The University of the State of New York

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

No. 21-021

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

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Daniel Levin, 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 a decision of an impartial hearing officer (IHO) which ordered it to evaluate the respondent's (the parent's) son or, alternatively, to fund an independent educational evaluation (IEE). The appeal must be sustained.

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 district last conducted a psychoeducational evaluation of the student on December 4, 2016 when the student was in ninth grade (see Dist. Ex. 5).[1] For the 2017-18 through the 2019-20 school years, the student attended Summit, a nonpublic school (see Dist. Ex. 11).[2]

[1] No exhibits were offered into evidence during the impartial hearing (see Tr. pp. 1-20); however, the hearing record on appeal includes 19 district exhibits. According to the district, it submitted its motion to dismiss (marked as exhibit "1") to the IHO along with supporting exhibits numbered thereafter (i.e., exhibits "2" through "19").

[2] The Commissioner of Education has approved Summit as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

A CSE convened on August 26, 2019 to conduct the student's annual review and develop an IEP for the 2019-20 school year (twelfth grade) (Dist. Ex. 3). The August 2019 CSE relied, in part on the results of the December 2016 psychoeducational evaluation (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 5). Having found that the student continued to be eligible for special education as a student with a learning disability, the CSE recommended that the student attend a 15:1 special class in a district "[n]on-[s]pecialized" school along with related services of counseling, occupational therapy (OT), and speech-language therapy (Dist. Ex. 3 at pp. 1, 9-10, 12).[3]

The hearing record includes a letter dated September 3, 2019 and signed by the parent on March 2, 2020, in which Summit confirmed that it had accepted the student into its "program under a P-1 (Nickerson) Letter" for the 2019-20 school year (Dist. Ex. 6).[4]

According to the evidence in the hearing record, in March 2020, the parent requested that the district conduct a psychoeducational evaluation of the student and the district told her to request the same in writing (Dist. Ex. 7 at p. 3).[5] A social worker called the parent on May 14, 2020 to complete a social history update at which time the parent stated her concern that the district should have conducted the student's "3 year mandated evaluation" (Dist. Exs. 7 at p. 3; 9 at p. 1). On May 26, 2020, the district representative called the parent to confirm the upcoming CSE meeting, at which time the parent again requested "updated psycho-educational testing" (Dist. Exs. 7 at p. 3; 9 at p. 2). The district representative informed the parent that the district "test[s] to inform an IEP" and that, since the student was graduating, he didn't require a new IEP (Dist. Exs. 7 at p. 3; 9 at p. 2).

On June 5, 2020, the CSE convened to conduct an exit summary in anticipation of the student's graduation (see Dist. Ex. 10 at pp. 1, 2; see also Dist. Ex. 4). According to the meeting minutes, the parent requested that the district conduct a psychoeducational evaluation of the student, asserting that the student's IEP was "still active" and that the evaluation was needed to plan for college, and requested that the CSE reconvene in July or August (Dist. Ex. 10 at pp. 2-3; see Dist. Ex. 9 at p. 2). District members of the committee explained to the parent that the student did not require a new IEP and that the district was not "required to test for college" and that, therefore, a new assessment was not necessary, but encouraged the parent to "follow[-]up with [a]

[3] According to the CSE attendance sheet, the parent did not attend the August 2019 CSE meeting, having instructed the CSE to "call her back later" but then not answering the telephone (Dist. Ex. 17). A teacher from Summit attended by telephone (Dist. Ex. 17).

[4] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that resulted from a stipulation and consent order in a federal class action suit and provided that parents were permitted to enroll their children, at public expense, in appropriate State-approved nonpublic schools if they had requested special education services but had not received a placement recommendation within 60 days of referral for an evaluation (Jose P. v. Ambach, 553 IDELR 298, 79-cv-270 [E.D.N.Y. Jan. 5, 1982]). As a remedy, a Nickerson letter was available to parents and students who were class members in accordance with the terms of the consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]).

[5] The evidence in the hearing record does not reflect that the parent subsequently requested the evaluation in writing.

social worker regarding testing options" (Dist. Ex. 10 at p. 3; see Dist. Ex. 9 at p. 2).[6] An exit summary was completed and dated June 8, 2020 (Dist. Ex. 4).

In a prior written notice, dated June 10, 2020, the district indicated that it was refusing the parent's request for a psychoeducational IEE (Dist. Ex. 9). The notice stated that the parent was not entitled to an IEE at public expense because the district "completed assessments to write an [IEP]" and that the student was graduating in June 2020 (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice filed on June 25, 2020, the parent requested an impartial hearing (Dist. Ex. 2). The parent asserted that, in spring 2020, she requested that the district conduct a psychoeducational evaluation of the student, noting that the district last evaluated the student in December 2016 and that, although the student was anticipated to graduate in August 2020, the evaluation was "necessary to allow [the student] to move forward as he transitions out of high school and allow for meaningful post-high school planning and transition support planning" (id. at pp. 1-2). According to the parent, during the June 2020 CSE meeting, she was informed that the district would not conduct a psychoeducational evaluation since such an evaluation "was only used to develop an IEP" and that, since the student was graduating, the CSE would not be developing an IEP (id. at p. 2). The parent alleged that the district misunderstood her request and subsequently provided her with a prior written notice denying her purported request for an IEE (id.). Based on the foregoing, the parent requested that the district be required to conduct a psychoeducational evaluation of the student or, alternatively, that the district be required to fund an IEE (id.).[7]

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on December 3, 2020, which concluded on December 23, 2020, after the second day of proceedings (see Tr. pp. 1-20). The district made a motion to dismiss the parent's due process complaint notice on the ground that the district had no obligation to conduct a new evaluation of the student during his last year of special education eligibility or prior to graduation and that the student's graduation rendered the parent's request for a psychoeducational evaluation moot (see Tr. pp. 8-11; Dist. Ex. 1).[8]

[6] The meeting minutes described the parent as "combative" and indicated that she hung up before the CSE reviewed "the documents they had for the meeting" or the parent's due process rights (see Dist. Ex. 10 at pp. 2-3; see also Dist. Ex. 9 at p. 2).

[7] According to a district record, the student was discharged as a student enrolled in the district as of July 1, 2020 due to his receipt of a high school Regents diploma (see Dist. Ex. 8). According to the parent's due process complaint notice, the student's classes at Summit ended on June 26, 2020 and his graduation was anticipated for August 5, 2020 (see Dist. Ex. 2 at p. 1).

[8] The district's motion to dismiss was dated December 10, 2020 (see Dist. Ex. 1 at p. 13); however, during the December 23, 2020 hearing date, the IHO and the parent's attorney indicated that they had not received the district's motion and the district's representative indicated that he was having trouble emailing the motion papers and that he would continue his attempts to send the document (see Tr. pp. 8-18). The IHO ultimately received

In an interim decision dated December 28, 2020, the IHO ordered the district to conduct or fund a psychoeducational evaluation of the student (Interim IHO Decision at p. 6). Citing State regulation, the IHO noted his authority to order an IEE during an impartial hearing and found that, in this matter, the parent was "entitled to further develop the record with an [IEE]" (id. at pp. 3-4 [internal footnote omitted]). The IHO further found that, in her due process complaint notice, the parent "made an adequate case for an [IEE]" (id. at p. 5). As for the district's objection, the IHO indicated that the district "ha[d] been stagnant and unresponsive over the course of this case" and that this sort of participation was "an obvious example of the endemic failures that plague the [district's] impartial hearing process" (id.). Based on the foregoing, the IHO ordered the district to conduct, or directly fund through a contract agency, a psychoeducational evaluation of the student (id. at p. 6). The IHO further ordered that, if the evaluation was not completed within 45 days, the parent would be entitled to secure an IEE at district expense (id.).[9]

In a final decision dated December 29, 2020, the IHO determined that the issuance of the December 28, 2020 interim decision rendered the matter moot since there remained no further relief outstanding (IHO Decision at pp. 3-4, 7). However, the IHO went on to address the district's arguments raised in the motion to dismiss in the alternative (id. at p. 4).

The IHO found that, while not required, State regulation did not prohibit the district from conducting evaluations of a student during his or her final year of eligibility (IHO Decision at p. 4). The IHO further indicated that such an evaluation might "ultimately further the Student's educational, employment, and independent living skills" and this would further goals of the IDEA (id. at pp. 4-5). For the student in the present matter, the IHO found that that post-secondary planning for the student would be lacking without a more current evaluation (id. at p. 5). The IHO also opined that an evaluation at this point could "uncover a deprivation of educational benefits, or at least, a consistent lack of attention to a need for evaluations like the one requested by the Parents" and that, as a result, the district's December 2016 psychoeducational evaluation or the CSE's June 2020 "exit summary" of the student might be revealed to be lacking and would "need to be reassessed" (id. at pp. 5-6). As for the district's other positions, the IHO agreed that "the failure to conduct an exit evaluation is merely a procedural violation" that does not necessarily rise to the level of a denial of a FAPE (id. at p. 6). The IHO disagreed with the district's position that the parent's claim had become moot due to the student's graduation but reiterated that mootness applied because his interim decision awarded all of the relief requested (id.). The IHO intimated that, although the parent did not seek it in the present matter, the student may be entitled to "continued relief," including compensatory education, notwithstanding his graduation, depending on the information gathered in the ordered psychoeducational evaluation (id. at pp. 6-7). Thus, the IHO dismissed the parent's due process complaint notice without prejudice (id. at p. 7).

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the motion and addressed it in the final decision (see generally IHO Decision). There is no indication in the hearing record that the parent responded to the district's motion.

[9] The IHO opined that an evaluation conducted by the district or funded by the district through a contract agency would be less costly than an IEE (Interim IHO Decision at p. 5).

IV. Appeal for State-Level Review

The district appeals and requests that the IHO's interim and final decisions be reversed in their entirety. First, the district argues that the parent was not entitled to the psychoeducational evaluation as a matter of law since the district's triennial psychoeducational evaluation of the student was conducted in December 2016, that evaluation was considered less than three years later by the August 2019 CSE, and the August 2019 IEP was in effect for the entire 2019-20 school year, which was the student's final year of eligibility before he graduated in August 2020. In support of its position, the district points to State regulations which provide that an evaluation is to provide the CSE with information upon which to base program and placement recommendations and that a district is not required to reevaluate a student before terminating eligibility due to graduation. The district characterizes the IHO's interpretation that the regulations do not prohibit the district from conducting an evaluation as "tortured" and argues that the IHO erred by requiring of the district more than the obligations imposed by law.

The district further asserts that the IHO erred in ordering, in the alternative, that the district fund an IEE. The district argues that the parent never disagreed with a district evaluation and specifically stated in her due process complaint notice that she did not want an IEE. The district contends that a district's failure to evaluate a student does not entitle a parent to an IEE.

As for the other grounds cited by the IHO as supporting his award of an evaluation or IEE, the district asserts that it responded promptly to the parent's request for an evaluation by issuing a prior written notice, its failure to file a response to the due process complaint notice does not amount to a denial of a FAPE, and its motion to dismiss was not delayed and, in any event, the delay would not overcome the parent's failure to meet the prerequisites for an IEE. The district argues that the IHO's reliance on State regulation was misplaced since the cited regulation permits an IHO to award an IEE "as part of a hearing" and not where the only relief sought in the hearing was the IEE. Further, the district contends that the IHO erred in speculating that the ordered evaluation could uncover some other deficiency in the district's planning or programming for the student or in the educational benefit that the student received, noting that the parent did not allege a denial of a FAPE and that the student graduated, which was evidence of educational benefit obtained.

Finally, the district asserts that the IHO erred in failing to rule on its motion to dismiss the parent's due process complaint notice. The district argues that the parent's claims in this matter became moot when the student graduated from high school.[10]

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.

[10] The parent did not file an answer to the request for review.

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]).[11]

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

Before turning to the districts' appeal, a note about the procedural posture of this matter is warranted. As set forth below, in his interim decision, the IHO erred in ordering the district to conduct a psychoeducational evaluation of the student or, in the alternative, to fund an IEE (see Interim IHO Decision at p. 6). Therefore, the IHO's final decision, determining that the matter was moot in light of his interim decision, was also error (see IHO Decision at pp. 3-4, 7). As a full evidentiary hearing was not held, I considered remanding this matter to the IHO (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]). However, at this juncture, given the limited issue raised by the parent in the due process complaint notice (see Dist. Ex. 2), the district has through the evidence submitted with its motion, met its burden of proof to demonstrate, legally and factually, that it did not deny the student a FAPE by failing to conduct a psychoeducational evaluation and that it was not required to fund an IEE. The parent did not respond to the district's motion or file an answer in this matter. Accordingly, in the interests of judicial economy, I have exercised my discretion to reach the merits of the parent's request for relief and I decline to remand the matter for further proceedings.

[11] 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).

A. District Conduct

To the extent the IHO relied on the district's purported failures to respond to the parent's due process complaint notice, schedule a resolution session, or file a timely motion to dismiss in order to support a finding that the district had been "stagnant and unresponsive over the course of this case" (Interim IHO Decision at pp. 2, 5), these considerations will be addressed before turning to the substance of the district's appeal.[12]

Initially, State regulation requires that, if a district has not provided a parent with prior written notice regarding the subject matter of the parent's due process complaint notice, the district "shall, within 10 days of receiving the complaint, send to the parent a response" (8 NYCRR 200.5[i][4]; see 34 CFR 300.508[e]). In this instance, the district provided the parent with a prior written notice regarding the subject matter of the due process complaint notice (Dist. Ex. 9).[13]

Beyond the IHO's mention, the hearing record is silent regarding the resolution session or lack thereof. The IDEA, as well as State and federal regulations, provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]). Except where the parties agreed to waive the resolution process or use mediation, a parent's failure to participate in a resolution meeting "will delay the timeline for the resolution process," as well as the timeline for the impartial hearing, until the meeting is held (34 CFR 300.510[b][3]; 8 NYCRR 200.5[j][2][vi]). Further, a school district may request that an IHO dismiss a due process complaint notice if, at the conclusion of the 30-day resolution period and notwithstanding reasonable efforts having been made and documented, the district was unable to obtain the participation of the parent in the resolution meeting (34 CFR 300.510[b][4]; 8 NYCRR 200.5[j][2][vi][a]). On the other hand, if the district fails to hold the resolution meeting within 15 days of receipt of the parent's due process complaint notice or fails to participate in the resolution meeting, the parent may seek the intervention of the IHO to begin the impartial hearing timeline (34 CFR 300.510[b][5]; 8 NYCRR 200.5[j][2][vi][b]). Accordingly, if the district failed to

[12] In this context, the IHO also indicated that the district "did not commence a proceeding to oppose the evaluation or otherwise pay for the evaluation"; however, as discussed below, prior to her due process complaint notice, the parent did not request an IEE (see Dist. Ex. 2 at p. 2) and, therefore, the district did not have an obligation to ensure that an IEE was provided at public expense or to initiate an impartial hearing (see 34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv).

[13] Although the prior written notice characterized the parent's request as for an IEE, the substance of the district's explanation for denying the request was the same as articulated at the CSE meeting in response to the parent's request that the district conduct the evaluation (compare Dist. Ex. 9 at p. 1, with Dist. Ex. 10 at p. 3).

schedule a resolution session as the IHO stated (Interim IHO Decision at p. 2), the remedy was for the IHO to begin the hearing timeline.

As for the district's motion to dismiss, as a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA (see, e.g., Application of a Student with a Disability, Appeal No. 19-102; Application of the Dep't of Educ., Appeal No. 11-004),[14] but generally regulations do not address the particulars of motion practice including the timing for such applications.[15] Instead, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in such matters so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). Here, the IHO stated that "[o]nly after the parties met in the context of a hearing, for the second time, did the[] district propound a motion to dismiss the compliant notice while opposing the requested relief" (Interim IHO Decision at p. 2). For reasons unknown, the district did not appear at the first hearing date on December 3, 2020 (see Tr. pp. 1-5). Apparently, the district attempted to submit a motion to dismiss on December 10, 2020 but was unsuccessful transmitting the document by e-mail to the IHO and the parent's attorney until after the proceedings on December 23, 2020 (see Tr. pp. 8-18; Dist. Ex. 1 at p. 13). In any event, the IHO was under no obligation to entertain the district's motion to dismiss and could have gone forward with the impartial hearing to receive documentary and testimonial evidence and rule on the merits of the parent's claims; however, the IHO stated his intent to address the district's motion (see Tr. p. 18).

The IHO seemed frustrated with the district's failure to resolve the parent's complaint, particularly given the "endemic failures that plague the NYCDOE impartial hearing process" (Interim IHO Decision at p. 5). The IHO was no doubt referring to the now well-documented problem in the district of "an unprecedented volume of special education due process complaints

[14] While permissible, summary disposition procedures should be used with caution and they are only appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]).

[15] The exception is a sufficiency challenge, which addresses a complaint on its face and whether the complaint lacks the elements required by the IDEA. The IDEA provides that a due process complaint notice shall include the student's name and address of the student's residence; the name of the school the student is attending; "a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem"; and a proposed resolution of the problem (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). In most instances when a challenge to the sufficiency of a due process complaint notice is timely made, an impartial hearing may not proceed unless the due process complaint notice satisfies the sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 CFR 300.508[c-d]; 8 NYCRR 200.5[i][2]-[3]). If there has been an allegation that a due process complaint notice is insufficient, the IDEA and federal and State regulations provide that the party receiving the due process complaint must notify the hearing officer and the other party in writing of their challenge to the sufficiency of the complaint within 15 days of receipt thereof (20 U.S.C. § 1415[c][2][A], [C]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]; [i][6][i]). An IHO must render a determination within five days of receiving the notice of insufficiency (see 34 CFR 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]). If a receiving party fails to timely challenge the sufficiency of a due process complaint notice, the due process complaint must be deemed sufficient (20 U.S.C. § 1415[c][2]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]).

[that] is overwhelming the New York City due process system" (N.Y. Reg., July 29, 2020, at p. 15). During the impartial hearing, the IHO also characterized the dispute as "a big . . . deal about virtually nothing" and stated that it did not seem that a request for a district psychoeducational evaluation was the time for the district to "hold the line" (Tr. pp. 17-18). While the IHO's ire with the district's litigation strategy may have been well founded, it should not have factored in to a finding that legally or factually the district had an obligation to conduct or fund a district or independent evaluation of the student, absent a determination that, by its hearing conduct, the district impeded the student's right to a FAPE.

B. District Reevaluations

Turning to the merits of the district's appeal, regulations require that 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]). A district must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary but need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). However, a district "is not required to conduct a reevaluation of a student before the termination of a student's eligibility" due to receipt of a high school diploma or due to exceeding the age eligibility for a FAPE (8 NYCRR 200.4[c][4] see 20 U.S.C. § 1414[c][5][B][i]; 34 CFR 300.305[e][2]).[16] A district must provide a student with a disability whose eligibility for special education services is ending with a summary of the student's academic achievement and functional performance, including recommendations on how to assist the student in meeting his or her postsecondary goals (20 U.S.C. § 1414[c][5][B][ii]; 34 CFR 300.305[e][3]; 8 NYCRR 200.4[c][4]). State guidance provides that a student exit summary should be based on a student's "current abilities, strengths, skills, needs, and functional limitations, and that "[m]uch of this information can be found in the student's IEP and progress reports for the student's final school year" ("Student Exit Summary," at p. 2, Office of Special Ed. [last updated Mar. 2014], available at http://www.p12.nysed.gov/specialed/idea/sumexit.pdf).

Here, the district last conducted a psychoeducational evaluation of the student in December 2016 (see Dist. Ex. 5). The parent requested a psychoeducational evaluation of the student as early as March 2020 (see Dist. Ex. 7 at p. 3). Although it is unclear whether or not the parent put the request in writing as directed by the district, there is no dispute that the parent repeatedly requested that the district conduct a psychoeducational evaluation of the student (see Dist. Exs. 7 at p. 3; 9 at pp. 1-2; 10 at pp. 2-3). Upon receiving the parent's request for an evaluation, the district was required to consider whether or not it would be appropriate to conduct the evaluation to assess the student's special education needs and, after due consideration, provide the parent with prior written notice describing, if applicable, its reasons for concluding that additional evaluative data of the

[16] In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100).

student was unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]). The district did not immediately respond to the parent's request via prior written notice, but reportedly responded verbally during a phone call, during the June 2020 CSE meeting, and in a June 2020 prior written notice, stating that the evaluation was not necessary since the student would be graduating shortly and the district did not anticipate that the CSE would engage in any further educational planning for the student (Dist. Exs. 7 at p. 3; 9 at pp. 1-2; see Dist. Ex. 10 at p. 3).

Even assuming that the district was obligated to conduct a triennial reevaluation of the student as of December 2019 or evaluate the student in response to the parent's requests, any failure by the district to complete the evaluation was a procedural violation that did not rise to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]), particularly given that the student's IEP had already been developed for the 2019-20 school year (see Dist. Ex. 3), there is no allegation that the August 2019 CSE had insufficient evaluation information before it or that the student's IEP was inadequate, and the student was anticipated to receive a Regents diploma in June 2019 and graduate at the end of the 2019-20 school year.

Moreover, as set forth above, the district otherwise had no obligation to reevaluate the student before his eligibility terminated by reason of graduation (see 20 U.S.C. § 141[5][B][i]; 34 CFR 300.305[e][2]; 8 NYCRR 200.4[c][4]). The IHO seemed to acknowledge this but noted that the district was not "prohibited" from conducting the evaluation and went on to note some of the goals of the IDEA, including to promote independent living and self-determination (IHO Decision at pp. 4-5). However, the IHO did not consider what information the June 2020 CSE had before it in conducting the student's exit summary and making recommendations to assist the student in meeting his or her postsecondary goals.

According to the meeting minutes, the June 2020 CSE considered several sources of information in developing the student's exit summary, including the August 2019 IEP, reports for the 2019-20 school year such as a transition report and a teacher report completed by Summit, a high school transcript, test scores, and a vocational interview with the student as the informant (see Dist. Ex. 10 at p. 2; see also Dist. Exs. 3; 11; 12; 16; 18; 19).[17] The June 2020 exit summary described the student's present levels of performance consistent with the information in the teacher report from Summit (compare Dist. Ex. 4 at pp. 1-2, with Dist. Ex. 12 at pp. 1-2). The exit summary described the student as conscientious and indicated he "enjoy[ed] learning and ha[d] a strong desire to succeed" (Dist. Ex. 4 at p. 2). Specific to reading, the exit summary indicated the student had good decoding skills and a literal understanding of materials but struggled with inferential comprehension (id. at p. 1). In math, the exit summary stated that the student had taken Algebra I, Geometry, and Business Math and that he had passed the Algebra I Regents examination (id.). The summary reflected that the student had a good foundation of basic math operations but had difficulty with multi-step examples and word problems (id.). In the social realm, the summary noted that the student was "polite and respectful," had positive relationships with peers and staff,

[17] The June 2020 CSE meeting minutes identified additional materials reviewed by the committee that are not included in the hearing record, including speech-language therapy, OT, and counseling reports for the 2019-20 school year (Dist. Ex. 10 at p. 2). The meeting minutes also reflected that a social history update and vocational interview with the parent as informant were "attempted" (id.). In addition, the minutes reflect that the parent "hung up" before the CSE reviewed the documents that were available to the committee (id. at p. 3).

and was learning to use strategies to minimize feelings of frustration and anxiety (id. at p. 2). The exit summary stated that the student was working on time management, study skills, self-advocacy, prioritizing of tasks, and organizational skills (id.). In OT, the summary reflected that the student had been working on his executive functioning skills and that the student needed "minimal to moderate encouragement" to more consistently use strategies, such as use of technology, to help with organization (id.). The student had improved in spending quality time on schoolwork and showed "increased effort and care" on his assignments (id.).

The summary included several examples of strategies or supports from which the student benefited, including preferential seating, small group instruction, class discussion, modeling, extended time for exams and assignments, and use of audio books, a calculator, semantic maps, outlines, a set of class notes or use of a recorder to tape lectures, a word processor for writing tasks, and technology such as a cell phone calendar for organization (Dist. Ex. 4 at pp. 1-3). The exit summary also listed testing accommodations from which the student benefited (id. at p. 2).

As for postsecondary goals, the exit summary reflected that the student would go to college and live home with his family (Dist. Ex. 4 at p. 3). For recommendations to assist the student in meeting his postsecondary goals, the summary indicated the student should apply to the college's office of students with disabilities for accommodations to locate help locate supports in the school for counseling, writing, and academic support (id.). The exit summary also provided information for the student to contact his local Adult Career and Continuing Education Services-Vocational Rehabilitation (ACCES-VR) office (id.).

According to the June 2020 meeting minutes, the parent's rationale for requesting a psychoeducational evaluation of the student was that the evaluation was needed to plan for college (see Dist. Ex. 10 at pp. 2-3). However, the CSE had several sources of information to inform the student's exit summary and there is no indication that further formal testing of the student was required to achieve such purposes. Accordingly, the parent's sole allegation in her due process complaint notice does not form the basis for a finding that the district denied the student a FAPE for any portion of the 2019-20 school year.

C. Independent Educational Evaluations

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in

a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Here, the parent did not seek an IEE leading up to the due process complaint notice and instead requested that the district conduct a psychoeducational evaluation of the student (see Dist. Ex. 9 at pp. 1-2; 10 at pp. 2-3; see also Dist. Ex. 2 at p. 2). In her due process complaint notice, the parent continued to request that the district conduct the psychoeducational evaluation but requested an IEE in the alternative (Dist. Ex. 2 at p. 2). Assuming that, based on the parent's request for an IEE in the due process complaint notice, the district was required to defend at the impartial hearing its decision not to evaluate the student, the district did so by arguing in its motion that, when the parent requested the evaluation, the student did not need further evaluation (see Dist. Ex. 1 at pp. 3-7). And for the reasons discussed above, the district's arguments were supported by the law and the evidence since the August 2019 CSE had already engaged in educational planning (relying on the then-timely December 2016 psychoeducational evaluation of the student) for the 2019-20 school year, the student's last year of eligibility, and the student graduated at the end of the 2019-20 school year (see Dist. Exs. 3; 8). The IHO did not elaborate on his finding that "[t]he parent, in her complaint notice, has made an adequate case for an [IEE]" and, as the district argues, it is not supported by the law or the evidence in the hearing record.

Additionally, 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]).

The IHO noted several ways that the ordered evaluation might result in information that would inform a hearing process; however, the IHO did not articulate how the IEE would inform the hearing in the present matter (see 8 NYCRR 200.5[g][2]; [j][3][viii] [referring the IHO's authority to request an IEE at district expense "as part of a hearing"]; see also 34 CFR 300.502[d]; Lyons, 2010 WL 8913276, at *3). First, the IHO opined that the evaluation could "uncover[] a serious deficiency in programming" and that it was "the District's responsibility and burden to

show that their IEP and FAPE's throughout schooling were appropriate for the student" (IHO Decision at p. 5). The IHO also indicated that the evaluation might "uncover a deprivation of educational benefits, or at least, a consistent lack of attention to a need for evaluations like the one requested by the Parent[]" (id. at pp. 5-6). However, there was no claim in the due process complaint notice that any IEP developed by the CSE was deficient or that the evaluative information available to the August 2019 CSE was insufficient, and the purpose of an IHO-ordered IEE should not be to give the parent leeway to go on a fishing expedition to collect evidence for future hypothetical proceedings. The IHO also indicated that "any post-high school planning would seemingly be lacking without conducting recent testing in this matter" (id. at p. 5); however, in so finding the IHO did not explore the evidence in the hearing record to determine what the June 2020 CSE did consider in preparing the student's exit summary. As discussed above, the June 2020 CSE had before it several sources of information, which were sufficient for the CSE to develop a summary of the student's academic achievement and functional performance, including recommendations on how to assist the student in meeting his or her postsecondary goals consistent with the IDEA and the implementing regulations (20 U.S.C. § 1414[c][5][B][ii]; 34 CFR 300.305[e][3]; 8 NYCRR 200.4[c][4]).

To the extent that the ultimate relief sought in the matter was the evaluation and that, having ordered it, there was no need for a hearing, the IHO acted beyond the authority contemplated by the regulations (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]).

VII. Conclusion

Based on the foregoing, the IHO erred in ordering the district to conduct or directly fund through a contract agency a psychoeducational evaluation of the student or to fund an IEE.

I have considered the district's remaining contentions and find that I need not address them in light of my determination above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision dated December 28, 2020, and final decision, dated December 29, 2020, are modified by reversing those portions which ordered the district to conduct or directly fund through a contract agency a psychoeducational evaluation of the student or to fund an IEE.

Dated: **Albany, New York**
February 19, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER