's July 2021 due process complaint notice with prejudice.

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<sup>15</sup> The district's second witness explained that the student's "permanent record"—which would contain "additional records," such as "letters from teachers" or letters to the school from the parent—were not stored at the "superintendent's office" (Tr. pp. 262-63). Rather, those types of documents in the student's permanent record would be located at the "school level," and if the student had attended five different public schools, the parent would need to "contact his most recent school that he was presented in, and the records should be there, because the records should follow [the student] from school to school" (Tr. pp. 264-65).

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated February 8, 2022, is modified by vacating that portion which ordered the district to evaluate the student to determine whether he remained eligible for special education.

**Dated:**           **Albany, New York**  
                          **April 21, 2022**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**