The University of the State of New York

The State Education Department
State Review Officer
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No. 21-120

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Erin O'Connor, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed, without prejudice, her request for compensatory educational services. Respondent (the district) cross-appeals those portions of the IHO's decision which determined that the district failed to offer the student a free appropriate public education (FAPE) and which directed the district to continue to provide the student with pendency placement services until the parties developed an agreed-upon IEP, as well as funding various independent educational evaluations (IEEs). The appeal must be sustained in part, the cross-appeal must be sustained in part, and for reasons set forth below, 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[a]). 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

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student's educational history is not possible but is, in any event, unnecessary due to the procedural posture of the impartial hearing proceedings and the limited nature of this appeal. When the IHO issued the decision, which ultimately dismissed the parent's due process complaint notice and related request for an award of compensatory educational services without

prejudice, no evidence had been admitted into the hearing record (see IHO Decision at pp. 61, 64).[1] Accordingly, unless otherwise specified, all factual references in this decision are drawn from the parent's allegations in the September 22, 2020 due process complaint notice (see SRO Ex. A at p. 1).[2]

According to the parent, the student did not receive Early Intervention (EI) services and, for the 2018-19 school year, the student was not evaluated and thus, did not receive services (see SRO Ex. A at p. 2). In September 2019, the parent placed the student at Phyl's Academy Preparatory School (Phyl's Academy), a nonpublic, general education school, and in fall 2019, the student was referred for an initial evaluation to determine whether he was eligible for special education as a preschool student with a disability (id. at pp. 1-2; see Tr. p. 64). After completing a social history, a psychological evaluation, and an educational evaluation of the student, a Committee on Preschool Special Education (CPSE) convened on January 15, 2020, and the CPSE developed an IEP for the student, which included recommendations for five hours per week of special education itinerant teacher (SEIT) services (small group, 2:1) and two 30-minute sessions per week of counseling (small group, 2:1) (id. at pp. 3-4). The parent further set forth that, on April 7, 2020, a CSE convened to conduct the student's "Turning 5" review, but as of September 22, 2020 (the date of the due process complaint notice), she had not received a copy of the April 2020 IEP (SRO Ex. A at p. 4). For kindergarten during the 2020-21 school year, the parent placed—and the student continued to attend—Phyl's Academy (id. at p. 5).

A. Due Process Complaint Notice

By due process complaint notice dated September 22, 2020, consisting of 13 pages and 97 enumerated paragraphs together with approximately 65 lettered subparagraphs, the parent asserted that the district failed to appropriately evaluate the student, failed to provide the student with an

[1] Notwithstanding this statement, after the conclusion of the impartial hearing and while drafting the decision, the IHO, sua sponte, entered a November 2019 psychological evaluation of the student into the hearing record as evidence; the evaluation had been completed by the district as part of the student's initial evaluation process and the IHO briefly reviewed the evaluation report, in camera, at the impartial hearing (see Tr. pp. 6-10; IHO Decision at p. 60, n.31; see generally IHO Ex. I).

[2] The parent submitted the following documents to the Office of State Review with her request for review: a September 22, 2020 due process complaint notice; a pendency placement form executed by the parent's attorney; and an amended due process complaint notice, dated April 16, 2021 (SRO Ex. A); various email exchanges between the parties' attorneys and the IHO (SRO Ex. B); an email exchange between the parties' attorneys and the IHO, dated April 16, 2021, which provided the IHO with an update as to the parties' IEE agreement and remaining issues for the impartial hearing (SRO Ex. C); an email exchange dated April 19 and 20, 2021, between the parent's attorney and the IHO regarding the parent's April 16, 2021 amended due process complaint notice (SRO Ex. D); and finally, an email exchange dated April 26, 2021 between the district's impartial hearing office and the parent's attorney regarding the amended due process complaint notice (SRO Ex. E). As part of the administrative hearing record required to be filed by the district pursuant to Part 279 of State regulations, the Office of State Review received a copy of the September 2020 due process complaint notice and a pendency placement form executed by a district representative; thus, while at least a part of one exhibit submitted with the parent's request for review is duplicative of documents already included in the hearing record, the documents filed by the district are unmarked, therefore, for ease of reference in this decision, the designation for the parent's September 2020 due process complaint notice—SRO exhibit A—will be used. Moreover, given the disposition of the appeal, the remainder of the additional evidence submitted with the parent's request for review, i.e., SRO exhibits B, D, E, and SRO exhibit A from pages 14 through 32, are not necessary to render a decision in this matter and therefore will not be accepted or considered. The parent is free to offer this documentary evidence upon remand for the IHO's consideration.

appropriate placement, and failed to develop a "procedurally and substantively adequate IEP" for the 2018-19, 2019-20, and 2020-21 school years, thereby denying the student FAPE for the same school years (SRO Ex. A at pp. 1, 3). The parent asserted that, although the student was then-currently attending Phyl's Academy, she had not provided the district with a 10-day notice because the district had "never provided [her with] any notice" of this requirement (id. at p. 5). The parent invoked the student's right to pendency for the 2020-21 school year, and further noted that Phyl's Academy—together with the pendency placement services, as well as "additional pendency and compensatory services that w[ould] be provided"—was appropriate for the student (id. at pp. 5-6). Alternatively, the parent indicated that if, however, Phyl's Academy together with these additional services was determined to be inappropriate, the district "should fund the tuition and transportation based on compensatory education theory or equitable relief under [s]ection 504" of the Rehabilitation Act of 1973 (section 504) (id. at p. 6). Next, the parent alleged that the CPSE IEP failed to offer the student a FAPE based on various procedural and substantive deficiencies (id. at pp. 6-7). The parent also asserted that, to the extent that the April 2020 CSE developed an IEP for the 2020-21 school year, the district failed to offer the student a FAPE based on various procedural and substantive deficiencies (id. at pp. 7-9). The parent also asserted claims concerning various district policies, including systemic violations of the IDEA and section 504 affecting the CSE's ability to offer specific programming and services (see id.).

As relief, the parent requested: a declaration that the district violated the IDEA, section 504, and the State Education Law and that the student was denied a FAPE for the 2018-19, 2019-20, and 2020-21 school years; a pendency placement consisting of the services set forth in the most recent CPSE IEP (five hours per week of SEIT services, two 30-minute sessions per week of counseling); the issuance of an interim decision ordering the district to fund IEEs, including speech-language, auditory processing, neuropsychological, occupational therapy (OT), physical therapy (PT), and an assistive technology evaluation, as well as an observation of the student by a "Ph.D.-level expert in behavior," a vision processing evaluation, an assessment by an "expert in remediation," and a "private" functional behavioral assessment (FBA) and behavioral intervention plan (BIP); and an award of compensatory educational services (see SRO Ex. A at pp. 11-12). Regarding compensatory education, the parent requested: a bank of 1:1 instruction, "ABA, PROMPT, additional SEIT" services, tutoring, behavior therapy, "services to improve executive functioning," assistive technology and assistive technology training, related services (i.e., OT, PT, speech-language therapy, counseling, social skills training, and/or feeding therapy), and "any other services recommended as a result of the IEEs (id. at p. 12).[3] In addition, the parent requested that the district "fund an increase in 1:1 instruction and related services" and develop an IEP that included "pendency services, as well as additional 1:1 instruction, ABA, PROMPT, SEIT, [speech-language therapy] services, OT services, PT services, counseling, [a] 12-month [school year program], behavioral support and home-based services" (id. at pp. 12-13). The parent also indicated that, "[i]f applicable, the IHO should also order the [district] to reimburse the [p]arents for and/or fund the Private School tuition as equitable and/or compensatory relief for IDEA and

[3] While not explained in the hearing record, "ABA" typically refers to applied behavior analysis and "PROMPT" is typically used as an acronym for "prompts for restructuring oral muscular phonetic targets"—a method of instruction used by speech-language pathologists (see, e.g., Application of a Student with a Disability, Appeal No. 20-002).

[s]ection 504 violations" (id. at p. 13).[4] Thus the parent's sought the costs of Phyl's Academy from the district.

B. Impartial Hearing

1. Discussions before the Impartial Hearing Officer

On April 9, 2021, the parties proceeded to an impartial hearing (see Tr. p. 1). The discussions initially focused on the parent's request for a neuropsychological IEE of the student (see Tr. p. 3). At that time, the district agreed to fund the neuropsychological IEE at a rate not to exceed $5000.00 and to continue to investigate potentially settling the matter; as a result, the parties agreed that additional time was needed to complete the IEE and to explore settlement (see Tr. pp. 3-4). After confirming the most recently conducted evaluations of the student, the IHO asked the parties to identify the "student's classification in the challenged IEP"; the district's attorney responded, "[e]motional disturbance" (Tr. pp. 1, 4-8). At that point, the IHO asked whether the district's attorney objected to him reviewing the psychological evaluation of the student in order to get a feel for the case and, in his opinion, the rarity of finding "Turning-5 students" eligible for special education as students with an emotional disturbance (Tr. pp. 8-10). More specifically, the IHO questioned whether anything within the psychological evaluation "supported" the emotional disturbance classification (Tr. p. 10). The IHO also asked the parent's attorney whether the emotional disturbance classification was "plausible"—and at that time, the parent's attorney indicated that, because the parent had alleged that the student had not been evaluated in all areas of suspected disability, the parent "wouldn't rule it out as possible" (Tr. pp. 10-11). The IHO explained that he was "trying to figure out . . . whether [the parent] shouldn't get a psychiatric [evaluation of the student] as well" because the psychological evaluation he reviewed did not include "projective testing" and typically, a neuropsychological evaluation did not include projective testing (Tr. pp. 11-12).

At that point, the district's attorney indicated that the educational evaluation of the student was possibly "more holistic, as opposed to the psychological evaluation"—and the IHO responded that it was, however, "unlikely to have been conducted by somebody who c[ould] diagnose"—explaining further that he was "looking for justification points for the IEP that [had been] generated" (Tr. pp. 12-13). The IHO then stated that he did not think the district had a "Prong I case," noting that an emotional disturbance "classification ha[d] to be justified," and that, especially in the case of a "Turning-5" student, the classification "ha[d] to be justified by clinical material that support[ed] the diagnostics" (Tr. p. 13). The IHO further opined that the district "should never rely on preschool psychologicals when doing a Turning-5 case," but then indicated that that was a "systemic problem," which was not within his jurisdiction (id.). Nevertheless, the

[4] In a "Due Process Complaint," dated March 26, 2021, the parent requested an impartial hearing, noting that she previously objected to the "last evaluations" completed by the district in her September 2020 due process complaint (IHO Consol. Order at p. 2). The parent further indicated that, although she had requested IEEs in the previous due process complaint notice, the district had not responded to that request, and as a consequence, the parent requested that the IHO order the district to fund the following IEEs: a neuropsychological evaluation, a speech-language evaluation, a PT evaluation, an OT evaluation, an assistive technology evaluation, an observation by a Ph.D. level expert in behavior, and an FBA (together with a BIP, if deemed necessary) (id. at p. 3). In a consolidation order dated April 1, 2021, the IHO consolidated the matters set forth in September 2020 due process complaint notice and the March 2021 due process complaint notice (id. at p. 1).

IHO indicated that, with respect to this particular student, it would be "very difficult to imagine what [the district's] Prong I case could look like on the basis of having adequately evaluated this [student]" (Tr. pp. 13-14). The IHO clarified, however, that he was not attempting to tell the district to "concede now" (Tr. p. 14). According to the IHO, since the present matter was "about IEEs," and the "standard for that, as [the parent's attorney] stated, was comprehensive evaluation in all areas of the student's suspected disability," then in order to meet that standard, "somebody sometime need[ed] to have conducted projective testing for this [student]" (Tr. pp. 14-15). The IHO also noted that he was "of a mind to order the full range of IEEs, unless the [d]istrict [was] consenting to them" (Tr. p. 15).

The district's attorney confirmed that, based upon discussions with the parent's attorney, it appeared that the parent was only seeking the completion of the neuropsychological IEE at the current time, but maintained her right to seek additional IEEs in the final order (see Tr. p. 15). The IHO interposed that he wanted both a neuropsychological IEE and a psychiatric IEE of the student, as well as a speech-language IEE, and he would "order them as IHO-ordered evaluations" (Tr. p. 16). The district's attorney argued that the parent was, by law and regulation, required to disagree with a district evaluation in order to be entitled to an IEE "of the same category", and more specifically, the district should be given the opportunity to conduct a psychiatric evaluation of the student prior to the parent obtaining a psychiatric IEE—especially where, as here, the district had not yet conducted this type of an evaluation (Tr. pp. 16-17). The district's attorney further stated that the same rationale applied to the IHO's suggestion that the student undergo a speech-language IEE, namely, that the parent could not obtain a speech-language IEE because the district had not conducted a speech-language evaluation with which the parent could express disagreement (see Tr. p. 17).

Thereafter, the parties and the IHO discussed the application of the Second Circuit Court of Appeal's decision, D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 (2d Cir. 2020), to the facts of this case, as well as the applicability of certain State and federal regulations (see Tr. pp. 17-30). According to the IHO's understanding of Trumbull, the parent was "entitled to a comprehensive [IEE] if [she] disagree[d] with the [d]istrict's comprehensive education evaluation" and it was the district's "effort to conduct the evaluation it needed to conduct in order to generate an IEP" (Tr. pp. 18-19). The IHO further indicated that the parent was therefore entitled to disagree with the district's comprehensive evaluation of the student, and since "it's within three years, the [d]istrict [was] in no obligation to conduct another one" (Tr. p. 19).

Based upon Trumbull and State and federal regulations, the district asserted that the parent must disagree with a district evaluation in order to request an IEE (see Tr. pp. 19-22). The IHO generally agreed with the district's position, except for noting that, under Trumbull, the parent need not "disagree with a specific assessment" (Tr. pp. 22-24). As a final point, the district's attorney explained that "since there ha[d] not been a psychiatric and a speech[-language evaluation] prior, the [p]arent [was] disagreeing with a psychoeducational or psychological [evaluation]"—and thus, the parent would be "entitled to an IEE neuropsychological at a rate not to exceed" $5000.00—and moreover, the district should be allowed, in the first instance, to conduct the psychiatric and speech-language evaluations prior to the IHO issuing an order for the parent to obtain these evaluations as IEEs (Tr. pp. 24-26).

Given the time constraints for the impartial hearing, the IHO noted that he was preliminarily inclined to order "some form of interim relief" but wanted the parties to continue to discuss the matter to possibly reach an agreement and return to the impartial hearing (Tr. pp. 26-30).

On April 13, 2021, the impartial hearing resumed (see Tr. p. 32). The parties revisited the Trumbull decision, as well as the parent's request for IEEs (see Tr. pp. 34-35). The parent's attorney indicated that the parent now agreed with the IHO's suggestion to obtain psychiatric and speech-language IEEs, and requested the same at the impartial hearing (see Tr. p. 35). The parent's attorney also indicated that the IHO would need to issue an order for interim relief, which directed the district to fund the IEEs at market rate and by a provider of the parent's choosing, in order to most expeditiously complete the IEEs (id.). According to the parent's attorney, the IEEs were warranted as interim relief pursuant to Trumbull and "to inform the record," as well as in response to the district's failure to respond to the parent's expressed disagreement with the district evaluations, or alternatively, the district's failure to file its own due process complaint notice to defend its evaluations (Tr. p. 36). The district's attorney reiterated the district's position as set forth at the prior impartial hearing date, noting that the district's failure to evaluate a student—here, specifically the fact that the district had not conducted either a psychiatric or speech-language evaluation of the student—did not give rise to the right to an IEE under State or federal regulations (see Tr. pp. 36-38).

Next, the IHO questioned whether the district intended to defend "its own prior evaluation, it's Turning-5 evaluation" and then clarified by asking whether the district intended to "defend FAPE" based upon those evaluations (Tr. pp. 38-39). More specifically, the IHO asked for the district to clarify whether the evaluations conducted were sufficient, and the district's attorney declined to voice further clarification in the event that the response might be prejudicial to the district's already stated position (see Tr. pp. 39-45). After additional discussions concerning the interpretation of the Trumbull decision, the IHO set forth how he would apply that case and also declared his uncertainty concerning whether the district's evaluations were "defensible" in the context of the development of the student's school-age, CSE IEP (Tr. pp. 45-52). The IHO stated that "unless" the district was "willing to concede FAPE here," the district could not "make the argument that the [d]istrict ha[d] an opportunity to cure a defective evaluation and not sufficiently comprehensive evaluation" (Tr. p. 52). In addition, the IHO noted that he would not order the IEEs as interim relief, but as a final order (see Tr. pp. 52-55). According to the IHO, the district could not establish that it offered the student a FAPE "without a comprehensive evaluation" (Tr. p. 55). With respect to interim relief, the IHO explained that it would entail whatever the student should receive "while those evaluations" were completed—noting further that it would not be considered compensatory educational services because the IHO could not yet reach that issue (Tr. pp. 55-56).

The parent's attorney expressed concern about the IHO issuing a final order "without a directed verdict of no FAPE and compensatory education" as it would effectively "dismiss this [student's] claims" for the 2018-19 school year without having the chance to litigate them"—as well as the 2019-20 school year claims—and that those claims would then become barred by the statute of limitations (Tr. pp. 56-59). However, the IHO stated that he would not "uphold the statute of limitations," which would not begin to run until the parent had obtained an "adequate evaluation" (Tr. p. 59). The IHO explained that, in his view, the parent could not "know the nature

of [her] compensatory claim for the [2018-19 school year] until [she] ha[d] an adequate evaluation" (id.).

In light of these concerns, the parent's attorney requested that the IHO also order interim relief, such as increased SEIT hours, counseling services, speech-language services, and "compensatory hours for the school years at issue" (Tr. pp. 59-62). The parent's attorney also disagreed with dismissing the case and asserted that the impartial hearing should continue with the district's case while the IEEs of the student were completed (see Tr. p. 61). However, the IHO pointed out that the student could only receive pendency services and there was no basis for the increased services the parent's attorney requested (see Tr. pp. 61-62). Thereafter, the parties and the IHO continued to discuss the parameters of the IHO's final order as well as the parties' concerns with the plan outlined by the IHO for the impartial hearing moving forward; eventually, the parties and the IHO agreed that the parties would reach out to the IHO by email no later than April 23, 2021 to inform the IHO of what, if anything further, the parties agreed upon with regard to the case (see Tr. pp. 62-98). The IHO noted, however, that "if we have to come back to the table, we'll schedule something very soon" (Tr. p. 91).

Consistent with the IHO's directive at the impartial hearing, both parties contacted the IHO via emails dated April 16, 2021, to provide an updated status of the matter (see SRO Ex. C at pp. 1-2). The district's attorney advised that although the parties resolved the parent's request for a neuropsychological IEE at district expense, the district was "not authorized to agree or stipulate verbally on the record nor by email" as to the "remaining elements" of the case (id. at p. 1). As such, the district requested that, going forward, the parties should have the opportunity to "brief the issue" concerning the parent's request for additional IEEs, and after the completion of evaluations, the IHO hold a "substantive hearing on the merits of the case" (id.). Similarly, the parent's attorney informed the IHO that the parent remained entitled to a speech-language IEE, the agreed upon neuropsychological IEE would include the "projective testing" discussed at the impartial hearing, and that the parent specifically joined the district's request to "litigate the merits of the case following the completion of IEEs" or to possibly explore settlement (id. at p. 2). The parent's attorney also reiterated concerns expressed at the impartial hearing about the potential dismissal of the parent's case, the statute of limitations, and the additional delay to litigate these claims if the parent was forced to refile these claims (id.).

In an email of the same date, April 16, 2021, the IHO thanked the parties and indicated, "[m]ore will follow" (SRO Ex. C at p. 3).

2. Impartial Hearing Officer Decision

The IHO issued a 74-page final decision dated April 21, 2021. The first 59 pages of the decision consist primarily of a general statement of law regarding the IDEA. Thereafter, the IHO found that the district failed to sustain its burden to demonstrate that it "adequately evaluated the student"; as such, the IHO vacated the "IEP based on that evaluative vacuum" and ordered that the student "continue to receive the services to which the parties had previously agreed" as his pendency placement "until the district ha[d] effectuated a new agreed-upon-or-ordered IEP" (IHO Decision at pp. 61, 72). More specifically, the IHO determined that the district "never provided this student with a FAPE" given the "absence of an adequate initial evaluation for school-aged

services and perhaps as well for preschool services" (id. at p. 50). The IHO further characterized the district's failure to offer the student a FAPE as "substantial and extended" (id.).

According to the IHO, the district failed to adequately evaluate the student, which led to the district failing to "properly classify the student" and ultimately, "unable to frame any justification for an understanding of the student" (IHO Decision at p. 59). He also indicated that the parent further alleged that the district failed to develop an appropriate IEP and failed to offer an appropriate placement, noting parenthetically "that the district c[ould] not justify any of its recommendations in the absence of any adequate comprehensive clinical information" (id.). Next, the IHO indicated that the district did "not appear to challenge any of these claims and ha[d] not done so at the [impartial] hearing to date," but the district had agreed to fund the neuropsychological IEE of the student and upon "which to base a new review and a defensible classification" (id.). With respect to the parent's additional requested IEEs, however, the IHO noted the district's argument that any "entitlement to such an evaluation must be premised on a disagreement with a particular assessment" conducted by the district, and moreover, that the district had the "right to conduct them now, months if not years after they should have completed doing so" prior to the parent obtaining the IEEs (id. at pp. 59-60). According to the IHO, the district "failed to conduct any assessments," other than a "preschool psychoeducational assessment," and the parent had disagreed with that assessment (id.).

The IHO considered the district's argument to be "particularly stark" given the "few but sufficient facts already available" in the hearing record, which, according to the IHO, were undisputed (IHO Decision at p. 60). As one undisputed fact, the IHO identified the district's "sole assessment" of the student as a preschool psychoeducational assessment that had been conducted "in response to the family's concern that the student was having articulation problems" (id.). The IHO noted that the "evaluation contain[ed] no projective testing, no affective assessment at all, no awareness of any concerns other than speech, and no testing other than cognitive and performance measures" (id.). In addition, the IHO indicated that while the evaluation included a recommendation for a speech-language evaluation, none had been conducted (id.). The IHO then pointed out that "despite speech articulation being the sole presenting condition delineated in [the preschool psychological evaluation], the IEP that the district developed for the student as a Turning-5 initial school-aged program classifie[d] the student as [e]motionally [d]isturbed, without, the parties agree, having had access to any psychiatric or other clinical diagnostic assessment on which to premise such a classification" (id.).

In light of the foregoing, the IHO considered the district's attempt to "vigorously preclude" the parent from obtaining IEEs as "startling," especially when given what the IHO found to be the district's "abject failure to have undertaken even the most preliminary evaluative steps needs to reach the conclusions jumped to in the IEP it developed" (IHO Decision at p. 60). As noted by the IHO, the district's actions resulted in not only "turning its back on its failure adequately to have served this student for at least the past two years," but also demonstrated the district's "deeply misplaced understanding of the binding caselaw authority" in Trumbull (id. at pp. 60-61). On the other hand, the IHO also found the parent unwilling to yield any ground with regard to the student's "urgent and immediate need for a comprehensive assessment," as opposed to the parent's "seeming desire to maximize the magnitude of some eventual award against the district" (id. at p. 61).

Next, the IHO turned to the question of ordering the neuropsychological IEE as interim relief, as urged by both parties, and for the IHO to "continue to oversee this student's education" (IHO Decision at p. 61). The IHO declined to do so, and instead, ordered the "requisite evaluations and remand[ed] the matter upon receipt of those evaluations to the CSE for the necessary first step in determining whether a compensatory award [was] call for and, if so, what its contours must be—the development of a currently appropriate IEP" (id.).

Thus, having found that the district failed to demonstrate that it adequately evaluated the student, vacating the student's IEP, and continuing the student's pendency placement, the IHO ordered the district to fund the "comprehensive evaluation detailed" in the parent's due process complaint notice, which included the following: a neuropsychological evaluation, a speech-language evaluation, an auditory processing evaluation, a PT evaluation, an OT evaluation, an assistive technology evaluation, an observation by a Ph.D.-level expert in behavior, a vision processing evaluation, an assessment by an expert in remediation, and a private FBA and BIP (IHO Decision at pp. 61, 64 n.32). The IHO "dismiss[ed] without prejudice as not-yet-justiciable" the parent's claims and requests for compensatory educational services, noting that these claims were "simply unripe and impossible even to assert, much less define in scope or substance, in the absence of any adequate assessment" (id. at p. 61). The IHO also indicated that the "accrual date for the purposes of the Statute of Limitations shall not be before the district has had an opportunity to review and act on the IEE here ordered" (id.). Thereafter, the IHO discussed how Trumbull supported his conclusions regarding the parent's requested IEEs, and that, contrary to the parent's arguments, neither the parent's concerns about dismissing her compensatory education claims or her concerns regarding the statute of limitations altered the IHO's decision (id. at pp. 61-72).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by failing to allow for the completion of the IEEs before dismissing the parent's claims without prejudice. The parent also argues that ordering the IEEs as part of the final order and dismissing the parent's claims "was an abuse of discretion and error of law, as it deprived her of her due process rights." Next, the parent asserts that the IHO erred by denying her request for an interim order for IEEs and stating that he "would not order the IEEs as an interim order." According to the parent, the IEEs were necessary to inform the hearing record and to craft a compensatory educational services award for the district's failure to offer the student a FAPE; thus, the parent contends that the IHO's rationale that awaiting the results of the IEEs would effectively "'endrun'" the CSE process was error. The parent also asserts that the IHO unjustifiably dismissed her claims without a full and fair hearing on all of her claims and without the submission of any evidence, which denied the parent her due process rights. Relatedly, the parent contends that the IHO failed to consider all of the claims raised in the due process complaint notice, failed to address the parent's subpoena request, and failed to address the parent's amended due process complaint notice. According to the parent, the IHO's improper dismissal of her claims caused further delays in the student's receipt of necessary services and forces her to file a new due process complaint notice, which will further delay an adjudication on the merits.

The parent additionally argues that the IHO improperly shifted the burden of proof to the parent by determining that all claims except the parent's request for IEEs were not ripe. The parent also argues that the IHO improperly and sua sponte raised the affirmative defense of ripeness on the district's behalf. Further, the parent contends that the IHO erred in dismissing the due process

complaint notice without prejudice without addressing her request for compensatory educational services related to her 2018-19 school year claims. Specifically, the parent argues that the IHO's finding that the parent could bring her compensatory educational services claims when ripe, and then opining that the parent's claims would accrue once the IEEs were completed, did not adequately protect the parent's child find and compensatory education claims for the 2018-19 school year. Although the parent argues that the IHO's finding about accrual for the purposes of the statute of limitations should be deemed "law of the case," the parent notes that the IHO could not guarantee a new IHO would apply this ruling.[5] Similarly, the parent asserts that the IHO's finding that the district failed to offer the student a FAPE must also be deemed the "law of the case" and "res judicata." Moreover, the parent asserts that the SRO should now admit the parent's additional evidence submitted with the request for review (see generally SRO Exs. A-E).

The parent also argues that the IHO's dismissal of the due process complaint notice "effectively terminated" the student's pendency rights. In addition, the parent contends that the IHO's order within the decision to continue the student's pendency placement was ambiguous, and left open the question of whether the student would receive services through the summer.

Based upon the foregoing, the parent argues that the IHO's dismissal should be reversed, find that the district failed to offer the student a FAPE for the school years at issue, and remand the matter to the IHO for a hearing with regard to the relief.[6] Alternatively, the parent asks the undersigned SRO to remand the matter to the IHO to determine whether the district offered the

[5] The law of the case doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case'" (Perreca v. Gluck, 262 F. Supp. 2d 269, 272 [SDNY 2003], quoting Arizona v. California, 460 U.S. 605, 618 [1983]). "Administrative agencies are no more free to ignore the law of the case doctrine than are district courts" (Ankrah v. Gonzales, 2007 WL 2388743, at *7 [D. Conn. July 21, 2007]). The doctrine of the law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata'"]; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by an SRO would not be reopened during the proceeding once it was decided]). For the law of the case doctrine to be a bar, the issue must have been actually considered and decided by the higher court (see Ms. S. v. Regl. Sch. Unit. 72, 916 F.3d 41, 47 [1st Cir. 2019]). As discussed below, the IHO erred regarding the manner in which the hearing was conducted and his findings were made and the doctrine does not apply in this matter.

[6] The parent also argues that the IHO failed to make any determination with respect to the parent's section 504 claims. An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504. In any event, given the disposition of this matter, the IHO may address the parent's 504 claims upon remand.

student a FAPE and address any relief thereto. Finally, the parent requests an order that the district fund a psychiatric IEE, "as the IHO intended."

In an answer, the district argues that the IHO violated both parties' due process rights by failing to hold a full impartial hearing on the merits, noting that the district had no opportunity to present evidence regarding on the issue of FAPE and did not concede its burden of proof on this issue. Although not completely overlapping with the parent's position, the district also seeks to vacate the IHO's decision for somewhat different reasons and to remand the matter to the IHO for a full hearing on the merits, including those issues set forth in the parent's request for review. Because the parties agree for different reasons that remand to the IHO is necessary, the district asserts that there is no need to address the parent's request to submit additional evidence for consideration on appeal. In addition, the district contends that the IHO's determination that the district failed to offer the student a FAPE is not the law of the case, especially when the district had no opportunity to meet its burden of proof and the IHO did not receive any evidence into the hearing record.

As a cross-appeal, the district argues that the IHO erred in finding that the district failed to offer the student a FAPE, in ordering the student to continue to receive pendency placement services after the proceeding concluded until a new agreed-upon IEP was developed, and in finding that the parent was entitled to the full range of IEEs at district expense. Overall, the district seeks an order remanding the matter to the IHO for a full hearing on the merits.[7]

In an answer to the district's cross-appeal, the parent affirmatively agrees that a remand to the IHO is appropriate, but thereafter asserts arguments concerning the scope of the remand. More specifically, the parent argues that the IHO properly found that the district failed to offer the student a FAPE based on the district's failure to adequately evaluate the student. The parent contends that the district's failure to defend its evaluations of the student, together with the agreement to fund a neuropsychological IEE of the student, constitutes a concession that the district denied the student a FAPE, as reasoned by the IHO. Additionally, the parent argues that, absent sufficient evaluations, "no reasonable factfinder could conclude" that the district offered the student a FAPE. Consequently, the IHO's finding regarding FAPE is now the "'law of the case'" upon remand. Next, the parent argues that the IHO properly afforded the district with due process and the district failed to avail itself of that opportunity. Finally, the parent argues that the student's pendency placement services should have continued and the IHO was within his authority to order the continued provision of these services, the IHO properly ordered a comprehensive IEE of the student, and the district's cross-appeal fails to comply with practice regulations as it lacked citation to the hearing record transcript to support the assertion that it did not concede FAPE.

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

[7] The district does not object to or challenge that portion of the IHO's decision ordering the district to fund the parent's requested neuropsychological IEE; as such, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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]).[8]

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).

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

Having reviewed the parties' pleadings, the parent's appeal and the district's cross-appeal must be sustained to the extent indicated herein because the impartial hearing was improperly conducted and this matter must be remanded to the IHO for further proceedings.

[8] 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).

Initially, both parties argue that the IHO's failure to conduct a full hearing on the merits of the case violated due process, which, consistent with the requirements of federal and State regulations, set forth the procedures for conducting an impartial hearing and address the minimum due process requirements that shall be afforded to both parties (34 CFR 300.512; 8 NYCRR 200.5[j]). Among other rights, each party "shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses" (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][2]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]).[9, 10]

Consistent with the parties' arguments, a review of the hearing record reflects that neither party was given the opportunity to present either documentary or testimonial evidence (see Tr. pp. 1-98). The impartial hearing in this instance consisted of two dates, during which the parties' representatives and the IHO delved into discussion of the parent's IEE requests despite the fact that the parties had already reached an agreement with regard to the neuropsychological IEE and the parent had already significantly narrowed her request for interim relief to this one specific IEE (id.; see SRO Ex. A at pp. 9-10). Therefore, given that the hearing record contained no evidence, the IHO had no basis upon which to conclude that the district failed to offer the student a FAPE for the school years in question or that the parent was entitled to the IEEs awarded, other than the neuropsychological IEE already agreed to by the parties. Moreover, in an email sent to the IHO before the IHO issued the decision, both parties affirmatively expressed their positions concerning the need for continuation of the impartial hearing and their intentions to litigate the remaining issues presented (see SRO Ex. C at pp. 1-2). And while it appeared that the parties anticipated resuming the impartial hearing after updating the IHO as to the status of their continued negotiations, the IHO—who informed the parties that "[m]ore w[ould] follow" but without notice to either party—issued the decision and terminated the proceedings (id. at p. 3; see generally IHO Decision).

Even if the IHO had not failed to conduct the hearing in a manner consistent due process as described above, the IHO's reasoning to support the finding that the district failed to offer the student a FAPE was nevertheless flawed. Here, the IHO erred by construing the district's failure to respond to the parent's disagreement with the district evaluations of the student— apparently set forth for the first time in the due process complaint notice—and related request for IEEs, together

[9] However, State regulation did allow for extensions beyond 30 days but for no more than 60 days during the time that schools are closed pursuant to an Executive order issued by the Governor pursuant to a State of emergency for the COVID-19 crisis (8 NYCRR 200.5[j][5][i]).

[10] Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.).

with the district's agreement to fund the neuropsychological IEE of the student, as a concession that the district failed to sufficiently evaluate the student.

As previously noted, the discussion on the record at the impartial hearing in this matter focused initially, and almost solely, on the parent's request for IEEs set forth in the due process complaint notice (see Tr. pp. 1-98; SRO Ex. A at pp. 1, 9-10, 12). Notwithstanding the breadth of IEEs originally requested in the due process complaint notice, the parent narrowed the scope of her request at that time to a neuropsychological IEE on an interim basis, which the district agreed to fund at a rate not to exceed $5000.00 and which the parties contemplated would be completed during the impartial hearing (see Tr. pp. 1, 3-4). It was at this point, however, that the IHO sought to review the district's psychological evaluation of the student, completed in November 2019, and began to question and raise new issues sua sponte that were not raised in the due process complaint notice, to wit, whether the psychological evaluation included sufficient information upon which to base the student's eligibility category of emotional disturbance and if not, whether a psychiatric IEE was also required (see Tr. pp. 4-15). Notably, the parent did not request a psychiatric IEE of the student, and when asked at the impartial hearing whether the parent thought the student's eligibility category of emotional disturbance was plausible, the parent affirmatively stated that it was not out of the question, given that the parent had alleged an overall challenge to the sufficiency of the evaluative information (see Tr. pp. 10-11; SRO Ex. A at pp. 9-10). Notwithstanding those points and with no opportunity to present evidence, the IHO began to state strongly held personal viewpoints that without certain information in the November 2019 psychological evaluation of the student, such as "projective testing," the district could not meet its burden to establish that it sufficiently evaluated the student (see Tr. pp. 13-15). The hearing record is not clear with respect to which projective testing, in particular, that the IHO believed must be conducted before a student can be found eligible as a student with an emotional disturbance under IDEA and, notably, no such express requirement is found in the IDEA or State regulations regarding the evaluation or classification of students with disabilities.[11]

On the second day of the impartial hearing, the IHO continued to express his grave concerns about the district's ability to sustain its burden of proof, and specifically questioned the district's attorney about whether the district intended to "defend FAPE"—and the student's school-aged IEP—based upon the November 2019 psychological evaluation of the student (Tr. pp. 38-39). The district's attorney did not further clarify this point during the impartial hearing, but in the email sent to update the IHO on April 16, 2021, the district clearly stated its intention to litigate the "merits of case" and the parent's remaining issues, other than the neuropsychological IEE that the district agreed to fund (see Tr. pp. 39-42; SRO Ex. C at p. 1).

[11] The scant case law on the need for projective testing similarly indicates that projective is neither prohibited from consideration by a CSE nor required by IDEA and that there is a difference in opinion among subject matter experts as to the reliability of such testing (see e.g., Jack B. v. Council Rock Sch. Dist., 2008 WL 4489793, at *10 [E.D. Pa. Oct. 3, 2008] [rejecting the argument that an IEP team must use projective testing and noting that it is not required by the IDEA; R.C. v. Bd. of Educ. of the Wappingers Cent. Sch. Dist., 2016 WL 5477747, at *3 [S.D.N.Y. Sept. 29, 2016] [describing one expert who sought the use of projective testing among other the evaluative information considered for a student who was experiencing hallucinations], aff'd sub nom. R.C. on behalf of N.C. v. Bd. of Educ. of Wappingers Cent. Sch. Dist., 705 F. App'x 29 [2d Cir. 2017]).

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]).[12]

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]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (Trumbull, 975 F.3d at 170).

While there are claims that the district failed to adequately evaluate the student, and it shows that the parent initiated a claim for publicly funded IEEs in the September 2020 due process complaint notice, there is no evidence that the parent sought IEEs at public expense prior to their September 2020 complaint or how the district responded, if at all, to the parent's requests in the due process complaint notice other than to agree to the parent's request for a neuropsychological evaluation. Moreover, there is no legal precedent that stands for the proposition that a district automatically denies a student a FAPE if the district does not follow the IEE procedures outlined herein to defend an evaluation within the context of a parent seeking an IEE through a due process complaint notice. The IHO failed to appreciate the distinction between the parent's claim that the district failed to evaluate the student in all areas of suspected disability or to sufficiently evaluate the student with the parent's claims that she disagreed with the district's evaluations of the student and the attendant relief flowing therefrom. Therefore, a separate basis exists upon which to vacate

[12] 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]).

the IHO's finding that the district failed to offer the student a FAPE, other than the already described due process violation.

Next, as discussed in unrelated appeal from a decision issued by the same IHO on many of the same grounds relied on in this matter, the IHO's dismissal of the parent's due process complaint notice on ripeness grounds is not supported by precedent (see Application of a Student with a Disability, Appeal No. 21-104). Generally, claims are ripe once a cause of action accrues, and under the IDEA a cause of action accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint (Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). While the analysis of compensatory education may, at times, feel like speculative assessments of future educational needs, it has been held that, since the injury has been done, the issue is ripe for review (see Lester H. v. Gilhool, 916 F.2d 865, 868 [3d Cir. 1990]).

Here the IHO reached his determination that the parent's claims did not accrue because she would not or should not know about her claims—and more particularly, her claims for compensatory educational services—until the completion of the IEEs. However, the IHO made this determination without a hearing record, without an examination of the nature of the parent's claims, and despite that the parent had already articulated her claims in a due process complaint notice, thereby demonstrating her knowledge of such claims prior to completion of the IEEs (see SRO Ex. A at pp. 1-2, 6-9, 12-13). Given the "fact-specific inquiry" necessary for a determination regarding accrual (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]), the IHO's accrual finding was insufficiently supported by any evidence.

Furthermore the IDEA requires that a due process complaint notice must contain, at a minimum, (i) the name of the student; (ii) the address of the residence of the student; (iii) the name of the school the student is attending; (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and (v) a proposed resolution of the problem to the extent known and available to the party at the time (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). The nature of the problem—that is, the alleged violations of the IDEA—are very clearly stated as having occurred during the 2018-19, 2019-20, and 2020-21 school years and thus relate to past events.[13] It is only the parent's proposed relief—compensatory education and publicly funded IEEs—that was not fully known or articulated at the time the parent's due process complaint notice was filed, but as indicated above, the IDEA does not strictly require all relief be fully known at the time a due process complaint notice is filed. The IHO in this case erroneously conflated the alleged violations of the IDEA with the proposed relief when concluding that the parent's claims had not yet accrued or that they were not ripe/justiciable. While the completion of IEEs may help shed further light on appropriate relief that the IHO should grant after a full hearing, the parent set forth

[13] Examples of the alleged violations in the due process complaint notice included that the district violated the IDEA's child find requirement at the time of the student's third birthday, the district's evaluation of the student was inappropriate, the district should have reevaluated the student when the student transitioned from CPSE to the CSE, the district failed to comply with the IDEA's procedures when developing IEPs for the student, and the resulting IEPs were substantively inappropriate because they contained inadequate annual goals and services for the student (see, e.g., SRO Ex. A at pp. 1-2, 6-9).

detailed allegations of deficiencies in the evaluations within the due process complaint notice before completion of the IEEs (see SRO Ex. A at pp. 9-10). However, with regard to determining whether the district adequately evaluated the student, the relevant facts are those present at the time the evaluations were conducted in November 2019 (or at the time that the parent alleged further evaluations should have been conducted when the student was transitioning from preschool services to school-aged programming); however, the IHO's approach of delaying the impartial hearing proceedings, in which claims have been asserted, runs counter to the IDEA and the goal of "resolving the dispute without undue delay lest the disabled student's best interests be compromised by the passage of too much time" C.M.E. v. Shoreline Sch. Dist., 2020 WL 2850296, at *3 [W.D. Wash. June 2, 2020], quoting Fresno United Sch. Dist. v. K.U., 980 F. Supp. 2d 1160, 1176 [E.D. Cal., 2013]).[14]

While the IHO's reticence in calculating a compensatory education award without the IEEs is understandable, as they may offer insight into what position the student would have been in had the district complied with its obligations under the IDEA and provided the student with the special education services she should have received (Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]; see Newington, 546 F.3d at 123), the dismissal based upon the contention that the parent's claims were not "ripe" cannot be upheld under the circumstances of this case.

Furthermore, the IHO's attempts to manage his caseload are particularly understandable given the now well-documented problem in the district of "an unprecedented volume of special education due process complaints [that] is overwhelming the New York City due process system" (N.Y. Reg., July 29, 2020, at p. 15). However, absent a legally sound basis for dismissing the parent's complaint, the IHO was bound to follow State regulations and either schedule the matter for a hearing before the timelines expired or within an extended timeframe if one of the parties so requested and after considering the factors set forth in State regulation (see 8 NYCRR 200.5[j][5][ii]). Ultimately, the IHO's dismissal of claims that are ripe for review simply deflects the IHO's responsibility to the parties elsewhere and compounds the problems faced by the system.

To be sure, there is a tension between the requirements that an IHO issue a decision within short timeframes and the provision which allows a hearing officer to order IEEs to be performed during the impartial hearing given the time that may be required to complete evaluations (see 8 NYCRR 200.5[j][3][viii]; see also 8 NYCRR 200.5[g][2]), which in this instance was further complicated by delays in the appointment of the IHO, not to mention the timing of the hearing and scheduling an evaluation in the midst of the COVID-19 pandemic. Nevertheless, the IHO was still

[14] In most instances, a new evaluation conducted sometime in 2021 or later is not going to identify the student's educational performance, academic achievement, social, emotional, and behavioral characteristics, and physical characteristics as they existed at the time of the alleged violations. All of the evaluative information available and relevant to the 2018-19, 2019-20, and 2020-21 school years in particular should be entered into evidence, and the parties should look to other educational records, information, and testimony to argue facts related to past events. But factual determinations related to the student's performance in later school years would be of little relevance to determining facts in preceding school years and would seriously undermine the prospective analysis called for in the Second Circuit's holding in R.E. (R.E., 694 F.3d at 188). That said, once again more recent evaluations may help in fashioning appropriate equitable relief going forward if the evidence shows that relief is indeed warranted.

required to move the hearing forward and could have made accommodations for the completion of the IEEs by granting extensions to the timelines if requested by the parties.[15]

Based on the foregoing, the IHO erred by failing to receive evidence from the parties or reach the merits of the parent's claims. 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]). Here, the appropriate remedy for the IHO's improper dismissal of the parent's due process complaint notice is a remand to continue these proceedings.

VII. Conclusion

Having determined that the IHO failed to conduct the impartial hearing in a manner consistent with due process, erred in prematurely concluding that the district failed to offer the student a FAPE, erred in awarding additional IEEs without developing an evidentiary record, and erred in finding that the parent's claims that the district violated the IDEA had not accrued, the IHO's decision dismissing the due process complaint notice without prejudice must be reversed and this matter must be remanded to the IHO to allow the parties to present evidence and fully develop the hearing record on the merits of the parents claims. Because the parties agreed on the record that a neuropsychological IEE should be conducted at public expense and the district has not appealed that aspect of the IHO's decision and such an evaluation may be useful if compensatory education relief is warranted going forward, that determination should remain intact. Upon remand, the parties should be prepared to present arguments and any factual evidence relevant to the IDEA's procedures for granting an IEE at public expense before the IHO renders a determination on any of the parent's requests for an IEE at public expense. To the extent that the parent seeks the costs of the student's unilateral placement at Phyl's Academy, or other unilaterally obtained services during the school years discussed above, the parent bears the burden of establishing that such unilateral placement or services were appropriate.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[15] As alluded to above, the IEEs would likely be most useful to the IHO for the purpose of crafting a compensatory education award (see Butler v. District of Columbia, 275 F. Supp. 3d 1, 5 [D.D.C. 2017] ["A hearing officer who finds that he needs more information to make such an individualized assessment [of needs for compensatory education due to denial of FAPE] has at least two options. He can allow the parties to submit additional evidence to enable him to craft an appropriate compensatory education award . . . , or he can order the assessments needed to make the compensatory education determination"]). The parent should be very clear in this matter regarding the periods of time for which she is seeking compensatory education and the periods of time in which the student has been unilaterally placed.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 21, 2021, is modified by reversing that portion which found that the district failed to offer the student a FAPE, ordered the district to fund IEEs other than the neuropsychological IEE, and dismissed the claims in the parent's September 22, 2020 due process complaint notice without prejudice; and

IT IS FURTHER ORDERED that the matter is remanded to the same IHO to resume the impartial hearing and issue a determination on the parent's claims as set forth in her September 22, 2020 due process complaint notice.

Dated: **Albany, New York**
July 22, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER