The University of the State of New York

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

No. 12-033

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Diane da Cunha, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

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 district) appeals from a decision of an impartial hearing officer (IHO) which determined that the district had failed to establish that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2011-12 school year was appropriate and ordered the district to fund independent educational evaluations of the student. The parents cross-appeal from that portion of the IHO's decision which denied their request for reimbursement for the student's tuition at the Rebecca School for the 2011-12 school year. The appeal must be sustained in part. The cross-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 CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

It is unnecessary to discuss the student's educational history in depth because of the procedural posture of this case. Briefly, the student has been found eligible for special education programs and related services as a student with autism since at least the 2006-07 school year (Parent Ex. J) and has attended the Rebecca School since 2008 (Tr. p. 473; Parent Ex. M at p. 3).[1] On May 23, 2011, the CSE convened to develop an IEP for the student for the 2011-12 school year

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

and recommended that the student attend a 6:1+1 special class in a specialized school and receive related services including occupational therapy (OT), speech-language therapy, and counseling (Dist. Ex. 3 at pp. 1-2, 15).[2] On or about June 15, 2011, the district informed the parents of the particular public school site to which the student was assigned for the 2011-12 school year (Dist. Ex. 12). On July 8, 2011, the student's mother visited the particular public school identified by the district and informed the district of her rejection of the recommended program by letter dated July 11, 2011 (Parent Ex. C at p. 2). In addition to specifying the reasons why she considered the district's assigned school to be inappropriate, the mother informed the district that she had placed the student at the Rebecca School for the 2011-12 school year and that, if the district did not offer an appropriate program in a timely fashion, she would "plan to seek tuition reimbursement for this placement" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated June 28, 2011, the parents requested an impartial hearing and reimbursement for the cost of the student's tuition at the Rebecca School for the 2011-12 school year (Parent Ex. A). The parents asserted that the IEP developed at the May 2011 CSE meeting did not offer the student a free appropriate public education (FAPE) because the goals contained on the IEP did not reflect all of the student's needs and the IEP was not reasonably calculated to provide educational benefits to the student (id. at p. 2). The parents further asserted that the district's recommended program was inappropriate because it did not align with the recommendations made by the Rebecca School participants, the district did not conduct evaluations prior to developing the May 2011 IEP, the program was insufficiently therapeutic for the student, and there was insufficient adult supervision (id. at p. 3). In addition, they asserted that the district was unable to provide them with information about the recommended program, depriving them of the opportunity to meaningfully participate in the IEP's development (id.). Finally, the parents contended that the district had previously recommended similar programs that have been found inappropriate (id.). The parents asserted that the Rebecca School was the student's pendency (stay put) placement and, for relief, they requested that the district pay for the student's tuition at the Rebecca School for the 2011-12 school year (id. at p. 4).

In a response dated September 2, 2011, the district asserted that the CSE relied on a classroom observation and a Rebecca School progress report in determining its recommendations (Dist. Ex. 2 at pp. 2-3). The district further asserted that the parents were able to participate in the May 2011 CSE meeting, the resultant IEP contained methods for measuring the student's progress toward meeting the goals contained therein, and that the CSE was properly composed (id. at p. 4).

[2] I remind the district that "IEPs developed for the 2011-12 school year, and thereafter, shall be on a form prescribed by the Commissioner" (8 NYCRR 200.4[d][2]) and that "the State's IEP form may not be modified to otherwise change its appearance or content" ("Model Forms: Student Information Summary and Individualized Education Program (IEP)," Office of Special Educ. Mem. [Jan. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm; see also "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents: Miscellaneous Questions," Question 2, Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-misc.htm).

B. Impartial Hearing Officer Decisions

An impartial hearing was convened on September 12, 2011, continued for three hearing dates, and concluded on October 24, 2011. After the third hearing date, the IHO informed the parties that he considered the evaluative data in the hearing record to be insufficient to determine what would constitute an appropriate placement for the student (Tr. pp. 551-52, 556). In an interim decision dated November 3, 2011, the IHO directed the district to conduct a comprehensive evaluation of the student—including a social history and psychoeducational, neuropsychological, pediatric neurological, speech-language, and OT evaluations—within 45 days of the interim order (IHO Interim Decision at pp. 4-5).

On November 9, 2011, the district submitted objections in response to the interim order, arguing that the IHO exceeded the scope of his authority in ordering evaluations, was not qualified to review the evaluations, the evaluations could not be considered in determining the appropriateness of the May 2011 IEP because they were not available to the May 2011 CSE, and having the evaluative data examined only by the IHO would "completely undermine[]" the purposes of the IDEA's requirement that multiple individuals work together to develop IEPs for students (Dist. Ex. 21).

After receiving the district's objections, the IHO reconvened the hearing to address the district's concerns regarding his interim order (Tr. pp. 577-80). In response, and noting that interim orders are not appealable, the IHO offered to rescind the interim order, stating that his final determination would "be that the CSE did in fact lack the information on which to base any determination," such that the district had failed to establish the appropriateness of the recommended program, and that he would order the district to conduct the evaluations in a final order (Tr. pp. 587-95). The district's counsel requested that the IHO rescind the November 9th interim order (Tr. pp. 593-95) and the IHO issued a second interim decision, dated November 16, 2011, rescinding the first interim decision (IHO Second Interim Decision at pp. 9-10).[3]

After receiving post-hearing memoranda from the parties,[4] the IHO issued a decision, dated January 9, 2012 in which, after detailing the district's repeated failures to obtain evaluations of the student in violation of the IDEA's procedural requirements, the IHO ordered that the district obtain educational, psychological, neuropsychological, psychiatric, speech-language, and OT evaluations of the student (IHO Decision at pp. 5-12). The IHO found that both the district and the parents had failed to establish the substantive appropriateness of their respective programs for the student, so that it was unnecessary to address whether equitable considerations supported the parents'

[3] The IHO noted in his second interim decision that State regulation explicitly empowers IHOs to request independent educational evaluations (IEEs) as part of the hearing process (IHO Second Interim Decision at p. 6).

[4] While counsel for the parents apparently submitted a response to the district's objections (Tr. p. 576), it was not included in the hearing record forwarded to the Office of State Review. I note that counsel for the parents expressed a desire to have his post-hearing memorandum excluded from the hearing record (Tr. pp. 542-43); I remind the IHO and the parties that State regulations require the IHO to identify and enter into the hearing record "all other items" he considers (8 NYCRR 200.5[j][5][v]; see 8 NYCRR 200.5[j][3][xii]; Application of the Bd. of Educ., Appeal No. 11-122). There is no valid basis whatsoever for a request to submit what amounts to a private response for an IHO only. If it is to be considered by the IHO, it must be included in the administrative hearing record for the benefit of subsequent State administrative and judicial review. The parents' options in this case were to either submit it for inclusion with the administrative hearing record in order to receive the IHO's consideration or not submit it at all.

request for reimbursement (id. at p. 13). The IHO directed that the district shall continue funding the student's program at the Rebecca School during the period that it conducts the ordered evaluations and reconvenes the CSE (id. at pp. 13-15). Finally, in response to the parents' request that the evaluation be conducted by evaluators not employed by the district, the IHO noted the distrust between the parties and the district's longstanding failure to evaluate the student, and ordered that the district arrange to have the assessments conducted by non-district employees and at public expense, and further stated that the resulting evaluations would be considered district evaluations for purposes of allowing the parents to request independent educational evaluations (IEEs) if they disagreed with the results of the ordered evaluations (id. at pp. 14-15).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that it did not offer the student a FAPE for the 2011-12 school year. Specifically, the district asserts that the May 2011 CSE had sufficient evaluative material to develop an appropriate educational program for the student, despite a lack of formal evaluative data. With regard to its failure to comply with the IDEA's requirement that it evaluate the student, the district asserts that the student's mother obfuscated its attempts to do so, excusing its noncompliance. Addressing the ordered evaluations, the district contends that the IHO erred in doing so because the district had not conducted an evaluation with which the parents disagreed, the hearing record did not establish that all of the ordered evaluations were necessary, and the district should have been given the opportunity to conduct the evaluations in the first instance itself. The district further argues that the Rebecca School was not an appropriate placement for the student because of its failure to provide decoding instruction or counseling. In any event, the district argues that the IHO erred in directing the district to continue funding the student's placement at the Rebecca School, despite having found that the parents failed to establish that it was an appropriate placement for the student, because the IHO's order constituted an improper continuation of the student's pendency placement. The district also argues that equitable considerations do not support the parents' request for reimbursement because the parents failed to produce the student for scheduled evaluation appointments, the parents did not give the district the statutorily-required ten-day notice of their intention to place the student at the Rebecca School, and the parents failed to establish that they were legally obligated to pay for the student's Rebecca School tuition for the 2011-12 school year. Finally, the district requests a finding that the IHO engaged in misconduct or is incompetent.

The parents answer, denying the district's allegations and requesting that the IHO's decision be affirmed with respect to his determinations that the district failed to offer the student a FAPE, directed the district to continue funding the student's placement at the Rebecca School, and ordered the district to conduct evaluations. With regard to the student's continued placement at the Rebecca School, the parents concede that it was not proper for the IHO to require the district to fund the placement as a matter of pendency on a going forward basis, but argue that the IHO has the authority to order the student's continued placement there as an equitable remedy. The parents also assert that the IHO has the inherent authority to order that IEEs be conducted, which were appropriate in this case because the student had not been evaluated since 2005.

The parents also cross-appeal the IHO's decision to the extent that it found that the parents failed to establish the appropriateness of the Rebecca School for the student and denied them reimbursement for the cost of the student's Rebecca School tuition for the 2011-12 school year. With respect to the Rebecca School, the parents argue that the hearing record establishes that the

student's program at the Rebecca School was tailored to his needs and that he had benefitted from instruction. Addressing equitable considerations, the parents assert that the district failed to prove that the parent refused to comply with district attempts to evaluate the student.[5]

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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. 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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). 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

[5] The district answers the cross-appeals, reiterating arguments previously made in its petition and additionally asserting that there was no objective evidence in the hearing record that the student had made progress at the Rebecca School.

greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). 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 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. IHO Authority to Order IEEs

Having abandoned the arguments it made during the impartial hearing with regard to the evaluations ordered by the IHO, on appeal the district asserts that the IHO erred in ordering it to evaluate the student primarily on the basis that the district had not conducted an evaluation with which the parents disagreed. The district does not address the IHO's authority to "request[] an independent educational evaluation as part of a hearing on a due process complaint" (34 CFR 300.502[d]; see 8 NYCRR 200.5[g][2]; [j][3][viii]). Upon review of the hearing record, I find that the IHO properly determined that there was insufficient evaluative data to determine the student's educational needs and that additional evaluative data was necessary for adequate development of the hearing record, and I will direct the district to fund IEEs of the student and remand to the IHO for further proceedings (see Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student with a Disability, Appeal No. 10-100).

As noted above, IHOs are vested with the authority to direct that a student be evaluated at district expense (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]). One Court, after quoting the regulation itself, noted that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process," without further elucidation (Lyons v. Lower Merrion Sch. Dist., 56 IDELR 169 [E.D. Pa. Dec. 14, 2010]), while another Court has noted with approval an SRO's remand of a proceeding to the CSE in conjunction with direction to reevaluate a student to determine the student's educational needs, based both on the absence of sufficient evaluative data in the record and the length of time since the student had last been evaluated (B.J.S. v. State Educ. Dep't, 815 F. Supp. 2d 601, 614-15 [W.D.N.Y. 2011]; see Application of a Student with a Disability, Appeal No. 08-001). However, it has also been acknowledged that the IHO's authority to direct an evaluation is not unlimited (see, e.g., Application of a Child with a Disability, Appeal No. 04-012; Application of a Child with a Disability, Appeal No. 96-13). The extent of the authority has been variously formulated as one which can be exercised when additional evaluative data is necessary to determine an appropriate educational placement (see Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 96-13; Evergreen Sch. Dist., 106 LRP 18815 [SEA WA 2006][6] [noting that the authority to order IEEs is a corollary of the IHO's obligation to develop an adequate record on which to base a decision]; In re Student with a Disability, 102 LRP 8250 [SEA AK 2001]; Teaneck Bd. of Educ., 17 IDELR 142 [SEA NJ 1990]). The extent of the IHO's authority to order an evaluation has also been described as a matter committed to the IHO's discretion (see Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 01-076; Application of the Bd. of Educ., Appeal No. 00-090 [finding that "there was a rational basis" for the ordered testing, "which would have been useful"]; In re Student with a Disability, 106 LRP 31162 [SEA NM 2005]), or as a hybrid of necessity and discretion (see Application of a Child with a Disability, Appeal No. 07-057; North Chicago Community Unit Sch. Dist. 187, 34 IDELR 25 [SEA IL 2000]). Furthermore, IHOs are "granted broad authority in their handling of the hearing process and to determine the type of relief which is appropriate considering the equitable factors present and those which will effectuate the purposes underlying IDEA" (Warren Consolidated Schs., 106 LRP 70659 [LEA MI 2000]).

In this case, the IHO found that he required additional evaluative data to determine the appropriateness of either the program offered by the May 2011 IEP or the student's placement at the Rebecca School (IHO Interim Decision at p. 4). A district is required to conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]), and no single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in

[6] Available at http://www.k12.wa.us/ProfPractices/adminresources/SpecEdDecisions/2005/2005-SE-0106.pdf.

determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The only evaluative information contained in the hearing record are a Rebecca School progress report, a classroom observation report, and an evaluation report from a neurodevelopmental pediatrician from 2005 (Dist. Exs. 5-6; Parent Ex. G). Furthermore, the only document in the hearing record providing any insight into the student's disability is the 2005 neurodevelopmental evaluation report, which stated that the student's deficits were "suggestive of Autism Spectrum Disorder" and recommended further evaluations (Parent Ex. G at pp. 3-4). I agree with the IHO that the hearing record is inadequate to determine the student's current needs or the full nature of his disability (IHO Decision at p. 7) and find that the IHO appropriately ordered that the student be reevaluated "to provide additional information so that the hearing officer may make an informed judgment about the issues that have been presented" (Application of a Child with a Disability, Appeal No. 02-005; see Application of a Student with a Disability, Appeal No. 08-001). Similarly, upon learning that the student had not been evaluated since reaching school age (Tr. pp. 57, 70-73; see Parent Ex. G), the IHO had the authority to order that the student be reevaluated to rectify the district's failure to comply with its obligation to evaluate the student at least once every three years, particularly in the absence of a written agreement by the parents and district that reevaluation is unnecessary (Application of a Child with a Disability, Appeal No. 02-005; see 20 U.S.C. § 1414[a][2][B][ii]; 34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]). I am not persuaded by the district's argument that the parents were first required to disagree with a district evaluation before the IHO could use his independent authority to order an IEE where, as here, there was inadequate information in the hearing record regarding the student's needs and the purpose of the IEE was ensuring that the IHO had some evidentiary basis in the hearing record upon which to render a determination of whether the parents' unilateral placement is appropriate.[7] The provision for an IEE at a parents request is distinct from the provision for an IHO's request as part of a hearing (8 NYCRR 200.5[g][1], [2]).

To the extent that the district argues that the hearing record does not reflect that the ordered evaluations are necessary to determine the student's needs, I agree in part. The IHO did not specify

[7] In cases such as this one in which the IHO determined that the district failed to offer the student a FAPE due to inadequate evaluation of the student, when determining whether the unilateral placement is appropriate for the student, one Court held that the district, rather than the parent, is held accountable for any lack of information regarding the student's needs because the IDEA places the responsibility for evaluation procedures on the district in the first instance (A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 206-07 [S.D.N.Y. 2010]). By ordering IEEs to be conducted in this case, the IHO was holding the district accountable for the lack of evaluative information.

the reasons why he requested that certain evaluations be conducted, and the hearing record contains no information suggesting that the student is in need of a psychiatric evaluation.[8] Furthermore, I find that it is duplicative to require both psychological and neuropsychological evaluations of the student, as a duly qualified neuropsychological evaluator could administer the psychological testing. Accordingly, I direct the district to fund educational, neuropsychological, speech-language, and OT evaluations of the student.[9] If the parties cannot mutually agree on independent evaluators to conduct the IEEs, the district shall provide the parents with information about where IEEs may be obtained, as well as the criteria applicable to IEEs should the parents wish to privately obtain additional evaluations at their own expense by individuals who are not on the district's list of independent evaluators (34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii], [vi]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]).[10] The district's obligation to pay for these evaluations is conditioned on the parents consenting to the disclosure of the resulting evaluation reports to the district and the IHO. I also note that parental consent is required before the district can release the student's educational records to an independent evaluator conducting an IHO-ordered IEE (Independent Educational Evaluation, 71 Fed. Reg. 46690 [Aug. 14, 2006]; see 34 CFR 300.622[a]). I direct the parents to consent to such disclosure; if they do not, the IHO is free to dismiss the due process complaint notice (Independent Educational Evaluation, 71 Fed. Reg. 46690).[11] The evaluations must be completed within 30 days of the date of this decision, after which the matter is remanded to the IHO, who is directed to reconvene the impartial hearing within 10 days of the completion of the evaluations, receive evidence, and hear testimony that is necessary to determine the merits of this matter.

As the district did not avail itself of the opportunity to supplement the hearing record with the results of IEEs (Tr. pp. 593-95; Dist. Ex. 21), I decline to reverse the IHO's determination that the district failed to establish that it offered the student a FAPE (IHO Decision at p. 13; IHO Interim Decision at p. 4; Tr. pp. 587-90). I note in particular that the evaluative information available to the CSE consisted solely of the Rebecca School progress report and a classroom

[8] This determination would not preclude an independent educational evaluator or the CSE from recommending that a psychiatric evaluation be conducted.

[9] Although the district asserts that "formal testing" of the student will not necessarily provide useful information, I note that an evaluation consists of much more than the administration of standardized testing (see 34 CFR 300.304-300.305).

[10] Nothing in this decision shall preclude the parties from agreeing to allow the parents to select independent evaluators that meet the criteria.

[11] I note that, while the district places great emphasis on its attempts to evaluate the student subsequent to receiving a request for a psychoeducational evaluation from the student's mother in November 2010 (Dist. Ex. 8), there is no evidence in the hearing record that the district ever attempted to obtain consent to evaluate the student from the parents (34 CFR 300.300; 8 NYCRR 200.5[b]). Rather, the record indicates only that an agency with which the district contracted to perform the evaluation was unable to schedule an appointment with the parent, after which the district sent the parent an "Appointment Letter," specifying a time and place at which the student could be evaluated (Tr. pp. 27-30, 83-84, 89-90; Dist. Ex. 11). In any event, the parent's alleged noncooperation with prior attempts by the district to evaluate the student is irrelevant to the IHO's authority to require the district to fund independent evaluations of the student as a component of the impartial hearing. However, should the parents fail to cooperate with the district in ensuring the timely evaluation of the student or in reconvening the impartial hearing in accordance with this decision, it would be reasonable for the IHO to dismiss the due process complaint for failure to comply with his reasonable directives and those of the SRO (Application of a Student with a Disability, Appeal No. 09-073).

observation of the student conducted by a district special education teacher who acted as the district representative at the May 2011 CSE meeting (Dist. Exs. 3-6). The district may not abdicate it's obligation to determine a student's needs and the hearing record as it stands does not support the district's assertion that it had adequate evaluative information to determine the student's needs. The lack of sufficient evaluative information in the hearing record makes it impossible to tell if the IEP developed for the student at the May 2011 CSE was appropriate to address the student's needs. Provided the parents cooperate with the process for obtaining IEE's, the parents shall be permitted to supplement their proof regarding the appropriateness of the Rebecca School to meet the student's needs, as initially envisioned by the IHO (IHO Interim Decision at pp. 4-5; Tr. pp. 551-52, 555-56). I recognize that the timeframe required by this decision is brief; it is intentionally so, in hopes that this proceeding may be concluded prior to the end of the 2011-12 school year (see In re Student with a Disability, 102 LRP 8250 [SEA AK 2001]).

Additionally, the district asserts that it should be given the opportunity to conduct the evaluations. I see no reason to depart from the IHO's reasoning for ordering that the evaluations be conducted by independent personnel. As noted by another hearing officer, when the level of distrust between the parties is high enough, the wiser course is to direct that evaluations be conducted by independent persons not affiliated with the district (K.I. v. Montgomery County Bd. of Educ., 109 LRP 75160 [SEA AL 2009]). I note that, despite asserting at the first impartial hearing date that the student would "be evaluated for next year" (Tr. p. 241), on appeal the district does not assert that it has attempted to conduct any evaluations of the student in advance of this year's CSE meeting. However, I find that the IHO erred in determining that the resulting evaluations would be considered district evaluations, rather than IEEs, for purposes of determining whether the parent may request an IEE challenging them (IHO Decision at p. 15), and I reverse his decision to that extent.

B. Alleged IHO Misconduct / Incompetence

Finally, the district requests that I find that the IHO engaged in misconduct or incompetence based on his determination that the district was obligated to maintain the student's placement at the Rebecca School until such time as there is "a final determination in a subsequent year that the district has offered an appropriate change of placement" (IHO Decision at pp. 13-14).

The IDEA and Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 11-104). A prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *20-*21, *23; Application of the Bd. of Educ., Appeal No. 11-072; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; see 34 CFR 300.514[a]). However, for the pendency provisions of the IDEA to apply, a due process proceeding must be currently pending (Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526 [S.D.N.Y. 2011]; Application of a Student with a Disability, Appeal No. 11-154; see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Honig v. Doe, 484 U.S. 305, 323 [1987]; Mackey v. Bd. of Educ., 386 F.3d 158, 160 [2d Cir. 2004]; Bd. of Educ. v. Schutz, 290 F.3d 476, 481-82 [2d Cir. 2002]; Zvi D. v. Ambach,

694 F.2d 904, 908 [2d Cir. 1982]; Letter to Winston, 213 IDELR 102 [OSEP 1987]). While the Rebecca School may constitute the student's current educational placement for pendency purposes should the parents initiate a subsequent impartial hearing, an IHO has no authority to establish a student's pendency placement on a going forward basis (Application of a Student with a Disability, Appeal No. 11-027; see Zvi D. v. Ambach, 694 F.2d 904, 908 [2d Cir. 1982] [holding that when a district has been found liable for a student's private placement, reimbursement pursuant to pendency is required "for the duration of the review proceedings"]; see also Child's Status During Proceedings, 71 Fed. Reg. 46710 [Aug. 14, 2006] ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]). In this instance, I agree with the district that the IHO's order that the district continue to fund the student's Rebecca School placement represents a misapplication of the pendency principle, but it does not constitute misconduct or incompetence under the circumstances presented here (see Application of the Dep't of Educ., Appeal No. 11-037). In any event, the student's pendency placement at the Rebecca School in this matter has been extended for the duration of the parties' appeals and will continue during the pendency of any further proceedings, unless the parties otherwise agree.

VII. Conclusion

Based on the foregoing, I find that the IHO properly exercised his authority in directing that the district obtain evaluations of the student to ensure that there was an adequate basis upon which to render a determination (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]). I note that SROs have upheld IHOs' dismissal of parents' due process complaint notices for failure to comply with the IHOs' reasonable directives (Application of a Student with a Disability, Appeal No. 09-073 [finding that "[a]s a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the impartial hearing officer regarding the conduct of the impartial hearing"]; Application of a Child with a Disability, Appeal No. 05-026; see also Application of the Dep't of Educ., Appeal No. 08-052; Application of a Child with a Disability, Appeal No. 04-010), and I caution the district that a refusal to comply with the procedures established for resolution of disputes relating to the identification, evaluation, or educational placement of students with disabilities may provide an independent basis for a finding that the district has denied a FAPE to a student (20 U.S.C. § 1415[b][6][A], [f][1][A]; see Hunt v. Bartman, 873 F. Supp. 229, 242-45 [W.D. Mo. 1994]).

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision dated January 9, 2012 is modified, by reversing those portions which (1) found that the parents failed to establish the appropriateness of the Rebecca School for the 2011-12 school year and (2) directed that the independent evaluations ordered by the IHO would include psychiatric and psychological evaluations and would be subject to a request by the parents for additional IEEs; and

IT IS FURTHER ORDERED that, with the written consent of the parents and unless the parties otherwise agree, the district shall fund independent OT, speech-language,

neuropsychological, and educational evaluations of the student, to be completed within 30 days of the date of this decision; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO who issued the January 9, 2012 decision to reconvene the impartial hearing within 10 days after the completion of the ordered evaluations, receive evidence and/or hear testimony as is necessary to supplement the parties' positions with respect to the evaluation reports, and render a new decision on the merits of the parents' claim for the costs of tuition; and

IT IS FURTHER ORDERED that, if the IHO who issued the January 9, 2012 decision is not available to reconvene the impartial hearing, a new IHO shall be appointed.

Dated: **Albany, New York**
April 25, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER