The University of the State of New York

The State Education Department
State Review Officer
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No. 20-154

Application of the BOARD OF EDUCATION OF THE IRVINGTON UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ingerman Smith, LLP, attorneys for petitioner, by Thomas Scapoli, Esq.

Littman Krooks, LLP, attorneys for respondents, by Kevin Pendergast, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition and enrollment costs at The Winward School (Windward) for the 2018-19 and 2019-20 school years. The parents cross-appeal from those portions of the IHO's decision which denied their requests for reimbursement for the costs of their daughter's private tutoring during the 2017-18 school year and for the district to conduct a neuropsychological evaluation of the student. The appeal must be sustained in part. The cross-appeal must be dismissed. The matter must be remanded for further administrative proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student demonstrated delays in language development and received early intervention services "due to her not knowing age appropriate sounds and words" (Dist. Exs. 13 at p. 1; 14 at

p. 1).[1] She attended preschool from the age of two years to four years old and received services through the Committee on Preschool Special Education (CPSE) (Parent Ex. J at p. 1; Dist. Ex. 14 at p. 1). The student was declassified prior to starting Kindergarten in the district public school in September 2014, received building level speech-language therapy during the 2014-15 school year, and received response to intervention (RtI) services during the 2014-15, 2015-16, and 2016-17 school years (Kindergarten through second grade) (Parent Ex. J at p. 1; Dist. Exs. 5; 13 at p. 1).

The parents referred the student to the CSE in an email dated September 27, 2016 (Parent Ex. A). The district conducted evaluations and convened a CSE meeting on December 8, 2016 (Parent Exs. J; K; Dist. Exs. 11-14). Although the student was not determined to "to meet the criteria for a CSE classification," the CSE determined a central auditory processing evaluation was needed and agreed to refer the student to the "Section 504 Committee" (Parent Ex. J at p. 1; see Dist. Ex. 16).

On March 2, 2017, the CSE reconvened to consider the results of the auditory processing evaluation and the parents' private psychoeducational evaluation (Dist. Ex. 18 at pp. 1-2; see Dist. Exs. 15; 16). Based on the evaluations, the March 2017 CSE determined that the student was eligible for special education services as a student with a speech or language impairment, recommended two 30-minute sessions per week of individual speech-language therapy for the duration of the 2017-18 school year, and developed five "speech/language" annual goals (Dist. Ex. 18 at pp. 1-2, 9-10).[2] In addition, the CSE recommended several supplemental aids and services/program modifications/accommodations as well as testing accommodations (id. at pp. 10-12).

On June 1, 2017, the CSE convened for an annual review meeting to develop the student's IEP for the 2017-18 school year (Dist. Ex. 23). The June 2017 CSE recommended three hours per day of integrated co-teaching (ICT) services, one 30-minute individual speech-language therapy session per week, and one 30-minute speech-language therapy session per week in a group (id. at pp. 9-10). In addition to speech-language annual goals, the CSE added two reading and one mathematics goal to the IEP (compare Dist. Ex. 18 at p. 9, with Dist. Ex. 23 at p. 9). Further, the CSE recommended supplemental aids and services/program modifications/accommodations including pre-teaching vocabulary, cuing attention when distracted by background noise, and repeating directions to aid auditory understanding (Dist. Ex. 23 at pp. 10-11). The June 2017 CSE

[1] The hearing record contains multiple duplicative exhibits (compare Parent Exs. D-H, L, M, P, R, W, AA, BB, HH, JJ, KK, MM, QQ, and WW, with Dist. Exs. 1, 11-18, 20, 22, 23, 28, 30, 31, 34, and 36). During the impartial hearing, the parties and the IHO discussed that several of the parent exhibits were duplicative of the district exhibits (see Tr. pp. 18-21). However, the IHO agreed to receive the duplicative exhibits into evidence since the parents' attorney had prepared to examine the witnesses with reference to the exhibits as labeled by the parents (see Tr. pp. 21-22). The IHO indicated that, at the end of the impartial hearing, the duplicative parent exhibits would be stricken (id.). However, the duplicative exhibits were never removed from evidence. Consistent with the IHO's intentions articulated at the impartial hearing, for purposes of this decision, only district exhibits are cited in instances where both a parent and district exhibit are identical or similar, unless the parents' exhibit is more legible or complete.

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

also recommended testing accommodations for the student for the 2017-18 school year (id. at pp. 11-12).

On May 18, 2018, the CSE convened for an annual review meeting to develop the student's IEP for the 2018-19 school year (Parent Ex. HH). The May 2018 CSE recommended for the student three hours per day of ICT services, one 30-minute individual speech-language therapy session per week, and one 30-minute speech-language therapy session per week in a group (id. at p. 10). The student's annual goals were updated and the CSE added new goals to address study skills, writing and speaking/listening needs (compare Parent Ex. HH at pp. 2, 9, with Dist. Ex. 23 at p. 9). Further, the CSE continued to recommend the prior IEP supplemental aids and services/program modifications/accommodations and added clear expectations, directions clarified, questions clarified, graphic organizers, and a study carrel (compare Parent Ex. HH at pp. 10-11, with Dist. Ex. 23 at pp. 10-11). The May 2018 CSE also recommended two additional testing accommodations for the student (compare Parent Ex. HH at p. 12, with Dist. Ex. 23 at pp. 11-12). The parents disagreed with the recommendations contained in the May 2018 IEP and, as a result, in an August 20, 2018 email, notified the district of their intent to unilaterally place the student at Winward (Parent Ex. LL; see Dist. Ex. 34 at p. 1).[3]

On August 6, 2019, the CSE convened for an annual review meeting to develop the student's IEP for the 2019-20 school year (Dist. Ex. 36). The August 2019 CSE recommended three hours per day of ICT services, one 30-minute individual speech-language therapy session per week, and one 30-minute speech-language session per week in a group (id. at p. 10). The student's academic annual goals were updated, and the CSE added one new reading goal and one new writing goal (compare Parent Ex. HH at p. 9, with Dist. Ex. 36 at p. 9). Further, the CSE updated the student's supplemental aids and services/program modifications/accommodations to include scaffolding of content (compare Parent Ex. HH at pp. 10-11, with Dist. Ex. 36 at pp. 10-11). The August 2019 CSE recommended one additional testing accommodation for the student for the 2019-20 school year (compare Parent Ex. HH at p. 12, with Dist. Ex. 36 at p. 12). The parents disagreed with the recommendations contained in the August 2019 IEP and, as a result, notified the district of their intent to unilaterally place the student at Winward and seek reimbursement of the tuition and related expenses (Parent Ex. RR at pp. 1-2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated September 3, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years and that Winward was an appropriate unilateral placement for the student for the 2018-19 and 2019-20 school years (Dist. Ex. 1 at pp. 17-24).[4] In their amended due process complaint notice, the parents first set forth a lengthy recitation of the student's "[b]ackground and [e]arly [e]ducation" summarizing events leading up to the challenged

[3] The Commissioner of Education has not approved Windward as a school with which districts may contract for the instruction of students with disabilities (see NYCRR 200.1[d], 200.7).

[4] The original due process complaint notice was dated May 6, 2019 (see Due Process Compl. Notice).

school years (id. at pp. 2-12), as well as events that occurred during the 2017-18 through 2019-20 school years (id. at pp. 12-16).

Under the heading "Legal Violations and Claim[s]," the parents specified the bases for their assertion that the district denied the student a FAPE (Dist. Ex. 1 at pp. 17-18). The parents asserted that, for the 2017-18 school year, the district failed to provide the student "with any necessary special education services and supports" (id. at p. 17). In addition, the parents alleged that, for all three school years, the CSEs failed to recommend "an appropriately ambitious special education program" for the student (id.). The parents further stated that the CSEs developed "inappropriate and insufficient" annual goals for the student and "'rolled' unachieved goals over" from year to year (id.). The parents alleged that the student's lack of progress in the speech-language realm warranted an increase in speech-language therapy services (id.). Next, the parents argued that the CSEs failed to address the student's "documented diagnoses of ADHD and Central Auditory Processing Disorder" in the IEPs (id. at p. 18).

Next, in their amended due process complaint notice, the parents described the student's program at Windward and the progress she had made there during the 2018-19 and 2019-20 school years (Dist. Ex. 1 at pp. 18-21) and set forth equitable considerations, which they asserted supported their requests for relief (id. at p. 22). The parents sought "200 hours of compensatory tutoring or reimbursement for tutoring" as relief for the district's failure to provide the student a FAPE for the 2017-18 school year (id. at p. 23). Further, the parents requested that the district be required to reimburse them for the costs of the student's attendance at Winward for summer 2017 and the 2018-19 and 2019-20 school years (id.). Finally, the parents requested that the district be required to conduct "appropriate evaluations" of the student, including "a full Neuropsychological Evaluation" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 22, 2019 and concluded on January 21, 2020 following four days of proceedings (Tr. pp. 1-1059).[5] In an undated decision, the IHO determined that the district failed to offer the student a FAPE for the "years at issue" and that Winward was an appropriate unilateral placement for the student (IHO Decision at pp. 29-30).[6]

In the decision, the IHO first listed the claims as alleged by the parents (IHO Decision at p. 1). Next, the IHO set forth a factual background, including a summary and assessment of the testimony received at the impartial hearing (id. at pp. 1-24). Under the heading "[t]he IEP and

[5] A prehearing conference took place telephonically on October 2, 2019 (Oct. 2, 2019 Tr. pp. 1-18). Further, according to the IHO, another prehearing conference had taken place in June 2019; however, a transcript or written summary of a June 2019 prehearing conference was not made a part of the hearing record as required by State regulation (see Oct. 2, 2019 Tr. p. 5; see also 8 NYCRR 200.5[j][3][xi]).

[6] The IHO's decision as filed with the record on appeal appears to be an edited draft version and is undated and unsigned by the IHO (see IHO Decision). In the request for review, the district indicates that the IHO issued the decision on August 14, 2020 (Req. For Review at p. 6). In a correspondence from the undersigned, the parties were directed to file a final signed version of the decision if one was or came to be in their possession. No other version of the IHO decision was received by the Office of State Review. On remand, the IHO is reminded to finalize, sign, and date his decision before transmitting it to the parties.

FAPE," after setting forth applicable legal standards, the IHO found that "the parents' opportunity to participate was significantly impeded" (id. at pp. 24-26). Specifically, the IHO found that, while the parents acted "proactive[ly]" to get the student "the help she needed, . . . the District's response was at times nonexistent, non-explorative in terms of investigation or follow up, and at best lax" (id. at p. 26). The IHO went on to cite examples, including the parents' request for an audiological evaluation, referral of the student to the CSE, and enrollment of the student in a summer program, as compared to a district teacher's dismissal of the student's difficulties in third grade, a speech-language therapist's lack of awareness that the student had already been evaluated and was receiving services, a CSE chairperson's failure to read the parental referral request, and the CSEs' recommendations, which the IHO characterized as "commonly utilized and accepted services," without "any substantial attempt to conduct a meaningful evaluation as to how these techniques were addressing the specific and unique needs of this child" (id. at pp. 26, 27). The IHO also pointed to the district's approach to the resolution meeting subsequent to the parents' due process complaint notice (id. at pp. 28-29). In sum, the IHO held that "the District by its reaction to, and attitude toward, the expressed concerns and repeated inquiry of the parents regarding their child's educational needs and progress (or FAPE) indicates that the parents were impeded in terms of their meaningful opportunity to participate in the decision making process regarding the provision of a FAPE to their child" (id. at p. 27). The IHO also held that the CSE appeared to hold "a predetermined attitude toward the needs of the child" (id. at p. 29). After reciting requirements relating to determining the least restrictive environment (LRE) for the student, the IHO further found that "[t]he student herein could have been placed in a smaller class and or given instruction in smaller groups as recommended by the parents' psychologist without violating LRE requirements" and noted that the "CSE did not pursue this avenue" (id. at pp. 25-26).

Regarding the unilateral placement, the IHO determined that "[t]he evidence of the [student]'s progress at the private school and the services geared to the particular needs of this [student] in the area of her particular disabilities support[ed] the appropriateness of the private school placement" (IHO Decision at p. 29). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Winward for the 2018-19 and 2019-20 school years (id. at p. 30). However, the IHO denied the parents' request for the costs of the student's attendance at the Winward summer program "due to lack of substantial proof of regression to justify the placement" (id.).

IV. Appeal for State-Level Review

On appeal, the district argues that the IHO erred in making a finding based on issues not raised in the parents' amended due process complaint notice. In addition, the district alleges that the IHO erred in determining that the district failed to provide the parents with a meaningful opportunity to participate in the development of the student's IEP. Relatedly, the district argues that the IHO erred in taking the resolution meeting into consideration as it took place after the CSE meetings at issue. Further, the district argues that the IHO erred in advocating a program that was not in the district's continuum of services and in determining it was "less restrictive." Generally, the district asserts that the IHO failed to consider documentary evidence submitted by the district. In sum, the district argues that the IHO erred in determining the district did not offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years. The district requests that the IHO's decision be reversed or, in the alternative, that the matter be remanded to the IHO "for further evidence concerning the amount of compensatory tutoring that should be provided to the Student."

In an answer, the parents respond to the district's allegations. As for a cross-appeal, the parents allege that the IHO erred in not ordering the district to reimburse the parents for the costs of the student's private tutoring during the 2017-18 school year. In addition, the parents allege that the IHO erred in not directing the district to conduct a neuropsychological evaluation of the student.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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

VI. Discussion

A. Scope of Review

As noted above, the district argues that the IHO exceeded the scope of the impartial hearing when he determined that the district denied the parents a meaningful opportunity to participate in the development of the student's educational program. In response, the parents argue that they raised the issue of the parents' participation in the amended due process complaint notice and specifically point to five paragraphs in which they indicate they alleged that the district "made the process of creating the 2019-2020 IEP a particularly difficult one for the parents to participate in meaningfully."[8]

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b]; 300.508[a]; 8 NYCRR 200.5[j][1]). Under the IDEA and its implementing regulations, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this instance, the parents had the first opportunity to identify the range of issues to be addressed at the impartial hearing. The five paragraphs to which the parents point as supporting the view that the issue of their ability to participate was sufficiently raised generally assert that: the parents decided to unilaterally place the student at Windward for the 2018-19 school year, in

[8] The parents allege that the IHO's purported finding about the CSE's consideration of the LRE and the possibility of a smaller class for the student "amount[ed] to dicta." As the parties appear to agree that the IHO should not have addressed and/or did not substantively determine the question relating to the CSE's consideration of the student's LRE, this aspect of the IHO's decision shall not be further discussed.

part, due to "the CSE's . . . failure to address the Parents' concerns"; the parent had to pursue the district to convene the CSE to conduct the student's annual review for the 2019-20 school year, and, when the CSE did convene in August 2019, the district "took an argumentative approach to the CSE's discussion"; and the district did not provide the parents with a copy of the August 2019 IEP until August 31, 2019 and, therefore, the parents had to provide the district with notice of their intent to unilaterally place the student prior to receiving the IEP (Dist. Ex. 1 at pp. 15-16, 22).

Despite the paragraphs to which the parents point to as representing allegations relating to their ability to participate in the CSE process, a review of the amended due process complaint notice shows that the parents delineated their claims under the heading "Legal Violations and Claim[s]," and a claim regarding the parents' ability to participate was not set forth thereunder (Dist. Ex. 1 at p. 17). In addition, the IHO listed the issues to be determined in his decision and did not include a claim related to the parents' participation among them (see IHO Decision at p. 1). Specifically, the IHO stated:

> The parents raised the following complaints in their hearing request: 1) the CSE failed to provide an appropriately ambitious special education program for their daughter to meet her unique circumstances and needs; 2) the special education programs for each of the above referenced years were inappropriate and not substantially supportive; 3) the IEPs contained inappropriate and insufficient goals not tailored to the unique needs of the student; 4) the CSE failed to appropriately update the IEP goals each for year "rolling over" unachieved goals from one year to the next; 5) the IEPs did not address the student's executive functioning needs; and 6) the parents should be reimbursed for the expense of placing the child in a summer school to avoid regression, because the District had no available program

(id.). To the extent the parents intended to assert claims based on allegations set forth in the lengthy factual recitation included in the amended due process complaint notice, the parents should have shared that intention with the IHO and the district at the prehearing conference; likewise, if the IHO intended to render his decision on a ground that was outside the list of issues specifically delineated, he likewise should have shared that intention with the parties (see 8 NYCRR 200.5[j][3][xi][a] [providing that one of the purposes of a prehearing conference is to simplify or clarify the issues]).

Based on the foregoing, the IHO erred in sua sponte raising the issue of the parents' opportunity to participate as it was outside the scope of the impartial hearing.[9] However, to the extent the parents' lengthy factual recitation included in the amended due process complaint notice

[9] Nor do I find that the district through the questioning of its witnesses "open[ed] the door" to unpled parent participation claims under the holding of the Second Circuit in M.H. (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

set forth allegations that plausibly could support a claim related to the parents' participation in the CSE process, the merits of the IHO's review of the claim is set forth below, notwithstanding my view that the claim was not sufficiently raised (see Dist. Ex. 1 at pp. 2-16).

B. Parent Participation

Even assuming that the issue of the parents' participation was an issue within the scope of the impartial hearing, the evidence in the hearing does not support the IHO's determination that the parents were deprived of the opportunity to participate in the CSE process.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "'[a] professional disagreement is not an IDEA violation'"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Not only did the IHO base his entire finding that the district denied the student a FAPE for three school years on one issue (parent participation), which was outside the scope of the specifically delineated claims in the amended due process complaint notice, but much of the evidence that the IHO relied upon to make findings regarding the parents' opportunity to participate in the CSE process related to events outside of the relevant time periods (see IHO Decision at pp. 26-27). The five paragraphs in the amended due process complaint notice to which the parents point as raising an issue relating to their ability to participate largely deal with allegations specific to the 2019-20 school year, with the one exception being the broad assertion that the parents unilaterally placed the student for the 2018-19 school year due to the CSE's failure to address

unspecified concerns of the parents (see Dist. Ex. 1 at pp. 15-16, 22). In contrast, the IHO focused on several events that took place during the 2016-17 and 2017-18 school years to support his finding that the parents were denied the opportunity to participate (see IHO Decision at pp. 26, 27). For example, the IHO cited to the parents' referral of the student to the CSE, as well as the CSE chairperson's failure to read the referral before conducting her evaluation, but the referral took place in September 2016 and the CSE chairperson's email seeking a copy of the parent's referral was dated November 2016 (see IHO Decision at pp. 26, 27; Parent Exs. A; XX at p. 1). The IHO cited the speech-language therapist's lack of awareness at the time of her evaluation that the student had previously been evaluated and was receiving RtI services, but the therapist evaluated the student in November 2016 (see IHO Decision at p. 27; Tr. p. 228; Dist. Ex. 13).[10] In addition, the IHO cited the parents' request for an audiological evaluation; however, to the extent the IHO was referring to an auditory processing evaluation, according to the evidence in the hearing record, the CSE determined that the student required such an evaluation at a meeting in December 2016 and it was conducted that same month (see IHO Decision at p. 26; Parent Ex. J; Dist. Ex. 16). The IHO pointed to the parents' enrollment of the student in a summer program at their own expense in response to reports that the student had exhibited regression the prior school year, but the evidence shows that the parents enrolled the student in Windward in summer 2017 (see IHO Decision at p. 26; see Dist. Ex. 23 at p. 1). The IHO noted evidence that a district teacher dismissed the student's difficulties with homework in third grade, but this was the student's teacher for the 2017-18 school year and there is no evidence in the hearing record that this view was shared at any CSE meeting or relied upon to determine the student's educational program or placement (see IHO Decision at p. 26; Tr. pp. 418-27).

Each of the examples cited by the IHO is also of questionable relevance in evaluating the parents' ability to participate in educational planning for the student. There is no question that the parents are strong advocates for their daughter's education; however, facts tending to show that they initiated and pursued evaluations of and/or services for the student does not support a finding that the district denied the parents the opportunity to participate in the CSE meetings. To the contrary, it shows that the parents were active and involved participants in the process. Likewise, evidence that the CSE did not recommend a particular service or that a district teacher or provider lacked certain information or held a particular view, without more, does not necessarily support a finding that the parents were denied an opportunity to participate in the CSE process.

The IHO also pointed to the district's approach to the resolution meeting subsequent to the parents' due process complaint notice (see IHO Decision at pp. 28-29); however, I am aware of no

[10] Moreover, the speech-language therapist's testimony about her awareness of the services the student had been receiving was far from clear. Her answers were as follows:

> Q. Are you aware that [the student] was receiving building-level services in kindergarten?
> A. I was aware -- I was aware, yes, after -- when I screened her that she had been receiving services, yes.
> Q. You weren't aware at the time?
> A. Yeah, I wasn't aware at the time.

(Tr. p. 228).

authority for the proposition that either party's participation or lack thereof at the resolution meeting may factor into a determination that the parents were denied the opportunity to participate in the CSE process. Rather, federal and State regulations specify that the consequence for a party's lack of participation in the resolution meeting is delaying the timeline for the resolution process, dismissing a due process complaint notice, or beginning the impartial hearing timeline, depending on the circumstances (34 CFR 300.510[b][3]-[5]; 8 NYCRR 200.5[j][2][vi]; see Resolution Period, 34 Fed. Reg. 46,702 [Aug. 14, 2006]).

The IHO's broader conclusions about the district's "attitude" (i.e., that the district generally held a "lax attitude" towards the parents' concerns and a "predetermined attitude" towards the student's needs) or the CSEs' recommendations (i.e., that they were based on a "pro forma, passive response to the student's situation") were either outside the scope of the impartial hearing or are unsupported by the hearing record for the relevant school years, as discussed further below (see IHO Decision at pp. 26, 27).

Therefore, even assuming that the issue of the parents' participation was raised in the five paragraphs in the amended due process complaint notice cited by the parents, the IHO went far afield of even this scope in finding that the district denied the parents an opportunity to participate. I now turn to the evidence in the hearing record relevant to the factual allegations set forth in the parents' amended due process complaint notice.

Regarding the May 18, 2018, CSE meeting, the parents alleged that during the meeting they "highlighted the need to adjust the noise level" for the student, expressed concerns about the student's "attention to visual detail while reading," noted that she "read through punctuation," and that they had "requested 1:1 reading support" (Dist. Ex. 1 at p. 14). Review of the May 2018 IEP shows that the parents attended the meeting and several of their questions and comments were included in the meeting information summary of the IEP (Parent Ex. HH at pp. 1-2). Specifically, the summary reflects that the parents questioned how independently the student composed a story, and how that story compared with other third grade students (id. at p. 1). The parents highlighted the need to adjust the noise level and reported that during homework completion background noise was intentionally used so the student could "practice working with auditory distractions" (id. at pp. 1-2). According to the summary, the parents noted that at times the student had difficulty identifying the main idea and inferences, and also expressed concerns about her attention to visual detail while reading, stating that regardless of the reading level, the student "reads through punctuation" (id. at p. 2). The summary also reflects that the parents requested 1:1 reading support for the student, at which time the CSE discussed the additional reading supports provided to students based upon their performance on State testing (id.). The parents asked how the student had performed during the State tests; however, that information was not available at the time of the meeting (id. at pp. 1-2).

On these points, the meeting information summary reflects that the May 2018 CSE discussed the student's difficulty with auditory discrimination, although she performed well synthesizing sounds (Parent Ex. HH at pp. 1, 7). The summary also indicates that the CSE discussed that the student's reading level had increased from a "level M at the start of the year to an instructional Level P" at the time of the meeting, and also an "analysis" of her performance on

a Fountas & Pinnell benchmarking assessment (Parent Ex. HH at p. 1; see Dist. Ex. 27).[11] According to the summary, the student's fluency and rate were good and comparable to her peers, and she had learned how to self-monitor and use strategies, including subvocalizations, which appeared to improve her comprehension (Parent Ex. HH at p. 1; see Dist. Ex. 27 at pp. 2, 28).

The May 2018 IEP addressed the student's auditory processing needs via annual goals designed to improve her ability to comprehend orally presented stories and verbally summarize text read aloud, together with one 30-minute session per week of individual speech-language therapy and one 30-minute session of speech-language therapy in a group (Parent Ex. HH at pp. 9-10). Supplemental aids and services/program modifications/accommodations to address the student's auditory processing deficits included check for understanding (the student will repeat all directions back to show understanding of the task at hand), allow wait time (to help the student process auditory information), visual cues (information presented visually), and directions repeated (to support the student's auditory understanding of the task at hand) (id. at pp. 10-11). Regarding the parents' specific concerns related to noise, the student was to receive preferential seating, specifically, "[c]lose to instruction and away from background noise from [the] hallway," and flexible seating during testing "to reduce background noise" (id. at pp. 10, 12). To address the student's reading needs, the May 2018 CSE developed an annual goal for her to learn strategies such as how to remember material, mark up reading passages, and chunk information when reading independently, to use when completing class activities (id. at p. 9). Another reading annual goal was designed to improve the student's ability to identify the central message of the story using "specific text details to make inferences" (id.). As discussed previously, the May 2018 CSE recommended that the student receive three hours per day of ICT services, together with program modifications to support her reading skills such as preview materials (pre-teach and review new vocabulary), break down tasks/directions, and directions/questions clarified (id. at pp. 1, 10-11).

Additionally, information available at the time of the May 2018 CSE meeting did not indicate that the student required 1:1 reading instruction. In addition to the student's progression according to the Fountas & Pinnell benchmarks described above, AimsWeb assessment results throughout the 2017-18 school year reflected that her reading performance was "consistently in the average range and that she was considered low risk," meaning it was expected she would be successful in a general education class without supports (Tr. pp. 89-90; Dist. Exs. 27 at pp. 1-2; 29 at p. 1). The student's IEP annual goals progress report through March 2018 indicated that she was progressing satisfactorily and was expected to achieve the annual goals regarding her ability to identify the main idea of a passage and use text evidence to demonstrate her understanding of a reading passage (Dist. Ex. 28 at pp. 1-2). Her report card through March 2018 indicated that she was progressing toward curriculum expectations in the areas of reading and comprehending a variety of grade level texts, determining the meaning of unknown words/phrases in text, and comparing/contrasting important information among texts (Dist. Ex. 30 at pp. 1-3). At that time, the student was meeting curriculum expectations for skills related to determining the main idea and using text evidence, understanding various elements of texts, recounting key ideas and details in a text, and reading orally with accuracy and fluency (id.). Although the district school

[11] According to teacher comments in the Fountas & Pinnell assessment summary form, over the course of the 2017-18 school year the student's accuracy improved, her miscues did not affect meaning, she self-corrected and used nice expression while reading dialogue, improved her phrasing over time, and made predictions before starting to read based upon titles and pictures (see Dist. Ex. 27 at pp. 1-2).

psychologist testified that the CSE did not review those specific documents at the May 2018 meeting, she did testify that at the meeting the teachers reported information from them (Tr. pp. 24, 86-91).

Given the above, the evidence in the hearing record does not support the IHO's finding that the parents were not able to participate in the development of the student's IEP for the 2018-19 school year and further that their concerns regarding her performance went unaddressed in the May 2018 IEP.

Turning to the facts as set forth by the parents regarding the CSE process for the development of the student's 2019-20 school year IEP, the parents alleged that they were required to exert "tremendous effort to schedule the CSE meeting" by repeatedly asking the district to convene a meeting to discuss the student's educational plan (Dist. Ex. 1 at pp. 15, 22).

Regarding the scheduling of the CSE meeting to plan for the 2019-20 school year, in an email to the parents dated June 14, 2019, the district's director of pupil personnel services (director) sought to confirm the parents' prior indication to her that they did not want to convene an annual review meeting because they were "keeping [the student] at Winward" for the 2019-20 school year (Dist. Ex. 35 at p. 2). Initially, in an email later that day, the student's mother confirmed that the student would remain at Winward "so no need for review" (id.). Also on June 14, 2019, as well as on June 17, 2019, the student's father asked the director her opinion as to whether "there [wa]s any reason for a review," and whether it "ma[d]e sense to do one" (id. at p. 1). In a June 17, 2019 email to both parents, the director replied that she thought not having a review was "fine" and when the parents were ready to return the student to the district, they would convene a meeting (id.).

On the afternoon of July 17, 2019, the parents emailed the director and reiterated the email exchange that had occurred in June 2019 regarding the scheduling of the student's annual review meeting (Dist. Ex. 41). In the email, the parents indicated that the director had failed to respond to the parents' June 14, 2019 and June 17, 2019 emails asking for her opinion whether there was a reason to conduct an annual review and if it made sense to do one (id. at p. 3). The email further described the parents' position that they had not waived the district's obligation to offer the student a FAPE for the 2019-20 school year, and their opinion that it was not appropriate for the director "to ask to decline a meeting in the manner you requested," stating that they had "never declined special education services from the district or refused to cooperate with any reasonable requests" (id. at p. 4). The parents further clarified that they were requesting an annual review meeting for the student "immediately, as our declination was not valid or informed and we will consider the [d]istrict program" (id.). In the email, the parents indicated they were "happy to share all reports," were available in July and August, and were looking forward to scheduling the meeting as soon as possible (id.).

On the morning of July 18, 2019 the director emailed the parents, thanked them for reaching out, and relayed that she had "asked if [they] wanted the [d]istrict to hold a CSE meeting because most parents who intend to place their students in nonpublic schools choose to forego the [d]istrict CSE process, as [they had]" (Dist. Ex. 41 at p. 3). She indicated that since the parents were now requesting a CSE meeting, she would schedule one "as soon as possible" (id.). The director expressed her hope that Windward staff were available over the summer and indicated

that district staff would be reaching out that day to schedule (id.). Later that day, the parents responded to the director's email, thanking her for her "facilitation and quick response"; reiterating that they had not intended to "forego the CSE process" and noted their availability during the last two weeks of August (id.).

A series of emails from district staff dated July 24, 2019 and July 29, 2019 reflect the district's efforts to secure participation from Windward staff at the upcoming CSE meeting (see Dist. Ex. 42). In an email to the parents on July 24, 2019, a staff member from the director's office notified the parents that Windward could have someone available to participate in a CSE meeting for the student on August 6, 2019—a time when district staff were available too—and that she would be sending out an "official invitation shortly" (id. at p. 1; see Dist. Ex. 43). The parents replied shortly thereafter thanking the district for the update and indicating that the date and time for the proposed CSE meeting "[s]ounds good" (Dist. Ex. 42 at p. 1).

Thus, the evidence in the hearing record does not support the parents' claim that they "repeatedly took the initiative in asking the [d]istrict to discuss the special education plan" for the student for the 2019-20 school year and "exerted tremendous effort to schedule the CSE meeting" (see Dist. Ex. 1 at pp. 15, 22). Rather, the evidence shows that once the parents requested an annual review meeting for the student on July 17, 2019, the district expediently took steps to secure information and participation from Windward staff, and scheduled a CSE meeting for August 6, 2019, less than three weeks later (see Dist. Exs. 41; 42).

On August 6, 2019, the CSE convened for an annual review meeting to develop the student's IEP for the 2019-20 school year (Dist. Ex. 36 at p. 1). Attendees included the director, the assistant director of pupil personnel services (assistant directory), a school psychologist, a special education teacher, a regular education teacher, and the student's father (id.). The student's mother and a CSE liaison from Windward (Windward liaison) participated in the meeting by telephone (Tr. pp. 679; Dist. Ex. 36 at p. 1). According to the August 2019 meeting information summary, during the 2018-19 school year the student received instruction in a "small" class of 10 students and 2 teachers, and did not receive speech-language therapy "as a separate service" (Dist. Ex. 36 at pp. 1-2).[12] The Windward liaison reviewed the student's final progress report and a report from her ELA teacher, and the meeting summary provides detailed information about the student's instruction, progress, and continued needs in reading, listening comprehension, spelling, written expression, and mathematics (id.). According to the meeting summary, the parents noted "tremendous growth in [the student's] skills and confidence at home," describing the past year as "transformational" in that she was "social, happy and demonstrate[d] no social-emotional concerns here" (id. at p. 2). The CSE noted that the student had "gained automaticity and consistency in many decoding and comprehension skills and [was] at least frequently using [those] without [the] need for prompting" (id.).

The August 2019 CSE meeting summary reflects the district staff then noted that "testing results provided by Windward demonstrate[d] some skill changes and improvements based on criterion referenced and anecdotal information, but the standardized tests that they utilized at

[12] The meeting summary reflects that the "[p]arents did not access" services from the district of location in this area (Dist. Ex. 36 at p. 2).

Windward d[id] not show statistically notable change as initial and post testing in 2018 for both ELA and [m]ath show[ed] results in the average range" (Dist. Ex. 36 at p. 2). According to the summary, district staff questioned why the Windward Coding Test: Reading had not been administered to the student in fall 2018 as the school indicated the student had "demonstrated growth, but the growth demonstrated by that test [was] from testing done in 2017" (id.). Additionally, as the student had not received speech-language therapy during the 2018-19 school year, it was "impossible for the team to consider any progress in those skill areas" (id.). The CSE discussed and identified the student's needs as they related to annual goals, and according to the meeting summary the parents were in agreement with the goals, including continuing with prior speech-language annual goals as they were still appropriate "despite lack of service and specific evidence of progress" (id.). The meeting summary indicated that the CSE reviewed and updated the program modifications and testing accommodations from the student's prior IEP and discussed her related service needs (id). Then, "[b]ased on review of records and history, parent input, and consideration of input from Windward staff and parents, [t]he [CSE] recommended [ICT] with related services of speech and language once individually and once in a group weekly" (id.). According to the meeting summary, the "[p]arents were in agreement with goals but not programming at [that] time," and the student's mother "requested the team to note" that they did not feel the ICT "setting of a large classroom would meet" the student's needs (id.).

The parents alleged that during the August 2019 CSE meeting "the [d]istrict, for the first time, took an argumentative approach to the CSE's discussion rather than a proper approach of focusing solely on a review of the student's progress and preparing a new IEP," adding that the district expressed skepticism about, and selectively pulled data from Windward assessments in order to cast doubts about the progress the student had made there (Dist. Ex. 1 at pp. 15-16).

The Windward liaison who participated in the August 2019 CSE meeting by telephone testified that "it was a typical review meeting in that we were asked by the school district to give a report on how the student [] was functioning," and that she "gave very detailed information of her needs and the progress she had made" (Tr. pp. 748-49; Dist. Ex. 36 at pp. 1-2). The Windward liaison further testified that "kind of throughout the meeting, there was a – somewhat of a hostile tone to the meeting" and "definitely an intensity added" that "felt contentious" (Tr. pp. 749-50). According to the Windward liaison, following her reports of the student's test scores, "that progress was kind of characterized as insignificant by the CSE personnel," and "specifically downplayed" (Tr. pp. 750, 800-01). Additionally, the Windward liaison opined that the CSE "was doubting whether that growth was significant, kind of questioning whether or not, you know, this was working" (Tr. p. 800).[13] When asked by the IHO whether she was able to voice her disagreement with the district's position, the Windward liaison replied "[y]es," and that she had voiced her opinion of the program (Tr. pp. 801-02). Specifically, the Windward liaison testified that after the CSE stated the student's needs could be met with ICT services, "we were saying, we didn't think they could be met in that kind of setting" and that there was "mutual disagreement" (Tr. pp. 803-04). She continued that "some of the disagreement and the hostility came from, because I was discussing progress based on [test results] and the progress reports. And it did not seem like the

[13] The Windward liaison opined that the discussion about the student's progress at the August 2019 CSE meeting "sounded something more like for a hearing or a litigation to me" and that she was not aware that the parents had filed for due process at that point (Tr. p. 801).

CSE was - - the personnel from the district was necessarily agreeing with us" (Tr. pp. 811-12; see Parent Ex. PP).

The student's mother participated in the August 2019 CSE meeting by telephone and testified that the assistant director "became quite combative" and was "absolutely trying to discredit" the Windward test results (Tr. pp. 851-52). She opined that "it was incredibly uncomfortable, and it didn't operate like any CSE meeting we've ever had" (Tr. p. 853). The student's mother testified that the meeting "was so uncomfortable to the point where I actually stopped talking," at which point the director asked—"quite a few times"—if the student's mother was still there (Tr. p. 854). Likewise, the student's father testified that at the August 2019 annual review, the assistant director took "harsh tones" with him (Tr. pp. 989-90). He described the verbal disagreement he had with the assistant director regarding whether or not the student had made progress according to her test results (Tr. pp. 990-91). The student's father testified that he was not aware of the assistant director's role during the meeting and that he did not "think if I knew she was an assistant director I would have done anything differently," although her tone "threw [him] off for the meeting" (Tr. p. 992).

While the parents' and the Windward liaison's experience with the assistant director during the August 2019 CSE meeting was clearly uncomfortable for them, nothing in their testimony shows that they were prevented from participating in the meeting. Rather, an overall read of the testimony shows that the parent and the Windward liaison were able to express their views about the student's needs and progress, even if those views were in contrast to those held by district staff, and that disagreement alone does not result in a finding that the parents were precluded from participating in the CSE process to the extent that it would support a finding of a denial of a FAPE (see Tr. pp. 748-50, 800-04, 811-12, 851-54, 989-92).

Finally, the parents asserted that they "repeatedly asked for the IEP" developed at the August 6, 2019 CSE meeting but that the district "failed to answer most of those queries and then failed to honor a promise to share the IEP earlier in August" (Dist. Ex. 1 at p. 16). The parents also alleged that the failure of the district to provide them with the IEP prior to August 20, 2019 left them "unable to make a fully informed decision as to the appropriateness of the [d]istrict's proposed special education program" recommended for the student for the 2019-20 school year and that they "had no appropriate choice but to re-enroll" the student at Windward (id.).

The district is required to have an IEP in effect for each student with a disability at the beginning of the school year and provide a copy of the IEP to the parents (34 CFR 300.322[f]; 300.323[a]; 8 NYCRR 200.4[e][1][ii], [e][3][iv]; Cerra, 427 F.3d at 193-94 [holding that a district "fulfill[s] its legal obligations by providing the IEP before the first day of school"]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE if the violation (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]; see G.B. v. New York City Dep't of Educ., 145 F. Supp. 3d 230, 246 [S.D.N.Y. 2015] [finding the failure to provide the IEP before the first day of school was a procedural violation that did not significantly impede the parents' participation in the CSE process]; K.M. v.

New York City Dep't of Educ., 2015 WL 1442415, at *1 [S.D.N.Y. Mar. 30, 2015] [same]; but see C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 225-27 [S.D.N.Y. 2014] [finding the failure to provide a copy of the IEP before the beginning of the school year impeded the provision of a FAPE to the student]).

In an email dated August 8, 2019, the student's father thanked the director for setting up the CSE meeting that had occurred on August 6, 2019 and requested that the director send to him "a copy of the meeting notes as well as a preliminary or final draft of the IEP" (Parent Ex. YY at p. 2). Within an hour the director responded, stating that the district did not "send separate notes from the meeting" as they "get incorporated into the IEP," which she indicated she could send to the parent the following week (id. at p. 1). The director testified that the completion of the IEP "ended up ultimately getting delayed" and was not sent to the parents until August 26, 2019 (see Tr. pp. 596-98). The student's father testified that the parents received the August 2019 IEP on August 30, 2019, but that they were required to have notified the district of their decision to reenroll the student at Windward and seek reimbursement by August 20, 2019, which they did (Tr. pp. 994-96; Parent Ex. RR). When counsel for the parents asked if the first day of the 2019-20 school year was September 4, 2019, the director responded "[p]otentially" (Tr. p. 598).

Thus, the parents received a copy of the August 2019 IEP on August 30, 2019, before the beginning of the school year, and, therefore, no procedural violation arises from the purported delay in the district's provision of the IEP (see Cerra, 427 F.3d at 190, 194 [finding no procedural violation where the IEP was mailed to the parents on August 29, before the first day of school]). Even if—as the parents seem to assert—the district was required to have provided the parents with the 2019-20 school year IEP prior to the date their 10-day notice to the district of unilateral placement was due, it would not amount to a denial of a FAPE, as the hearing record shows that the parents were at the August 2019 CSE meeting, were aware of the district's program and placement recommendations, and in June 2019 had already notified the district that the student was going to attend Windward for the upcoming school year (Tr. pp. 599; Dist. Exs. 35 at p. 2; 36 at pp. 1-2).

Based on all of the foregoing, the IHO erred in finding that the district denied the student a FAPE based on a determination relating to the parents' participation in the CSE process. This is both because the issue was not sufficiently raised in the parents' amended due process complaint notice and because the evidence in the hearing record does not support the IHO's conclusion.

C. Unaddressed Issues

Having found that the IHO erred in finding that the district denied the student a FAPE for three school years based on a claim that was outside the scope of the impartial hearing, it is necessary to remand this matter back to an IHO to render substantive determinations on the claims raised in the parents' amended due process complaint notice.[14]

[14] Although the parents did not explicitly present for review on appeal the IHO's failures to rule on the other claims set forth in their due process complaint notice as alternative grounds for a finding that the district denied the student a FAPE (8 NYCRR 279.8[c][2], [4]; see also 8 NYCRR 279.4[f]), the district alleges that the IHO erred by failing to consider documentary evidence and asserts that the IEPs developed for the student were

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). It is left to the sound discretion of the IHO on remand to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the parents' claims and/or whether the parties should submit further evidence to otherwise fully develop the hearing record. Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]). Further, to the extent that the parents' cross-appeal includes a request for additional relief, specifically a request for reimbursement for the cost of tutoring provided to the student during the 2017-18 school year and a request for the district to conduct a neuropsychological evaluation of the student, those requests should be addressed in the first instance by the IHO.

If either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf. D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

VII. Conclusion

Having determined that the IHO erred in finding that the district failed to offer the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years based solely on an issue that was outside the scope of the impartial hearing, the case is remanded to the IHO to consider the parents' allegations raised in their amended due process complaint notice.

I have considered the remaining contentions and find it is unnecessary to address them at this time in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

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appropriate, and that the student had relatively mild deficits and was making progress in the district's program. In their answer, the parents respond, arguing that the evidence in the hearing record contradicted the district's view of the student's progress in the district. Under the circumstances, additional findings from the IHO are necessary as it unclear from the IHO's decision whether he weighed the evidence relevant to the parents' claims (see A.M.V. v. Lake Forest High Sch. Dist. No. 115, 2019 WL 479999, at *11 [remanding a case to a hearing officer where it was unclear whether the hearing officer afforded certain evidence no weight or simply overlooked it]). Given the extensive testimony and documentary evidence offered by the parties in this matter, further consideration of the issues by the IHO is necessary in the first instance, and I exercise my discretion to remand the matter for further determinations (8 NYCRR 279.10[c]).

IT IS ORDERED that the IHO's undated decision in this matter is hereby vacated; and

IT IS FURTHER ORDERED that that the matter be remanded to the same IHO who presided over the impartial hearing to determine whether the district offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school year based upon the issues raised in the parents' amended due process complaint notice, and what relief, if any, the parents may be entitled to; and

IT IS FURTHER ORDERED that, if the IHO who presided over the impartial hearing is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
November 13, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER