The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 22-168

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 Westhampton Beach Union Free School District

Appearances:
Anne Leahey Law, LLC, attorneys for respondent, by Anne C. Leahey, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice. The appeal must be 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 in this case has been the subject of 16 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 22-163; Application of a Student with a Disability, Appeal No. 22-147; Application of a Student with a Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties'

familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and, as such, they will not be repeated herein unless relevant to the disposition of this appeal.

Briefly, the student has received a diagnosis of Down Syndrome and is classified by the CSE as a student with an intellectual disability (IHO Ex. II-B at pp. 5-6). According to a prior written notice dated September 9, 2022, a CSE meeting was held for the student's annual review for the 2022-23 school year but was not completed (IHO Exs. II at pp. 5-6; II-A at pp. 1-3). According to the prior written notice, the district agreed to continue to provide the student with "home instruction and related services as per the pendency agreement" (IHO Ex. II-A at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice, dated August 30, 2022, the parent alleged that the district attempted to "intimidate/interfere/retaliate" against the student by "intimidating/interfering/retaliating" against the student's "'related service providers', CSE members, and [the student's] teacher aide'" (IHO Ex. I at p. 1).

More specifically, the parent alleged that the district engaged in intimidation, interference, and retaliation against the student's teacher aide, parental trainer, and educational consultant (IHO Ex. I at pp. 1-2). The parent asserted that the district's acts of intimidation, interference, and retaliation against these three individuals is violative of the IDEA because "such acts have negatively impacted the [student's] right to an appropriate educational placement, as well as the [student's] right to a free [] appropriate [public] education (FAPE)" (id. at p. 2). The parent alleged that if the district is permitted to continue to intimidate, interfere, and retaliate against the CSE members the due process protections under the IDEA "will become irrevocably compromised" (id. at p. 3). Additionally, the parent argued that the district removed other CSE members "without cause" for no reason other than to prohibit the CSE from conducting an annual review for the 2022-23 school year (id.). Lastly, the parent argued that the "district has still not facilitated the completion of the [student's] 'annual review CSE'" for the 2022-23 school year (id.).

As a proposed resolution, the parent requested an order for the district to retain the services of the student's teacher aide, educational consultant, and parental trainer as well as the student's "current CSE members and related service providers" (IHO Ex. I at p. 3). The parent additionally requested an order directing the district to refrain from intimidation, interference, and retaliation towards the student's teacher aide, educational consultant, and parental trainer (id.). Next, the parent sought a directive for the district to complete the student's annual review for the 2022-23 school year (id.). Further, the parent requested an order directing the district to remove the CSE chairperson (id. at pp. 3-4). Finally, the parent requested "compensatory education to the extent that the [district's] actions have negatively impacted and/or delayed the [student's]" placement and/or receipt of a FAPE (id. at p. 4).

B. Motion to Dismiss and Impartial Hearing Officer Decision

On September 12, 2022, the district responded to the allegations in the parent's due process complaint notice and simultaneously moved to dismiss the due process complaint notice (see generally IHO Ex. II). The district moved to dismiss the due process complaint notice based on

the parent's lack of standing, failure to sufficiently describe a FAPE deprivation, failure to propose a resolution of the alleged problem, failure to state a cause for proceeding, and that punitive remedies were unavailable to the parent (IHO Ex. II at pp. 6-17).

In the parent's opposition to the district's motion to dismiss, the parent argued that he had standing to assert retaliation claims as they affected the student's education; that the district's retaliatory actions negatively impacted the student's rights under the IDEA; that the parent set forth a valid IDEA claim based on retaliation and punitive damages should be available for such a claim; and that the due process complaint notice set forth proposed remedies to address both present and potential injuries caused by the district's interfering and retaliatory conduct (see IHO Ex. III at pp. 8-14).

On October 10, 2022, the IHO conducted a prehearing conference with the parties (Tr. pp. 1-40). During the prehearing conference, the parties and the IHO discussed multiple proceedings pending before the IHO involving the same parties, including the present matter, and it was noted that the district had already submitted its response to the due process complaint notice and its motion to dismiss before the prehearing conference (Tr. pp. 5-7, 13-14, 22-38). In this same prehearing conference, the parent withdrew his claims pertaining to the alleged failure to facilitate or complete a CSE meeting for an annual review of the student's educational program for the 2022-23 school year (Tr. pp. 9-13).

The IHO granted the parent an opportunity to submit a supplemental brief in response to the district's motion to dismiss, which the parent submitted for the purpose of asserting that an IHO has the authority to dismiss a CSE member (Tr. pp. 23-24; IHO Ex. V). Thereafter, on November 15, 2022, the district filed a reply memorandum of law in support of its motion to dismiss and in opposition to the parent's supplemental brief (IHO Ex. VI).

In a decision dated December 14, 2022, the IHO granted the district's motion to dismiss, generally finding that the parent did not have standing to bring retaliation claims on behalf of the teacher aide, educational consultant, and parental trainer, and the parent's claim pertaining to the removal of the CSE chairperson had been litigated in prior proceedings and was barred from re-litigation by the doctrine of collateral estoppel (IHO Decision at pp. 11-16).[1]

Related to the IHO's finding that the parent's claims of retaliation against the student's teacher aide, educational consultant, and parental trainer must be dismissed for a lack of standing, he also determined that these individuals were third-party contractual employees and the

[1] The doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]; see Perez, 347 F.3d at 426; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

allegations of retaliation against each of these individuals did "not constitute a denial of a FAPE or of a procedural right created by the IDEA sufficient to satisfy the injury-in-fact requirement for standing" (IHO Decision at p. 12).[2] The IHO also found that the relationship between the district and the individuals at issue was contractual in nature and not based on the IDEA; accordingly, the IHO determined that the parent did not have the right to bring an IDEA claim on behalf of those third parties (id.). Next, the IHO found that the parent's request for removal of the CSE chairperson was barred by the doctrine of collateral estoppel as the issue had been decided in prior proceedings (IHO Decision at pp. 14-15).[3] The IHO granted the entirety of the district's motion to dismiss and dismissed the due process complaint notice.

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in granting the district's motion to dismiss. The parent asserts that he has standing to assert an IDEA retaliation claim and that the Second Circuit has not precluded IDEA retaliation claims. Next, the parent contends that the due process complaint notice should not have been dismissed based on collateral estoppel. The parent further claims that he should have been afforded a full evidentiary hearing with respect to the allegations regarding the district's alleged retaliatory actions, including an attempt to change the program recommendations of the educational consultant and parental trainer and the firing of the student's teacher aide. At the end of the request for review, the parent requests that a number of the IHO's findings be reviewed, including that the teacher aide did not provide educational instruction to the student, that the parent did not have standing, that the parent did not suffer an injury in fact related to the protections afforded by the IDEA, that the alleged injuries belonged only to third parties, that the parent asserted acts inflicted on others as opposed to himself, that the relationship between the parent and the educational consultant, parental trainer, and teacher aide were not based on the substantive and procedural protections of the IDEA, that the district court's dismissal of the parent's "ADA 'interference/retaliation' complaint" was persuasive in dismissing the parent's IDEA based interference/retaliation claims, that the district's actions did impact the protections of the IDEA, that the due process complaint notice was dismissed based on one aspect of the requested relief being previously litigated, that an IHO does not have the authority to remove a CSE member as a form of equitable relief, that the IHO used his prior decision to preclude claims based on res judicata or collateral estoppel, and that the IHO relied on the notion that the Second Circuit does

[2] In addressing standing under the IDEA, courts in New York have found that a denial of a FAPE constitutes an injury in fact sufficient to confer standing on a parent to bring a claim in federal court under the IDEA (M.F. v. New York City Bd. of Educ., 2013 WL 2435081, at *13 n.9 [S.D.N.Y. June 4, 2013]; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, at *6 [S.D.N.Y. Mar. 14, 2011], rev'd on other grounds by 2014 WL 3377162 [2d Cir. July 11, 2014]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 359-360 [S.D.N.Y. 2009]; see also E.M. v. New York City Dep't of Educ., 2014 WL 3377162, at *10-*16 [2d Cir. July 11, 2014]; Heldman v. Sobol, 962 F.2d 148, 154-56 [2d Cir. 1992]; M.M. v. New York City Dep't of Educ., 2014 WL 2757042, at *8 [S.D.N.Y. June 17, 2014]; but see Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007], quoting Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]).

[3] The issue of the authority of an IHO to remove the CSE chairperson was raised by the parent in three prior proceedings (see Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 22-147; Appeal of C.K., 61 Ed. Dep't Rep., Decision No. 18,069 [2022], available at http://www.counsel.nysed.gov/Decisions/ volume61/d18069).

not recognize IDEA based retaliation claims. As relief, the parent requests a remand to the IHO for a proper adjudication of his claims, or in the alternative, awarding the parent all relief requested in the due process complaint notice.

In an answer, the district responds to the request for review by denying the material allegations contained in the request for review and generally argues to uphold the IHO's decision in its entirety. For example, the district contends that the parent failed to allege a denial of FAPE, and therefore, failed to "satisfy the injury-in-fact requirement for standing." In addition, the district argues that the parent does not have the "right to bring IDEA claims on behalf of third parties." Further, the district asserts that the issue pertaining to the removal of the CSE chairperson has been decided in two prior proceedings and is barred from re-litigation by the doctrine of collateral estoppel. The district also argues that the parent's request for review should be dismissed for failing to comply with State regulations governing appeals before the Office of State Review. Lastly, the district argues that the parent abandoned his request for compensatory education as it was not raised in the request for review.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are

alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

[4] 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).

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

A. Preliminary Matter

1. Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failing to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a]; 279.8[c][1]-[3]).

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]).

Section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.
>
> (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

The concerns raised by the district with respect to the parent's failure to comply with the practice regulations are not new. Historically, issues with the form and content of pleadings filed with the Office of State Review by the parent have been raised by the district and addressed by the SRO in several prior appeals involving this student, including Application of a Student with a

Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; and Application of a Student with a Disability, Appeal No. 16-040. The parent has been repeatedly cautioned that his failures to comply with the practice regulations could result in dismissal or rejection of his pleadings and, currently, two of the parent's appeals were dismissed in Application of a Student with a Disability, Appeal No. 21-019 and Application of a Student with a Disability, Appeal No. 19-021 for the failure to comply with the practice regulations, as well as on alternative grounds.

In this instance, the district argues that although the request for review identifies "one factual issue and eleven legal issues for review, it fails to specify the bases for challenging said findings, and to explain the grounds warranting the reversal or modification of such findings" therefore, the request for review fails to comply with sections 279.4[a] and 279.8[c][2] of State regulations (Answer ¶ 27). The district contends that rather than challenging the findings of the IHO, the request for review merely "expresses disagreement and disappointment with the findings and the legal principles upon which the findings were based" (id.). Additionally, the district asserts that the parent failed to set forth the specific relief requested (id. ¶¶ 30-32). As a result, the district contends that the request for review fails to comply with practice regulations and must be dismissed.

Turning to the parent's pleading in this case, as noted above, State regulation requires that a request for review shall, in part, "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Tethered closely to this requirement is the State regulation mandating that a request for review set forth a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). Here, the parent generally complies with the stated regulations by setting forth issues presented for review by numbering each issue (i.e., "Point I" – "Point IV" with a subsequent statement of the issue) and using italic text to highlight the specific issue, which distinguishes the issue presented from the argument in support of each issue (see generally Req. for Rev.). Next, while the parent does not state the relief sought in the underlying proceeding as required by State regulation (8 NYCRR 279.8[c][1]), as the ultimate relief sought in this matter is a remand to an IHO to consider the due process complaint notice, including, if necessary, whether the parent is entitled to the relief set forth therein, this is not an instance where the omission of such information warrants rejection or dismissal of the pleading. As for the relief the parent seeks from an SRO, the request for review sufficiently requests remand of the complaint back to the IHO "for appropriate adjudication" (Req. for Rev. at p. 10).

Upon review and notwithstanding the accuracy of some of the district's characterizations of the form and content of the parent's request for review, I decline to dismiss the request for review on these grounds given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result

(see Application of a Student with a Disability, Appeal No. 18-053; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058). In this instance, although the parent's failure to comply with certain aspects of the practice regulations will not ultimately result in a dismissal of his appeal, the parent is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). However, in light of the foregoing, the district's arguments regarding the form of the parent's request for review are dismissed.

B. Claims and Requested Relief

While I ultimately concur with the IHO's determination that the parent's due process complaint notice should be dismissed in this matter, the reasoning and analysis underlying my decision to do so differs in some respects from that of the IHO and, therefore, requires some additional discussion.

Here, the IHO dismissed the parent's retaliation claims for a lack of standing and held that even if the allegations asserted by the parent, as described below, were true, the "allegations do not constitute a denial of a FAPE" (IHO Decision at pp. 11-12). The IHO found that the parent's claims were comprised of claims of wrongdoing by the district against "third-party contractual employees of the [d]istrict" and the relationships of these individuals with the district "[we]re voluntary and contractual, and not based on the IDEA's substantive and procedural entitlements" (id. at p. 12). The IHO additionally stated that if the allegations of intimidation, interference, and retaliation were true, the claims belonged to the individuals themselves and not the parent of a student with a disability (id. at pp. 12-13). Although the IHO is correct in that claims of retaliation against the third-party individuals affecting their employment or retention by the district generally would belong to the individuals, the IHO did not sufficiently address the parent's allegations that the district's actions also impacted the student's educational placement or the CSE review process, assertions which could be construed as being related to the IDEA and potentially falling within its purview for purposes of an administrative adjudication of those claims.

Under the IDEA and State law a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531).

In reviewing the hearing record and specifically the parent's allegations in both the due process complaint notice and request for review, I am unable to discern specific allegations regarding a denial of FAPE and particularly with respect to the identification, evaluation, or

placement of the student. Generally, the parent's claims that the alleged intimidation, interference, and retaliation compromised the student's IDEA protections are not sufficiently detailed to describe how the actions impeded the student's right to a FAPE, impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits to the student (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

Specifically, in the due process complaint notice, the parent contended that "the district's acts of intimidation/inference/retaliation. . . negatively impacted [the student's] right to an appropriate educational placement, as well as [the student's] right to a [FAPE]" (IHO Ex. I at p. 2). However, review of the specific allegations does not indicate such an impact. In connection with the teacher aide, the parent alleged that the district terminated her employment "because of her advocacy" for the student and her documentation of and reporting of "educational neglect" of the student by school employees (id. at p. 2).[5] Consequently, the parent argues that as a result of the termination of the teacher aide, the student "is now suffering from the absence of the valuable educational services" provided by her (id.).

With respect to the educational consultant, the parent alleged that the district "attempted to terminate" her employment because of her advocacy for the student and "her role in testifying about the IDEA based violations committed by" the district against the student (IHO Ex. I at p. 2). The parent also alleged that the district sought to terminate services provided by the educational consultant through the agency owned by the parental trainer (id. at pp. 2-3). Further, the parent argued that the district "attempted to alter the testimony" of the parental trainer in a recently concluded impartial hearing (id.). The parent argued that the district's acts "[we]re designed to improperly influence the integrity of the educational services provided by" the educational consultant and the parental trainer and to influence their testimony in the "ongoing" impartial hearings (id. at p. 3). The parent asserted that if the district continues "to intimidate/interfere/retaliate against the CSE members" who are an integral part of determining the student's placement and offering a FAPE, "the due process protections contemplated by the" IDEA "will become irrevocably compromised" (id.).

Further, in his request for review, the parent raises similar arguments as in the due process complaint notice. For example, he asserts that "when an act of intimidation, interference, coercion and/or retaliation is, in fact, inflicted upon a CSE member, or within the context of an adjudicative due process hearing, that the development and implementation of a student's IEP will undoubtedly become gravely compromised" (Req. for Rev. at p. 3). The parent argues that when the district commits acts of intimidation, interference, coercion, and/or retaliation against a "'supplementary service provider,' who is engaged in the implementation of a student's IEP and FAPE, that the protections contemplated by the IDEA unquestionably become compromised" (id.). According to

[5] A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "attending to the physical needs of children" and "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6[b]).

the parent, "when a school district acts in a manner designed to subvert the implementation of an IEP, [] the IDEA obviously becomes violated" (id. at p. 4).

The parent contends that the district's acts of intimidation, interference, and retaliation purportedly impacted the student's right to a FAPE and "compromised" the student's due process protections under the IDEA (Req. for Rev. at p. 3; IHO Ex. I at pp. 2-3). The student has been classified and received special education services since prior to the 2015-16 school year when this office received the first appeal pertaining to this student (see Application of a Student with a Disability, Appeal No. 16-040). Accordingly, none of the arguments extended by the parent relate to the identification of the student.

Next, viewing the allegations contained in the due process complaint notice and request for review, there is no claim that the district failed to evaluate the student, that any district evaluation was insufficient, or that the parent disagreed with any evaluation. In fact, no evaluative data is mentioned within the pleadings. Therefore, the due process complaint notice again fails to identify a proper issue for an impartial hearing.

Lastly, a parent may seek an impartial hearing pertaining to the educational placement of the student or the provision of a FAPE to the student, which includes allegations pertaining to staffing as well as IEP implementation and the appropriateness of the recommended educational program. The parent's allegations pertain to alleged acts of intimidation, interference, and retaliation against the three third-party individuals. The parent claims that intimidating, interfering, and retaliating against these providers "who are actively involved in developing and implementing" the student's IEP negatively impacts the "procedural and substantive due process protections contemplated by the IDEA" (Req. for Rev. at pp. 2-3). The parent also argues that CSE members should be permitted to express their opinions regarding an appropriate IEP "free from acts of intimidation, interference, coercion and/or retaliation" (id. at p. 3). The parent argues that when acts of intimidation, interference, coercion, or retaliation are "inflicted" upon a CSE member, the "development and implementation of a student's IEP will undoubtedly become gravely compromised" (id. at pp. 3-4). It does not appear that the third-party providers in this case were required members of a CSE and it is also unclear which CSE meeting the parent asserts was compromised.[6] Although these individuals, if invited to participate in a CSE meeting, may share their opinions with the CSE, the CSE was not required to adopt their recommendations but only to consider them (see J.C.S., 2013 WL 3975942, at *11 [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation

[6] The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student, "including related services personnel as appropriate"; and if appropriate, the student (20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Further, the IDEA and its implementing regulations make the attendance of related services providers discretionary (20 U.S.C. § 1414[d][1][B][vi]; see 34 CFR 300.321[a][6]; 8 NYCRR 200.3[a][1][ix]). A determination as to whether an individual "with specific professional knowledge or qualifications" should attend a CSE meeting should be made "on a case-by-case basis in light of the needs or a particular child" but such individuals should not be required for all CSE meetings (IEP Team, 71 Fed. Reg. 46, 669 [Aug. 14, 2006]).

be considered in developing the IEP"]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]).

Although the parent's most compelling argument would be that the district's actions influenced the recommendations made at the student's CSE meetings, the parent is not objecting to any recommendations made by the district in this proceeding. Additionally, as noted by the IHO, the parent has raised challenges to the district's programming in prior hearings and for the 2021-22 school year, and an SRO determined that the district did not deny the student a FAPE (IHO Decision at p. 13; see Application of a Student with a Disability, Appeal No. 22-010). Additionally, in that proceeding and in a more recent proceeding regarding an April 2022 CSE meeting for the student, SROs have determined that the parent was able to fully participate in the development of the student's educational programs (see Application of a Student with a Disability, Appeal No. 22-163; Application of a Student with a Disability, Appeal No. 22-010). Accordingly, without a more detailed allegation as to how any acts of interference or retaliation on the part of the district against staff employed by the district impacted the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student, the parent's due process complaint notice does not provide a claim that can properly be adjudicated at an impartial hearing.

A detailed review of the parent's allegations raises additional concerns. For example, with respect to the teacher aide, the parent's argument as to how the district's actions impacted the student appears to be that the student did not receive services from the teacher aide after her employment was terminated. However, the parent has not argued that the district failed to implement a service recommended on the student's IEP or that the student did not receive the support of a teacher aide at any time after the termination. Accordingly, this argument can only be read as an assertion that the district was required to provide the student with the service by a specific provider, an argument that is not supportable under the IDEA. Pertinently, it is within the district's authority to determine how to provide the student's educational programming including which personnel shall provide the student with teacher aide services (Ventura de Paulino v. New York City Dept. of Educ., 959 F.3d 519, 534 [2d Cir. 2020], cert. denied, 141 S. Ct. 1075 (2021), reh'g denied, 141 S. Ct. 1530 [2021]). Additionally, it would not be appropriate to require the district to utilize a specific person to provide the student with services as "[t]he prospective nature of the IEP also forecloses the school district from relying on evidence that a child would have had a specific teacher or specific aide . . . [and] the [district] cannot guarantee that a particular teacher or aide will not quit or become otherwise unavailable for the upcoming school year" (R.E., 694 F.3d at 187; see R.B. v. New York City Dep't. of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]).

Moreover, if, as the parent alleged, these individuals have brought claims based on retaliation to the Office of Civil Rights, then that is their avenue to pursue alleged retaliation claims (see 20 U.S.C. 1415(b)(6)-(7); 34 C.F.R. 300.503(a)(1)-(2), 300.507(a)(1); 8 NYCRR 200.5(i)(1)).

The parent has not cited to any authority that supports finding that the IDEA affords a parent the right to bring IDEA claims on behalf of third parties. Furthermore, even if the retaliation claims were brought on behalf of the student, an SRO has previously advised the parent that an SRO does not have jurisdiction to review any portion of the parent's claims regarding retaliation (see Application of a Student with a Disability, Appeal No. 19-121; see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Similarly, it appears that the parent's allegations of intimidation, interference, and retaliation may be an attempt to raise some type of operational failure or systemic violation committed by the district; however, an SRO does not have the authority to correct systemic violations where the alleged deficiencies were in the administrative scheme, and therefore, those claims are not properly the subject of this proceeding (J.S. v. Attica Cent. Schools, 386 F.3d 107, 113 [2d Cir. 2004]; Heldman v. Sobol, 962 F.2d, 148 [2d Cir. 1992]).

In summary, since the parent withdrew his claim pertaining to the 2022-23 school year, there are no allegations of substantive or procedural violations pertaining to a specific CSE meeting or IEP (Tr. pp. 9-13; IHO Ex. I). The parent's general claims about implementation of an IEP fail to contain a reference to a specific IEP or service that has not been implemented. Further, the allegations pertaining to the three third-party providers do not allege a failure to implement the student's IEP by qualified staff. Generally, when implementing a student's IEP, school districts have discretion to assign qualified staff to students, thus, they need not honor a parent's request for a particular teacher or related service provider (Slama v. Independent Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 884-85 [D. Minn. 2003]; Application of the Bd. of Educ., Appeal No. 07-007; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-31; Application of a Child with a Disability, Appeal No. 97-87; Application of a Child with a Disability, Appeal No. 95-50; Application of a Child with a Disability, Appeal No. 91-19; Marple Newtown Sch. Dist., 46 IDELR 295 [SEA PA 2006]).

Based upon the foregoing, the parent's claims of intimidation, interference, and retaliation do not demonstrate a denial of FAPE as they lack sufficient specificity to state any cognizable IDEA claim for the "the identification, evaluation, or educational placement" of the student upon which relief could be granted, and therefore, the parent's appeal must be dismissed (see 20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). Consequently, I will not address any of the parent's requested relief including removal of the CSE chairperson or the request for compensatory education.

VII. Conclusion

Having concluded that there is insufficient basis to overturn the IHO's decision to dismiss the parent's due process complaint notice, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 20, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER