The University of the State of New York

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

No. 19-080

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

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the interim and final decisions of an impartial hearing officer (IHO) which directed evaluations of the student to be conducted and the respondent's (the district's) Committee on Special Education (CSE) to reconvene in order to recommend an appropriate program for the student. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

As described more fully below, this appeal arises from several IHO decisions issued after the matter was remanded for further proceedings by an SRO (see Application of a Student with a Disability, Appeal No. 18-105).[1] A full recitation of the student's educational history is unnecessary in light of the limited issues in this appeal.

Briefly, the student attended the Westchester Exceptional Children's School (WECS), a New York State approved nonpublic school, during the 2015-16 school year (Dist. Exs. 9; 13 at p.

[1] In the prior State-level review proceeding, it was determined that the first hearing on the merits had been conducted in a manner that was inconsistent with regulation, which had the effect of impeding the parents' right to due process. Consequently, the matter was remanded for a new hearing with a new impartial hearing officer. The district exhibits had been entered into the hearing record prior to remand (Dist. Exs. 1-144).

1; see Dist. Ex. 144 at p. 2). The student has remained at WECS since the 2015-16 school year (see Tr. p. 88).

The CSE convened on June 14, 2016 to develop the student's IEP for the 2016-17 school year (Dist. Exs. 3 at pp. 11, 16; 7).[2] The June 2016 CSE recommended a 12-month program consisting of an 8:1+1 special class placement in a New York State approved nonpublic school, with related services (id. at pp. 1, 11-12). The CSE determined that the student would participate in the same State and district-wide assessments administered to general education students and recommended various testing accommodations (id. at pp. 13-14). [3]

On July 6, 2016, the parents requested that the CSE reconvene because WECS could not implement the student's IEP (Dist. Ex. 16). On the same day, the district sent the parents a request for a reevaluation of the student, indicating that if new assessments were required, the parents would be asked for consent (Dist. Exs. 14; 15). On August 18, 2016, the district notified the parents that additional assessments were required, which "may include a psychoeducational evaluation, a classroom observation, and other appropriate assessments or evaluations," and sent the parents a request for consent (Dist. Ex. 30 at p. 1).

Through a number of letters and notices from July 2016 to October 2016, the district scheduled and rescheduled evaluations of the student in the areas of assistive technology (see Dist. Exs. 11 at p. 5; 12; 36 at p. 1; 43 at pp. 2, 3, 6; 46 at p. 2; 48 at p. 1), academics/psychoeducation (Dist. Ex. 21 at p. 8; 26 at p. 2; 46 at p. 2; 48 at p. 1), social history (Dist. Ex. 21 at pp. 6, 7, 8), and neuropsychology (Dist. Ex. 32 at pp. 1-5).

By a series of letters and email correspondence, the parents indicated that they did not want the evaluations conducted as proposed by the district (Dist. Exs. 18 at p. 2; 21 at p. 6) and repeatedly either refused consent, requested rescheduling, often with specific conditions, or did not appear with the student for scheduled evaluations (Dist. Exs. 38 at p. 1; 41 at p. 2; 42 at pp. 1-2; 43 at pp. 5, 8; 44 at pp. 1-3; 45 at pp. 1-2; 50 at p. 2). An assistive technology evaluation was conducted in November 2016, but the student was absent, and attempts were made to update it with the student present (Dist. Exs. 50, 57). In 2017, the parents indicated they preferred to be communicated with in writing (Dist. Ex. 62; 63). An IEP was developed in June 2017, during which the CSE suggested that the student be placed in special class in a specialized school, but, according to the IEP, the parents left the meeting in anger (Dist. Exs. 73-75; 83; 89).[4] The parents visited a district specialized school in September 2017 and regarded it as inappropriate (Dist. Ex. 87). The district offered a different specialized school (Dist. Exs. 89 at p. 5; 100), but the student continued to attend WECS, but he was reported as frequently absent (see, e.g., Dist. Ex. 90; 92; 111; 112; 120; 128; 133). The parents continued to disagree with the district, and although it appeared that communications briefly improved on both sides and became productive, they again

[2] The parents did not attend this CSE meeting despite attempts by the district to contact the parents by phone (Dist. Ex. 7).

[3] In a letter dated June 8, 2016, the executive director of WECS indicated that students at the school were "New York State Alternatively (NYSAA) assessed," and that because the student's IEP indicated that he should be "State tested," she supported the parents "in their desire to see [the student] in a more appropriate placement beginning with the 2016-17 school year" (Dist. Ex. 13 at p. 1).

[4] Apparently, the student was rejected from at least 11 nonpublic schools (Dist. Ex 76).

deteriorated, and the parents engaged in activities such as picketing (Dist. Ex. 102; 103). The CSE conducted a meeting in November 2017, but the placement recommendations were not fundamentally altered (Dist. Ex. 119). Busing problems occurred with the student's specialized transportation in 2018 (see, e.g., Dist. Ex. 132).

A. Due Process Complaint Notice

In an amended due process complaint notice dated July 20, 2018, the district requested a hearing to "compel the parents. . . to provide consent" and produce the student for evaluations (Dist. Ex. 144 at p. 1).[5] The district indicated that it wished to conduct a psychoeducational evaluation, a social history update, a speech-language assessment, an occupational therapy (OT) assessment, a physical therapy (PT) assessment, an assistive technology evaluation, a vocational assessment, and a functional behavioral assessment (FBA) (id.). The due process complaint notice describes the numerous unsuccessful efforts and attempts made by the district from June 2016 to January 2018 to reevaluate the student (id. at pp. 2-5). Moreover, the district stated that the parents themselves had requested that the student be reevaluated in August 2016 and had been in regular communication with the district throughout the relevant time period (id. at pp. 2-4). Despite this, the student remained unevaluated as of the filing of the due process complaint notice due to the parents' refusal to cooperate with the reevaluation process (id. at p. 4).

B. Impartial Hearing Officer Decisions

The parties proceeded to an impartial hearing (see Tr. pp. 1-205). After six days of proceedings and four interim decisions, the IHO rendered a final decision dated July 18, 2019.

The IHO rendered the first interim decision on January 31, 2019 (Jan. 2019 Interim IHO Decision at p. 10). The IHO held that the parties agreed that the student should continue at WECS; however, they also agreed that this placement was not appropriate (id. at p. 9). Since the parties agreed that WECS was not appropriate, the district provided the parents with a related services authorization (RSA) for ten hours per week of "academic instruction in support of Standard Assessment curriculum and diploma" (id.). The IHO found that WECS with tutoring was the student's baseline pendency program (id.).[6] Further, the IHO found that he would be unable to render a decision without a current psychoeducational evaluation and ordered "such an evaluation be conducted by a provider identified by the family" (id.). The IHO noted that the district had offered to conduct the evaluation and indicated that the parents had the option to avail themselves of that offer, or, the parent may arrange to have the evaluation "conducted by any duly-licensed professional, at market rates, at district expense" (id. at pp. 9-10). The parents had requested that the student be evaluated at his school; therefore, the IHO ordered the location of the evaluation to

[5] The initial due process complaint notice filed by the district was dated July 2, 2018 (July 2, 2018 Due Proc. Compl. Notice at p. 1). In that due process complaint notice, the district requested a hearing to conduct a psychoeducational evaluation, social history update, and functional behavioral assessment (FBA) (July 2, 2018 Due Proc. Compl. Notice at p. 1).

[6] The IHO determined that the 1:1 tutoring included in the student's pendency "may be provided by or contracted by [WECS] for delivery to the student while at [WECS], if the family so desires and [WECS] so agrees. Alternatively, it may be contracted for with a duly licensed provider by the family at market rates. The services are to be delivered at school or such other location as the provider and the family mutually agree[d] upon." (Jan. 2019 Interim IHO Decision at p. 9).

be either at WECS "or such other location as may be agreed upon by the family and the clinician" (id. at p. 10). As to the parents' request that they be present for the evaluation, the IHO noted that this request was between the parents and the clinician, and if the clinician agreed to their presence during the evaluation, then the parents may be present (id.). Finally, the IHO found that "if and when a new clinical report is made available to the district pursuant to this Order, the CSE must, as a matter of law, convene to consider that new assessment upon the family's request to do so" (id.).

The second interim decision was dated April 11, 2019 (Apr. 2019 Interim IHO Decision at p. 5). The IHO noted that the parents had not been able to utilize the RSA provided by the district, as neither the district nor the school had been able to identify a tutor (id. at p. 4). The IHO held that this "[wa]s not an acceptable circumstance for this student's education or his rights" (id.). Based on this, the IHO modified his prior pendency order to add that "the district may seek to contract with an agency provider" and ordered the district "to pay market hourly rates for travel time by a private provider if that is what is needed to identify a provider willing and able to work with the student in coordination with his family and his school" (id.). Further, the IHO modified his order regarding the psychoeducational evaluation, as he noted that the parents had identified a provider to conduct the evaluation (id. at pp. 4-5). The IHO ordered the district to "provide or contract for transportation with appropriate supervision for the student to and from all evaluation sessions, coordinating arrival and departure with the evaluators, the school, and the family, as appropriate" (id. at p. 5).

In the third interim decision dated May 17, 2019, the IHO indicated that the previously scheduled psychoeducational evaluation did not occur due to disputes regarding transportation and that the parents had withdrawn consent to conduct the ordered evaluation (May 2019 Interim IHO Decision at pp. 4, 6). Also, the IHO noted that the district had identified a tutor to work with the student and that a meeting was scheduled with the school, the parents, the student, and the tutor on May 21, 2019 (id. at p. 4).[7] The IHO found "that there [was] no material dispute between the parties with respect to the need for a new evaluation, for tutoring services, and for an updated IEP" all of which were part of the student's pendency (id. at p. 5). Therefore, the IHO ordered: (1) if the parents provided the district with the contact information for a taxi or car service by May 20, 2019, the district was required to "arrange to pre-pay or assure payment" for a car to pick up the parents at the location and time they specified, drive the parents to the school, wait for them, and return them to their specified address at the conclusion of the evaluation;[8] (2) if the parents did not provide the car service information by May 20, 2019, then the parents may contract with any car service of their choice and be reimbursed for the cost of the trip on an expedited basis, upon production of documentation of payment; (3) the district was "to seek to conduct" the assistive technology evaluation and "other assessments as requested by the family, at WECS on May 21"; (4) the district was directed to convene a CSE review either at WECS on May 21 or "on the earliest viable date agreeable between the district and the family at the district offices to address the concerns raised by the family prior to completion of the assessments"; and (5) the district was to

[7] The IHO requested that the parents provide the district with information regarding their preferred transportation method for the meeting (May 2019 Interim IHO Decision at p. 5).

[8] The IHO directed the car service to be assured it "w[ould] be paid for the driver's waiting time from the time designated for a minimum of three hours if the family does not appear unless expressly released from the need to wait by the district contracting contact" (May 2019 Interim IHO Decision at p. 5).

provide transportation to and from the CSE reviews for the family on the same basis as previously ordered, if the review was "not undertaken on May 21" (id.). Finally, the IHO ordered the appointment a guardian ad litem, who would be identified in a subsequent order, "for the sole purpose of facilitating on behalf of the student and the family these transportation and evaluation scheduling arrangements" (id.). The IHO deemed the appointment of the guardian ad litem "essential" because the parents and district were "irreconcilably at odds with one another in a manner and to a degree that impede[ed] their capacity to [] work together without assistance to achieve even the simplest coordination [of] their shared goals on behalf of the student, thereby thwarting the development of an appropriate program or his capacity to benefit from instruction" (id. at pp. 5-6).

In the fourth interim decision dated June 30, 2019, the IHO indicated that he had been awaiting transcription of the prior proceeding and appointed the guardian ad litem (Jun. 2019 IHO Interim Decision at pp. 5-6).[9]

In the final IHO decision dated July 18, 2019, the IHO noted that in his prior interim decisions he had ordered "that the family may have evaluations conducted independently at district expense, and that they may seek to retain a duly-licensed tutor at district expense" and "that the district provide private transportation to facilitate having these assessments conducted at the student's school" (IHO Decision at pp. 3, 7). The IHO noted that he had appointed a guardian ad litem and that she provided a final report (id. at pp. 4-6). The IHO then held that:

> Based upon the family's inability to identify even a single clinical provider to assess the student, their incapacity to date to implement my orders granting them the right to conduct IEEs and retain a related service provider, their refusal to cooperate with the Guardian ad Litem, their refusal to participate in district-mandated assessments, and the student's ongoing and urgent need for appropriate assessment and development of a new, appropriate, IEP calling for a new, appropriate, placement . . .

(IHO Decision at p. 6).

As a result, the IHO found: (1) the district has the right to conduct a triennial re-evaluation of the student, at a time and in a location of reasonable selection; (2) the parents do not have the right to attend the evaluation, but may do so, if the evaluator concludes that their participation will not negatively impact the reliability of the assessment; (3) the district has an ongoing obligation to identify and provide ten hours per week of tutoring services to the student for Standard Assessment; (4) the district must convene a CSE to address the parents' concerns about the student's IEP, even before evaluations are completed, at a time and in a location of its reasonable selection; (5) the district must convene a CSE to address the student's triennial assessments as best it can, at a time and in a location of its reasonable selection; (6) the district must convene a CSE to address evaluations it will conduct, at a time and in a location of its reasonable selection; (7) to

[9] The guardian ad litem report was not dated (see IHO Ex. II). The guardian ad litem indicated that she was "unable to give detailed and specific recommendations for the student, as the parents would not speak to [her] and would not cooperate" (IHO Ex. II at p. 2). The guardian ad litem did provide information regarding potential recommendations for an independent neuropsychological evaluation, an FBA and BIP, and tutoring services (IHO Ex. II at pp, 2-3).

the extent the parents choose to arrange to have one or more evaluations conducted, the district is ordered to pay for the cost of the evaluations recommended by the guardian ad litem to be conducted by the recommended providers and at the costs recommended by the guardian ad litem; (8) should the parents choose to arrange for the tutoring service recommended by the guardian ad litem, at the recommended cost, the district is ordered to pay the cost of those services up to 10 hours per week, until the student has a new mutually agreed upon or ordered IEP (IHO Decision at pp. 6-7).

The IHO noted that this was not a case of unilateral placement and that equitable factors were not at issue (IHO Decision at p. 7). However, the IHO held that the parents' unwillingness to cooperate with the guardian ad litem "verges on a refusal to accept special education services for this young adult who plainly is in need of them and could benefit from them" (id.).

IV. Appeal for State-Level Review

The parents appeal.[10] The parents object to the way the IHO conducted the hearing noting that due to him "repeatedly demonstrating conduct of a perceiving partial nature" they requested that he recuse himself. The parents note that the IHO "delayed to respond" to their recusal requests, if he responded at all. Further, the parents contend that the IHO seemed to abandon the case because he was non-responsive for extended durations.[11] The parents argue that the IHO improperly extended this case for over six months, either without proper extension requests or against their objections. Moreover, the parents assert that towards the end of the proceedings, the IHO only responded to the district, leaving them in "limbo." This caused the parents to reach out to the impartial hearing office for assistance and ultimately file a complaint with "OCR" to address their outstanding concerns.[12] The parents argue that the IHO should have recused himself due to this complaint and that after the complaint was made, the IHO's behavior changed as he became unresponsive and appointed the guardian ad litem.

The parents assert that the IHO was "less than impartial" by "openly acting in [the] best interest" of the district. Specifically, the parents argue that the IHO's allowance of the district witness to be present for the entire proceeding, even prior to her testimony, was improper. Further, the IHO "stigmatized us in [the] best interest of the [district] with absolute untruths and inconsistencies, eventually appointing [a] guardian ad litem as he threatened us with throughout the entire proceedings." The parents claim that the IHO based his decision on inaccuracies and unsubstantiated claims by the district. Further, the district did not make a "single substantiating presentation, assertion, fact, or presenting supporting evidence to substantiate their claim." The parents contend that the district is required to provide the student with a FAPE and they have "grossly failed to do so for years," yet, the IHO only faulted the parents for the delay in implementing the IEEs that were granted, placing the district's obligations onto the parents.

[10] The parents submitted additional evidence with the request for review. The parents allege that this evidence supports their claims of IHO bias and cite to the additional evidence throughout the request for review (see Req. for Rev. at pp. 1-4, 6-7).

[11] The parents filed a due process complaint notice subsequent to July 2018, which is the subject of another impartial hearing, and the parents claim the IHO delayed that hearing as well.

[12] OCR stands for the United States Department of Education's Office of Civil Rights.

The parents assert that the IHO was "willfully, incorrect/misleading in his statement that we refuse to participate in district-mandated assessments." The parents argue that the IHO incorrectly stated that they did not comply with a single order; noting that they identified a provider to conduct evaluations and scheduled dates for those evaluations. The parents also point to the fact that two evaluations were previously allowed to be conducted. Further, the parents note that the interim decisions failed to provide a compliance date and were open-ended. The parents contend that the issue is not the evaluations, but rather the conflict is with the CSE staff they are forced to work with. The parents assert they made good faith efforts to work with the CSE by making "persisting and consistent efforts to implement" the IHO's orders and have the student evaluated; however, "many times evaluations were even scheduled, just to get canceled due to something or other, always leading back to the conflict between [the CSE] and us.". Additionally, the parents assert that they need a change in the student's CSE. The parents note that even if the evaluations are completed it won't matter if the CSE does not change, which is an issue the IHO ignored.[13]

The parents argue that the IHO failed to provide a reason for disregarding the district's failure "to comply with nearly all of our due process rights and/or laws and regulations that pertain regarding the [impartial hearing] process." Further, the IHO was "incorrect in his findings, partial and discriminatory even." The IHO ignored "significant details and later stigmatized us as uncooperative." The parents argue that the IHO's finding that they were on the verge of refusing special education services was "[e]xpressing extremely partial, opinionated statements that serve purpose only to provide, unconfirmed and beyond the scope, suggestive concepts."

Regarding the guardian ad litem, the parents argue that the IHO contradicted his own statement that he would not appoint guardian ad litem if the parents objected to it. The parents assert that the IHO ignored the fact that they did communicate with the guardian ad litem and they answered every question she presented. The parents assert that the student has great advocates in his parents and that the guardian ad litem will not follow through with the case long enough to address the real issue, which is the CSE. The parents argue that the guardian ad litem "only stigmatizes the parents as unable to preserve the best interest of their child and/or seemingly looked at as unfit."

The parents contend that the IHO's findings were not in the "best interest" of the student. They argue that the decision places the student in a worse position that he was already in as the issue is still without a conclusion because the decision failed to ensure that the student will be evaluated. The IHO should have set dates and providers for the evaluations. Instead, the IHO's findings will allow the district to continue to delay through "hoops of red tape" until the student "ages out" of special education eligibility. According to the parents, there is an urgent need to evaluate the student and the IHO did not address that need. The parents request that the SRO reverse all the IHO's findings and direct the district to transfer the student to a new CSE.

In its answer, the district asserts that the parents' request for a new CSE is beyond the scope of review because the parent raised the issue for the first time on appeal. The district contends that

[13] The parents assert that the CSE wrongly filed reports with other authorities against the parents "in retaliation of our persistent and highly competent pro-se parental advocacy" to protect the student's rights.

the parents have not filed a due process compliant notice regarding this issue and did not make such a request during the impartial hearing.

The district next argues that the parents failed to point to any instance in which the IHO demonstrated partiality or any support for their request to overturn any of the IHO's decisions. Notably, the district maintains that the IHO granted every possible order in the parents' favor to assist and facilitate the student being evaluated and receiving services. The district asserts the IHO "capitulated to each of the Parents' demands" and that there is no evidence that any of the parents' requests were denied by the IHO. Based on this, the district argues that the parents' claim that the IHO was biased is without merit. Further, the district contends that the parents' disagreement with the appointment of the guardian ad litem is not a basis for bias.

The district requests that the parent's additional evidence submitted with the request for review be disregarded. The district asserts that most of the additional evidence was available at the time of the hearing and should have been offered as evidence then. The rest of the evidence refers to the parents' other due process complaint notice and therefore, should not be considered.

The district asserts that the parents' request for review failed to comply with the practice regulation of 8 NYCRR 279.8[c]. The district indicated that it "endeavored to respond to the claims that could be discerned," but the parents' failure to comply with the regulations "thwarted [the district's] ability to formulate an answer to any possibly outstanding issues raised on appeal." Further, the district argues that the parents' request for relief is too vague and does not comply with the specificity required by the regulations. The district asserts that the request for review should be dismissed at facially deficient.[14]

V. Applicable Standards

A district must 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 need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and 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][1]-[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]). 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 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 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

[14] The parents served a reply dated September 20, 2019 (see generally Parent Reply).

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]).

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

I will first address the district's assertion that the parents' request for review must be dismissed for failing to comply with the form requirements for pleadings (8 NYCRR 279.4[a]; 279.8[c][2]-[3]). Specifically, the district argues that the parents failed to set forth a clear and concise statement that specifies their reasons for challenging the IHO's decision and failed to identify the relief they are seeking, noting that the parents' arguments are "difficult to discern" (Answer at p. 10). The district contends that the parents' request that the SRO overturn all the IHO's rulings is "too vague and does not comply with the regulation's requirement for specificity" and therefore, the district requests that the parents' appeal be dismissed as facially deficient (Answer at p. 10).

While the parents' allegations may not be as artfully drawn as those that might be prepared by a seasoned attorney, the numbered issues identify the parents' areas of dissatisfaction with the IHO. While the request for review is certainly not pristine, such a high standard is not required, especially from pro se parents. The request for review is a functional pleading and, as a matter within my discretion, I reject the district's argument that it must be dismissed for noncompliance with Part 279.

Although I decline to dismiss the parents' request for review for non-compliance with the form requirements governing such pleadings (see 8 NYCRR 279.4 and 279.8), the parents' reply submitted in rebuttal to the district's answer does not fully comply with the requirements and will not be considered to the extent that it does not comply (see 8 NYCRR 279.6). The only aspect of the reply that has been considered is the parents' rebuttal to the district's procedural defense that the request for review should be dismissed as facially deficient. Otherwise, the parents' reply exceeds the scope of a permissible reply insofar as it does not relate to any claims raised for review in the answer that were not addressed in the request for review, or to any additional documentary evidence served with the answer (8 NYCRR 279.6[a]).

2. Additional Evidence

The parents present additional evidence with their request for review that they assert supports their claim that the IHO was biased (see generally Req. for Rev.). The district argues that the additional evidence should have been presented at the time of the impartial hearing and therefore, it should not be reviewed (Answer at p. 9).

As a matter within my discretion, I will accept the additional evidence submitted by the parents as SRO Exhibit 1.[15] The emails submitted by the parents are highly probative of the issues

[15] The parents did not paginate the exhibit; therefore, the cover sheet has been marked as page 1 of the exhibit.

raised in their request for review of the IHO's rulings. The parents argue that this additional evidence supports their assertion that the IHO was biased and that they communicated with the guardian ad litem; however, examination of this additional evidence supports the opposite conclusion. Specifically, the parents assert that they "did fully communicate" and "answered every single question [the guardian ad litem] presented" (Req. for Rev. at p. 3). The parents are correct insofar as they did eventually respond to every question presented by email; however, this occurred only after the guardian ad litem attempted other forms of communication and they refused (see IHO Ex. II; SRO Ex. 1 at pp. 53-60).[16] When the parents responded to the guardian ad litem's questions, their retorts were nevertheless oblique at best and did not actually answer the questions presented (see IHO Ex. II; SRO Ex. 1 at pp. 53-60). For example, when the parents were asked if they would like the guardian ad litem to assist them with identifying a neuropsychologist that could conduct an evaluation, a tutoring agency, and their preferences as to a location for an evaluation and tutoring, the parents merely responded that the IHO's pendency order already spelled out what needed to be done, and the following day they indicated they did not want the guardian ad litem's help, but that she should "do [her] job to see to it that [the student's] rights are protected" (SRO Ex. 1 at pp. 53, 55-56). Further, the other emails between the parents and the guardian ad litem supports the IHO's finding that the parents refused to cooperate with the guardian ad litem (SRO Ex. 1 at pp. 53-60). It is unclear why the district objects to consideration of the additional evidence as it tends to support rather than undermine the district's argument that the IHO was impartial.

3. IHO Bias and Request for Recusal

The parents argue that the IHO was unable to make unbiased decisions. They assert that he was biased in granting extensions over their objections, unresponsive in email correspondence, did not recuse himself upon their request and after their OCR complaint, and by allowing a district witness to attend the impartial hearing. The district counters that the IHO was fair and impartial.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). As discussed more below, a review of the hearing record does not demonstrate that the IHO abused his discretion.

[16] Although not entirely clear, it appears that IHO Exhibits I and II originated in whole or in part as electronic records. IHO Ex. I was entered into the administrative record by the IHO as exhibits in electronic format only. Suffice it to say, on appeal the district submitted these exhibits to the Office of State Review in electronic media format only.

A review of the evidence reveals that both parties were afforded a fair opportunity to be heard by the IHO during the impartial hearing (see generally Tr. pp. 73-192). The hearing record does not support the parents' contentions raised in the request for review.

The parents argue that the IHO was biased because he allowed a district witness to "remain present for the entire hearing, even prior to her being called to testify" (Req. for Rev. at p. 2). Initially, the "district witness" the parents refer to is the district's CSE chairperson (Tr. p. 167). The CSE chairperson was present for two of the four hearing dates, that is, during the May 2, 2019 and May 17, 2019 proceedings (see Tr. pp. 166-67, 193, 195). Notably, the parents have not presented a reason as to why the presence of the CSE chairperson would be impermissible at the impartial hearing.[17] The parents also failed to offer any authority to support their assertion that allowing the CSE chairperson to be present at those two hearings is indicative of bias on the part of the IHO. While the parents may have preferred that the CSE chairperson not attend the hearing, their preference was not controlling and the argument of IHO bias is rejected on that basis.

Turning next to the parents' assertion that their complaint to OCR rendered the IHO incapable of being impartial and that the IHO should have recused himself (Req. for Rev. at pp. 6-7), parental complaint to OCR regarding an impartial hearing or impartial hearing officer does not require automatic recusal of an IHO. If automatic recusal in such circumstances were required, it would be an easy matter for any party dissatisfied with the interim rulings of an IHO to engage in forum shopping and obtain appointment of another IHO by merely filing a complaint. Such an automatic rule would be an abomination. The IHO's decision not to recuse himself at that point of the hearing fell well within the IHO's sound discretion and there is no evidence whatsoever that he abused that discretion. Further, I find there is no basis to conclude bias based on the IHO's decision to appoint the guardian ad litem, which will be discussed in more detail below.[18]

With respect to the extensions of the timeline granted by the IHO, federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. §300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. §300.515[c]; 8 NYCRR 200.5[j][5][i]). Additionally, under State regulation, "[i]n cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision" (8 NYCRR 200.5[j][5]).

In this case, a review of the transcript and evidence demonstrates that the IHO was patient and treated the parents fairly, with courtesy and respect; allowing them time to obtain their evidence and independent evaluations according to their restrictions (see generally Tr. at pp. 73-91; IHO Ex. I). The hearing record demonstrates that with regard to several extensions, the IHO

[17] At the May 17, 2019 hearing, the "witness" was labeled as the "district representative" by the hearing minutes (Tr. p. 193).

[18] Additionally, the IHO's refusal to recuse himself at the outset of the hearing upon remand does not indicate that the IHO was biased. The parents' requests for recusal were dated January 2, 2019 and January 7, 2019 (SRO Ex. 1 at pp. 65-66, 116-23; IHO Ex. I at pp. 82-130). These requests did not provide sufficient grounds to indicate that the IHO would not be impartial.

assisted the parents by allowing them more time to obtain evidence for their case, as they were having housing issues (Tr. at pp. 81-84; 108-09; 142). Moreover, the IHO had clear reason to believe that granting the parties additional time to obtain evaluations would be beneficial to both parties, the student, and his own ability render a decision. Review of the record does not support a finding that the IHO granted extensions of the hearing timeline for improper purposes.

However, even assuming for the sake of argument, that the IHO had issued the decision late, a delayed decision in this instance would not warrant overturning the IHO's findings. Courts have found that as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino, 2016 WL 9649880, at *6 citing J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45–day deadline, "relief is warranted only if... [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education"]; see A.M. ex rel. J.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] aff'd, 513 F. App'x 95 [2d Cir. 2013] [same]. According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 [S.D.N.Y. Mar. 31, 2015], aff'd 643 F. App'x 31 [2d Cir. 2016] [noting that "(t)he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning, however. Moreover, Plaintiffs have cited no authority supporting their assertion that an SRO decision is entitled to no deference when issued outside the '30–day statutory timeline.'"] citing M.L., 2014 WL 1301957, at *13 ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]).

Overall, an independent review of the hearing record demonstrates that the parents had a full and fair opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process, and that the IHO did not exhibit bias against the parents.[19]

4. Scope of Review

Next with respect to the parties' underlying disputes issue, I must determine which issues are properly before me. In the request for review, the parents request that I direct that the student's case be transferred to a different CSE.[20] The district contends that this request is beyond the scope of review as it was not raised during the impartial hearing.

[19] The parents appear to consistently accuse IHOs with which they disagree with being bias and SROs independently review each claim (see Application of a Student with a Disability, Appeal No. 14-168; Application of a Student with a Disability; Application of a Student with a Disability, Appeal No. 15-101), however, in only one case was there evidence that an IHO affirmatively indicated that she could not be impartial with respect to the parents and she was accordingly replaced (Application of a Student with a Disability, Appeal No. 18-105).

[20] The parents submitted "Closing Summations" with the other additional evidence submitted to the Office of State Review (SRO Ex. 1 at pp. 48-52). In this brief, the parents made a request for a transfer to a new CSE (id. at p. 49). The brief was submitted to the IHO on July 10, 2019 (IHO Ex. I at pp. 4303-305). However, the email demonstrates that it was sent via an attachment and the actual attachment was not printed and submitted with IHO

Although the request for a change in the CSE was mentioned in a few emails sporadically, the issue was not placed before the IHO at the impartial hearing, and it was not part of the due process complaint notice, which was filed in this case by the district. Although the parents made many complaints about the CSE during the impartial hearing, they did not ever voice a request for a transfer of the student to a different CSE during the impartial hearing, nor did the district agree to add that issue for resolution in by the IHO. Instead, this case was brought by the district to compel the parents to present the student for evaluations (see Dist. Ex. 144). As the parents' request was not among the issues in the due process complaint notice, and there is no indication that the district agreed that the issue should be made part of the impartial hearing, it is beyond the scope of my review and will not be further addressed.

Additionally, the parents also did not make any discernable challenge in their request for review regarding the student's need for tutoring and the IHO's orders related thereto, beyond an insufficient, generic request that all the orders of the IHO be rescinded. Since neither party articulated any specific challenges to the IHO's determinations regarding tutoring, the IHO orders pertaining to the student's need for and receipt of tutoring are final and binding and will not be disturbed in this appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Conduct of Impartial Hearing

1. Appointment of a Guardian ad Litem

Turning next to the parents' challenges regarding the IHO's decision to appoint a guardian ad litem, I note that this is at least the second time an impartial hearing officer has reached a determination to appoint a guardian ad litem for this student in a due process proceeding (see Application of a Student with a Disability, Appeal No. 12-065).[21] An impartial hearing officer is empowered to appoint a guardian ad litem; "[i]n the event the [IHO] determines that the interests of the parent are opposed to or are inconsistent with those of the student . . . the [IHO] shall appoint a guardian ad litem to protect the interests of such student" (8 NYCRR 200.5[j][3][ix]). State regulation defines a guardian ad litem as "a person familiar with the provisions of [8 NYCRR Part 200] who is appointed from the list of surrogate parents or who is a pro bono attorney appointed to represent the interests of a student in an impartial hearing . . . [who] shall have the right to fully participate in the impartial hearing" and, where appropriate, join in an appeal to the SRO initiated by the parent or district (8 NYCRR 200.1[s]). This provision supports the objective of ensuring that a student's rights are adequately represented during an administrative due process proceeding.

Ex. I.

[21] The parents filed an interlocutory State-level appeal of a previous guardian ad litem determination; however, it was determined that the issue could not be appealed on an interlocutory basis and only be heard in an appeal from an IHO's final determination (Application of a Student with a Disability, Appeal No. 12-065). The first IHO in this proceeding also indicated that she would appoint a guardian-ad-litem should the parents appear before her again (Tr. p 62), but that is unlikely because as noted previously that IHO had previously indicated that she had recused herself because she felt she could not be impartial with the parents (Application of a Student with a Disability, Appeal No. 18-105).

Initially, I note that the guardian ad litem has not appeared in the State-level review proceedings. The hearing record shows that the IHO wanted to appoint a guardian ad litem in order to help facilitate the scheduling of the evaluations and to help the parties obtain a tutor for the student, which the IHO believed would be beneficial to both himself and the parents (Tr. pp. 120, 123-24, 129-31).[22] Further, the IHO indicated that he would like for the parents to speak with any potential guardian ad litem before he appointed them (Tr. pp. 124-25, 133-34). Initially, the IHO indicated that he would not appoint a guardian ad litem if the parents spoke with the person and "did not want their assistance," and, a moment later he again stated that "I won't appoint somebody that you don't agree with" (Tr. pp. 133-34, 135). However, the parents vehemently objected to the idea of appointing any guardian ad litem and indicated they would not speak with anyone (Tr. pp. 120-35). Following their strong objections, the IHO noted their concerns and indicated that he would have to decide whether he should appoint a guardian ad litem without the parents' approval (Tr. pp. 135-37). The IHO also stated that he did not view the potential appointment of a guardian ad litem as a person opposing the views of the parents, but as someone "who would be there assisting [the IHO] in implementing" his interim decisions (Tr. p. 138).

The parents' claim that the IHO promised that a guardian ad litem would not be appointed without their consent is without merit as the IHO never made such a statement on the record. Further, there is no evidence to support the parents' contention that the IHO threatened them with the appointment of a guardian ad litem. It is clear that the record belies the parents' claims regarding the appointment of the guardian ad litem.

In this case, the IHO correctly pointed out to the parents that the appointment of a guardian ad litem would not prevent the parents' participation in the impartial hearing or stop their role in advocating their position with respect to the student's evaluation and education (Tr. p. 139). However, it is not clear that the IHO's statements during the impartial hearing were consistent with the express terms of the regulation governing the appointment of a guardian ad litem. As the regulation indicates, a guardian ad litem should be appointed when the interests of the parents are opposed or inconsistent with those of the student (8 NYCRR 200.5[3][j][ix] [emphasis added]). Here, as noted previously, the IHO's stated intentions in appointing the guardian ad litem were for facilitating the evaluations and transportation, and effectuating the tutoring ordered by the IHO under pendency, and he stated "I'm the one who needs the guardian a[d] litem" (Tr. pp. 131, 138; May 2019 IHO Interim Decision at pp. 5-6). The IHO correctly found that the parents and the district were "irreconcilably at odds with one another" (May 2019 IHO Interim Decision at p. 5), but it is not uncommon for the public school district and the parents to have opposing viewpoints within a due process proceeding and such disagreements do not satisfy the criteria for appointing a guardian ad litem on behalf of the student. However, the IHO's error was technical only, and does not require reversal in this instance. I have conducted an independent review of the entire hearing record and find sufficient grounds to conclude that the interests of the parents have at times during the impartial hearing been inconsistent with those of the student. On the one hand, the parents have consistently indicated over time that WECS is not an appropriate placement for the student and that the student needs to be reevaluated so that a CSE can identify an appropriate setting for the student (Tr. pp. 4, 6-7, 53-55, 57, 187-88, 196) and, eventually, two of eight

[22] The IHO also asked the district to appoint another attorney to the case to assist the district's attorney with the volume of emails as the IHO believed if the case proceeded on the merits, the district's attorney could be called as a witness (Tr. p. 120).

assessments, a physical therapy and a social history assessment, were successfully conducted (Tr. pp. 54, 63-64). On the other hand, I find the parents' cooperation in producing the student for the needed reevaluation was insufficient, even when the district provided transportation through the CSE or at the IHO's direction, such as car service or other travel accommodations (see, e.g., SRO Ex. 1 at pp. 87-91, 93, 111; Tr. pp. 56, 91, 172-74, 176, 182). While it appears that the IHO was trying everything he could think of to ensure that the needed evaluations of the student were conducted in a manner acceptable to the parents, including the appointment of an independent guardian ad litem to facilitate that process, it was regrettably unsuccessful. Federal regulations specify that the timeline for evaluating a student with a disability does not apply if "[t]he parent of a child repeatedly fails or refuses to produce the child for the evaluation" (34 CFR 300.301[d][1]). Thus, as envisioned by federal regulation, it is ultimately the responsibility of the parents—not the district—to deliver the student to any needed evaluations. The hearing record shows that the parents do not have their own car, but were capable of acquiring transportation across the city when they chose to, such as when they appeared for a hearing date for the impartial hearing (Tr. pp. 18, 84, 169-70; 182).[23] The parents have had a demonstrable pattern of inconsistency, first filing then withdrawing due process proceedings against the district (Application of a Student with a Disability, Appeal No. 14-168; Application of a Student with a Disability, Appeal No. 15-101). While that pattern has not resulted in their cases being dismissed "with prejudice," it does not alter the fact that they have shown a pattern on inconsistent behavior. If they want their son evaluated, the parents must focus on carrying through to completion any action that will lead to an evaluation rather than finding a reason not to proceed and reliving their feelings of distrust of the district, however hurtful their past experiences may be (see e.g., Tr. pp. 112, 125). Where, as here, they indicated that the student should be evaluated, yet do not attend appointments, avail themselves of district funded transportation, or otherwise successfully produce the student for whatever reason, they cannot continue to place the blame for that at the district's feet. Accordingly, I find that the hearing record shows that the parents' interests, and the student's interests diverged sufficiently to support the appointment of a guardian ad litem to ensure that the student's interests were adequately represented. While I make this finding of divergent interests, it is also clear to me that the parents care deeply about their son, but their own misgivings regarding the district, regardless of whether or not they are well-founded, appear to prevent them from taking all of the actions needed to ensure that he attends evaluation appointments. In summary, upon my independent review, the parents' contentions regarding the appointment of the guardian ad litem are belied by the hearing record and are without merit.[24]

C. Evaluation of the Student

1. Request to Compel

Turning next the remainder of the parties' dispute, as noted above, the parents and district have been attempting have the student evaluated since 2016 (Dist. Ex. 30). At the beginning of the impartial hearing, the parties were able to successfully complete a physical therapy evaluation

[23] The parents refused to attend the hearing on the last hearing date, which coincided with the same hearing date on which IHO issued the interim decision to appoint a guardian ad litem (Tr. pp. 137, 194).

[24] The appointment of the guardian ad litem very late in the impartial hearing process also had little bearing on the determinations of the IHO, which were primarily focused on the undisputed need to evaluate the student.

and a social history update (Tr. pp. 26, 63, 149, 151, 184). Further, the parents acknowledged during the impartial hearing that they agreed with every evaluation that the district had requested to perform (Tr. p. 6).[25] Although, the proceeding appears to have begun as one involving the override of the parents' wishes in terms of evaluation (see 8 NYCRR 200.5[b][3]), by the time the IHO issued the first of his interim decisions, he authorized the parents to obtain an independent psychoeducational or neuropsychological evaluation at district expense, presumably in accordance with the provisions of State regulations authorizing IHOs to order independent evaluations at district expense in connection with a due process proceeding (see 8 NYCRR 200.5[g][2]), and he subsequently also directed the district to meet the parents' demands regarding transportation, in addition to other requests made by the parents (see Jan. 2019 Interim IHO Decision; Apr. 2019 Interim IHO Decision; May 2019 Interim IHO Decision).[26] Although, the parents claimed that they had scheduled several evaluations for the student, these evaluations were never conducted and depending upon the party, the reason for the failure of these appointments to occur varies.[27]

Under State regulations, "[i]f the parents of a student with a disability refuse to give consent for an initial evaluation or reevaluation or fail to respond to a request to provide consent for an initial evaluation, the school district may, but is not required to, continue to pursue those evaluations by using the due process procedures . . . . The school district does not violate its obligation to locate, identify, and evaluate a student in accordance with sections 200.2(a) and 200.4(b) and (c) of this Part if it declines to pursue the evaluation" (8 NYCRR 200.5[b][3]; see 34 CFR 300.300[a][3]).

Although, the parents request that all of the IHO interim and final decisions be rescinded in their entirety, I find there is no basis to take such drastic action and grant this request. To the contrary, the opposite is true. Because the parents stated during the impartial hearing that they had no disagreement with the reevaluations that the district requested and continue to agree on appeal that the student should be reevaluated (see, e.g. Tr. p. 6; Req. for Rev. at p. 4), I find that the district's request to override the parental consent provisions should be granted. Thus, the district will not be required to obtain parental consent in advance of an evaluation of the student and the district may proceed with the requested evaluations at the first opportunity he becomes available.

In the due process complaint notice, the district also requested, in addition to the override of the parents' consent, that the parents be compelled to produce the student for evaluations (see Dist. Ex. 144). However, while the district is seeking to override the parent's consent, I note that consent override is not the same as and does not guarantee that the student will actually be produced by the parents at an appointed date and time to be evaluated. Nothing in the IDEA or New York State law confers upon me the authority to issue a mandatory injunction against the

[25] The student's mother stated that she did not "know why we're even proceeding with this being that we completely agree with the CSE and we have scheduled appointments for every evaluation that they're requesting" (Tr. p. 6).

[26] It is noted that the parent also requested to be present during the evaluations, which the IHO indicated should be a decision made between the clinician conducting the evaluation and the parents (Jan. 2019 Interim Decision at p. 10).

[27] There is insufficient evidence in the record to find that the district prevented the student from being evaluated as the parents allege.

parents to force them to produce the student in order for evaluations to be conducted on a specific date, at a specific time, or in a specific place. The student is their child and it is not my place to force them do anything they do not wish to with respect to the education of their child. The IDEA itself is explicitly clear that parents cannot be forced into accepting any special education services for their child, no matter how profound the child's disability may be, as parents are never under an obligation to consent to the actual provision of special education or related services and a school district may not utilize the consent override provision to overcome her refusal to consent to the provision services to a student with a disability (20 U.S.C. § 1414[a][1][D][ii][II]; 34 CFR 300.300[b][3]; 8 NYCRR 200.5[b][4]).[28]

2. Independent Evaluations

Turning to the parents contentions with regard to the IHO's determinations to direct IEEs at public expense, it is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO" is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE' as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO" the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]). 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]).

Although, the parents did not request an IEE at public expense in this case, the IHO appeared to believe that an IHO-ordered IEE was best to help facilitate the completion of evaluations of the student. The district did not challenge the IHO's determination to grant IEEs at public expense and I have no reason to disagree with the IHO, especially in light of the fact that the parents repeatedly stated that their distrust of the district and its processes was among barriers that prevented the successful evaluation of the student. Assuming that is the case, the IHO's authorization of the student's evaluation by independent professionals who are not beholden to the district should empower the parents and allow the evaluations to be completed. Accordingly, I will allow the parents a last opportunity to utilize the IEEs granted by the IHO, but I will not require them to avail themselves of them.

[28] The jurisdiction of IHOs or SROs is limited to matters relating to the identification, evaluation, or placement of students with disabilities, or the provision of a FAPE to such students (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1][a]; 34 CFR 300.503[a], 300.507[a][1]; 8 NYCRR 200.5[i][1]; see Application of the Bd. of Educ., Appeal No. 07-043; but see Application of the Bd. of Educ., Appeal No. 04-068). Issuing or enforcing an injunction distinguishable from issuing order containing conditions, that is, an order that contains requirements that certain events take place or conditions be met before a further order becomes operative. While not an injunction, conditional orders can have the effect of incentivizing parties to take necessary actions.

If, however, the parents fail to avail themselves of the IEEs and continue to fail to produce the student for evaluations conducted by the district, the district would only be responsible for conducting a CSE meeting and developing an IEP without the evaluations based upon its review of existing data (e.g. teacher reports, attendance records, report cards, prior evaluations, observations from teachers/service providers, and testing and general assessments administered to all students). Under those circumstances, the district could not be held in violation of the child find or individual evaluation/reevaluation provisions of IDEA (see 34 CFR 300.[a][3][ii]; 8 NYCRR 200.5[b][3]).[29] In such an instance, a parent, would be hard pressed to argue a denial of FAPE based on insufficient/inaccurate evaluative data, should they disagree with that IEP.

Lastly, relating to the IHO's direction for IEEs, the parents argue that the IHO did not specify clear terms under which to evaluate the student and how the evaluations were to be produced. Federal regulations provide that a school district "must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations" (34 CFR 300.502[a][2]). Furthermore, [i]f an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation" (34 CFR 300.502[e]). I will direct the district to provide the requisite information to the parents, including where an IEE may be obtained and any agency criteria that an IEE must meet. The parents are not obligated to select an independent evaluator that may appear on a district list of potential independent evaluators, so long as the independent evaluator meets agency criteria. It is the parents' responsibility to select an appropriate independent evaluator that meets agency criteria, schedule the appointments, and produce the student.

The parents have indicated that they did not need the assistance of a guardian ad litem to facilitate the evaluation of the student, and with respect to obtaining an IEE, they will be held to that assertion. They have shown that they are capable of producing the student for an evaluation (Tr. pp. 54, 63-64). As indicated above, they will be given a final opportunity to obtain an IEE at public expense, after which, they will waive that opportunity.[30] The parents have been provided multiple opportunities to have the student evaluated, and a significant portion of those attempts were unsuccessful. Yet, all parties have agreed—as do I—that if the student is going to be offered an appropriate placement, it is critical that he be evaluated because he is currently attending school at an inappropriate placement. However, the parents' strategy thus far is not helping the student move forward, and to change that trajectory they must at least temporarily lay aside their continued attempts to accuse district staff of wrongdoing at every turn. Even assuming for the sake of

[29] The IHO's statement that the parents' refusal to allow the evaluation of the student "verges on a refusal to accept special education services" is not accurate. Even if the parents do not produce the student, the CSE would nevertheless be required to develop an IEP based upon a review of existing data. That said, any resulting IEP may not be particularly meaningful in the absence of updated evaluations, and the parents will not be able to fault the district in that case if they fail to produce the student to the evaluators.

[30] The parents' request to observe the student during the evaluations shall be at the discretion of the professional conducting each evaluation.

argument that the district does not act perfectly, they must proceed in producing the student in order to achieve the greater good—a successful comprehensive evaluation of the student.

As the parties also do not articulate any specific challenge to the IHO's directives to provide transportation for purposes of conducting evaluations, I will only align the requirement so that it reflects the parents' responsibility under the IDEA to produce the student. Thus, the parents will be responsible to arrange public transportation or a taxi service for the student to and from any appointments for district evaluations or IEEs, and upon producing the student for an evaluation session, the district shall reimburse the parents for the cost of such transportation to and from the session.

VII. Conclusion

In view of the forgoing, I find that the IHO was not biased against the parents, and I find there was a sufficient basis in the hearing record to appoint a guardian ad litem for the student. Additionally, the district may proceed to conduct the four remaining requested evaluations of the student without further obligation to seek the parents' consent. As there is no specific reason for challenging the IHO's order authorizing the parents to obtain IEEs of the student at public expense, the parents may, within a limited time period, choose to proceed and obtain the IEEs of the student if they wish. An independent evaluator is required to produce the evaluation results to both the district and the parents in order to be compensated at public expense. However, it is parents' obligation to produce the student for any assessment whether conducted by the district or an independent evaluator. As transportation costs for evaluations were not specifically challenged, the district shall reimburse the parents for successfully transporting the student to an evaluation session. If the student is not further evaluated, the CSE must review existing data and convene to recommend a new IEP based upon the available information, however inadequate. Accordingly, I will modify the IHO's directives to impose these conditions on the conduct of any evaluations with the objective of moving the student to an appropriate educational placement that is based on updated evaluative information.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that within 10 days of the date of this decision, the district shall provide the parents with information about where an independent educational evaluation may be obtained, and the agency criteria applicable to independent educational evaluations; and

IT IS FURTHER ORDERED that the parents have until January 15, 2020 to produce the student for the independent educational evaluations ordered by the IHO at public expense consisting of a psychoeducational evaluation, a speech-language evaluation, an occupational therapy evaluation, an assistive technology evaluation, a vocational assessment, and a functional behavior assessment at public expense that meet agency criteria; and

IT IS FURTHER ORDERED that if the parents do not obtain a particular IEE assessment described above prior to January 15, 2020, the parents' right to obtain that IEE at public expense shall be waived; and

IT IS FURTHER ORDERED that the district's request to conduct a psychoeducational evaluation of the student without seeking parental consent is granted; and

IT IS FURTHER ORDERED that the district's request to conduct a speech-language evaluation of the student without seeking parental consent is granted; and

IT IS FURTHER ORDERED that the district's request to conduct an occupational therapy evaluation of the student without seeking parental consent is granted; and

IT IS FURTHER ORDERED that the district's request to conduct an assistive technology evaluation of the student without seeking parental consent is granted; and

IT IS FURTHER ORDERED that the district's request to conduct a vocational assessment of the student without seeking parental consent is granted; and

IT IS FURTHER ORDERED that the district's request to conduct a functional behavior assessment of the student without seeking parental consent is granted; and

IT IS FURTHER ORDERED that the district is directed to complete its evaluations of the student within 60 days (on or before Monday December 9, 2019); and

IT IS FURTHER ORDERED that notwithstanding any failure by the parents to produce the student for one or more district evaluations, the CSE shall, provide written notice to the parents consistent with State regulations and convene to produce an IEP within 70 days (not later Thursday December 19, 2019) and, based upon a review of existing data and any updated evaluations obtained, recommend an alternative placement to WECS effective not later than January 2, 2020; and

IT IS FURTHER ORDERED that the CSE shall document its efforts to encourage the parents to participate in the CSE meeting; and

IT IS FURTHER ORDERED that upon request of the parents or not later than June 30, 2020 school year, the CSE shall convene to consider the results of any IEEs obtained by the parents that meet the district's criteria for independent evaluations and revise the student's IEP if necessary; and

IT IS FURTHER ORDERED that, unless the parties shall otherwise agree on an alternative means of transportation, upon the submission of proof of payment, the district shall reimburse the parents for public transportation or taxi transportation of the student to and from each evaluation session conducted with respect to a district evaluation or an IEE a public expense directed by this decision.

Dated: **Albany, New York**
October 10, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER