The University of the State of New York

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

No. 21-187

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.

Brain Injury Rights Group, Ltd., attorneys for respondent, by Peter G. Albert, 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 publicly fund three independent educational evaluations (IEEs) of respondent's (the parent's) son. The parent cross-appeals from the IHO's dismissal of her remaining claims. The appeal must be sustained in part. The cross-appeal must be dismissed.

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

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student is not possible but is, in any event, unnecessary due to the limited nature of this appeal.[1] A CSE convened on May 26, 2020 and developed an IEP with

[1] When the IHO dismissed the matter without prejudice two exhibits had been admitted into the hearing record (IHO Decision at p. 7; see Tr. pp. 2, 24; Dist. Exs. 1; 2). As such, in addition to the two district exhibits and a transcription of the administrative hearing, the district provided the following documents to the Office of State Review as the administrative record on appeal: the parent's due process complaint notice, the IHO's final written decision, and notices of appearance by the district's representatives. In addition, the IHO's interim order on the sufficiency of the parent's

implementation dates of June 1, 2020 and June 2, 2020 (Dist. Ex. 2 at pp. 15, 19). The May 2020 CSE found the student eligible for special education and related services as a student with a speech or language impairment and recommended a 10-month school year consisting of integrated co-teaching (ICT) services in English Language Arts (ELA) and math with the related services of individual occupational therapy (OT) two times per week for 30 minutes per session, counseling once per week for 30 minutes in a group, and speech-language therapy two times per week for 30 minutes in a group (id. at p. 15). The May 2020 CSE further recommended an individual, daily, full-time paraprofessional with notations of "Health" and "ADHD" (id.). The May 2020 CSE also recommended testing accommodations and placement in a non-specialized district school (id. at pp. 17, 19).

A. Due Process Complaint Notice

In a due process complaint notice dated August 26, 2020, the parent asserted that the student had been denied a free appropriate public education (FAPE) due to the district "failing to implement the [s]tudent's educational program as established in the [s]tudent's last agreed upon Individualized Education Program" (Due Process Compl. Not. at p. 1).[2] The parent further alleged that the district violated section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §794[a]) "based on the [] [d]istrict's failure to provide the [s]tudent with a FAPE by unilaterally modifying the [s]tudent's IEP (id.).

The parent asserted that "[a]s of mid-March 2020," the district had "unilaterally, substantially, and materially altered the [s]tudent's 'status quo' educational program as it relate[d] to the [s]tudent's pendency rights" (id. at p. 1). Further, the parent contended that the district "substantially and materially altered the location of where the [s]tudent was to receive services" from a school classroom to the student's home and "substantially and materially altered the delivery" of the student's IEP services by "precluding the [s]tudent from receiving in-person services" (id. at p. 2). The parent alleged that these "substantial and material alterations" were made without notice to the parent, constitute an improper change in the student's program and placement, and by implication violated the student's right to pendency (id.).

Based on the district's alleged "failure… to provide a FAPE since mid-March 2020," the parent requested an "extensive independent evaluation of the [s]tudent to determine the need for compensatory services as well as any appropriate changes to the [s]tudent's educational program and placement" (Due Process Compl. Not. at pp. 2-3). Following the completion of the evaluation, the parent requested a CSE meeting to review the updated evaluation and to make any appropriate changes to the student's IEP (id. at p. 3). As relief, the parent requested an order from the IHO to implement the student's last agreed upon IEP by reopening the student's school or an order "allowing the [p]arent to self-cure the unilateral change in the [s]tudent's status quo educational program and placement," an interim order for the "[d]istrict to conduct an extensive independent evaluation of the [s]tudent to evaluate what, if any, changes need to be made to the [s]tudent's

---

due process complaint notice was not included with the certified record provided by the district. The interim order was subsequently requested and provided by the district.

[2] The August 26, 2020 due process complaint notice did not specify an IEP or school year at issue, referencing unilateral change in the student's placement beginning in "mid-March 2020" during the 2019-20 school year.

IEP," and an interim order finding that the district denied the student a FAPE and awarding appropriate compensatory services due to the denial of a FAPE (id.).

B. Facts Post-Dating the Due Process Complaint Notice and Impartial Hearing Officer Decision

During the hearing, the district submitted a document described as "an undated IHS insufficiency record" into evidence (Tr. p. 25; Dist. Ex. 1). The document itself indicates that it is a printout of "Case Details" for this proceeding (Dist. Ex. 1). The document reflected that on August 27, 2020, the district challenged the sufficiency of the parent's due process complaint notice on the ground that the name of the school the student was attending had been omitted (id.). The document further indicated that a resolution case manager was assigned on August 27, 2020, a notice of appearance by a district representative was filed on August 27, 2020, a motion to schedule was recorded on March 31, 2021, an IHO was appointed on June 21, 2021, and a hearing was scheduled for August 10, 2021 (id.).

The parties convened on August 10, 2021 for a one-day proceeding (Tr. pp. 1-28).[3] In an interim order dated August 10, 2021, the IHO determined that the district's sufficiency challenge to the parent's due process complaint notice was untimely and further that the parent's due process complaint notice was sufficient on its face (Interim IHO Decision at pp. 2-3; IHO Decision at p. 2; see Tr. p. 8). In a decision dated August 10, 2021, the IHO reiterated his finding on the sufficiency of the parents' due process complaint notice and stated that during "the hearing on the merits," the district asserted a new sufficiency challenge that the parent had not provided a description of the alleged problem (IHO Decision at p. 2). The IHO stated:

> to decide the merits of the parent's claim as a matter of law would require a finding that the change in methodology of provision constituted a substantive change in program - that there was some reason, for this particular student, to expect that remote instruction could not under any circumstances adequately deliver the IEP, given the lockdown. The family at hearing today acknowledged that they lack the clinical basis on which to mount such a case.

(IHO Decision at p. 3).

Next the IHO addressed the parent's request for "the district to fund a series of independent assessments" (IHO Decision at p. 3). After acknowledging that the parent did not disagree with any district evaluations, the IHO then construed—and asserted that the district agreed with him—that the parent's request was a "demand for an evaluation" consisting of a psychoeducational evaluation, an occupational therapy (OT) evaluation, and a speech-language evaluation (id.). The IHO then concluded that while the impartial hearing was pending, the district should have conducted its own evaluation the student at some point after the parent's due process complaint notice was filed, relying on to State regulation that require a CSE to conduct a reevaluation at parental request (id.; see 8 NYCRR 200.4[b][4]). The IHO then cited to State regulation on independent educational evaluations (IEEs) for the proposition that the parent was now entitled to

[3] Two district exhibits were admitted into evidence and no witness testimony was received (Tr. pp. 1-28).

IEEs at public expense in this circumstance (IHO Decision at pp. 3-4). Additionally, the IHO noted his own authority to order IEEs "to complete the record and allow for a determination of the merits or the crafting of a remedy" (id. at p. 4). The IHO then determined that the parent was entitled to IEEs, specifying a neuropsychological evaluation, an OT evaluation, and a speech-language evaluation (id.).

Turning to the remainder of the parent's claims, the IHO found "no further cognizable claim against the district" upon which relief could be granted (IHO Decision at p. 4). The IHO noted that although the delivery of instruction to the student was dramatically changed, the parent failed to assert that the student was adversely impacted as a consequence and further the parent did not "assert the capacity to demonstrate it" (id.). The IHO then determined that "to the degree that the [parent] believe[s] [she has] articulated a complaint on the merits against the district beyond their demand for IEEs, that complaint is here dismissed, without prejudice, subject to their review of the results of the evaluations here ordered" (id.).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred by denying its sufficiency challenge to the parent's due process complaint notice and further erred by granting the parent an independent neuropsychological evaluation, an independent OT evaluation, and an independent speech-language evaluation at public expense. The district argues that the parent did not disagree with a district evaluation and even if the district failed to evaluate the student, the parent is not entitled to an IEE at district expense. The district further asserts that the IHO erred by finding that the parent's allegation that the student's program and placement had been unilaterally changed constituted a disagreement with a district evaluation. The district also alleges that the IHO incorrectly cited his authority to order IEEs as a means of circumventing the parent's lack of disagreement with a district evaluation and further that the IHO's authority was limited to awarding an IEE as interim relief as part of a hearing, not as the entirety of relief.

The district next argues that the IHO erred by finding that the parent's due process complaint notice was sufficient and that the district's sufficiency challenge was untimely. The district alleges that the parent's due process complaint notice failed to identify the student's school and further that it filed a timely sufficiency challenge with the impartial hearing office because an IHO had not been appointed. The district argues that the failure to timely appoint an IHO did not result in a waiver of the district's right to file a sufficiency challenge and that the IHO erred by finding that the district was required to raise the sufficiency challenge within 15 days of the appointment of the IHO. The district further alleges that the parent acknowledged timely notice of the sufficiency challenge during the hearing but failed to amend the due process complaint notice.

The district objects to the IHO's dismissal of the parent's claims without prejudice and contends that the IHO should have dismissed the parent's due process complaint notice with prejudice. The district argues that because the IHO had incorrectly ordered IEEs and there was no other relief to order, the IHO reached a final adjudication on the merits and, accordingly, should have dismissed the parent's due process complaint notice with prejudice. Additionally, the district argues that the IHO incorrectly declined to decide the merits of the case, asserting that the parent's claims regarding the move to home instruction due to the pandemic consist of systemic allegations

related to all students with disabilities and such allegations are beyond the jurisdiction of an IHO. The district also asserts that the parent's claim that remote instruction constituted an improper change in placement had been rejected by several courts and that remote instruction comported with State guidance, and as such the parent's due process complaint notice should have been dismissed with prejudice. Next the district argues that the IHO acknowledged that the parent did not allege a denial of a FAPE as a result of remote instruction and further that the IHO did not find a denial of a FAPE to the student. As such, the IHO had no basis to award IEEs "for the parent to go on a fishing expedition to find a deprivation of FAPE." The district next argues that there was no purpose for awarding IEEs because there was no finding of a denial of FAPE for which an IEE may have been used to calculate an award of compensatory educational services. With regard to the parent's request for an order reopening the student's school, the district argues that the IHO lacks the authority to reopen the student's school and that the parent's claim is moot due to public schools having been reopened for the 2021-22 school year. As relief, the district requests that the IHO's interim order and decision be reversed and that the parent's due process complaint notice be dismissed with prejudice.

In an answer and cross-appeal, the parent argues that the IHO's award of three IEEs should be upheld. The parent cross-appeals from the IHO's decision to dismiss the parent's due process complaint notice without prejudice. As relief, the parent requests remand to the IHO to conduct an evidentiary hearing on the merits of the parent's claims.

In a reply and answer to the cross-appeal, the district asserts that the parent's cross-appeal should be dismissed for failing to timely file a notice of intention to cross-appeal.

In a reply to the district's answer to the parent's cross-appeal, the parent concedes that the notice of intention to cross-appeal was not timely filed. The parent alleges this was due to a clerical error and that the district failed to allege that it was prejudiced by the delay.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley,

458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

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

A. Preliminary Matters

1. Failure to Timely File an Answer with the Office of State Review

The hearing record reflects that the district's request for review was served on the parent on September 3, 2021. The parent's answer and cross-appeal were served on the district on September 20, 2021.[5] A copy of the parent's pleadings was not received by the Office of State Review until September 27, 2021. State regulation provides that the respondent may answer a request for review within five business days after the date of service of the request for review, and that an answer, along with any additional papers in support of an answer together with proof of service upon the petitioner shall be filed with the Office of State Review within two days after such service (8 NYCRR 279.5[a], [c]-[d]).

By letter dated September 24, 2021, the undersigned wrote to parent's counsel requesting a status update on this matter due to the Office of State Review having received a copy of the district's answer to the parent's cross-appeal on September 23, 2021, without having received a copy of the parent's answer and cross-appeal. With the issuance date of the decision approaching

---

[4] 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).

[5] The district alleged in its reply to the parent's answer and cross-appeal that the parent's notice of intention to cross-appeal was untimely but did not allege that the parent's answer and cross-appeal was also untimely.

and it appearing as though an answer and cross-appeal may have been served on the district but not filed within the statutory timeline, the parent's counsel was notified that acceptance of the answer and cross-appeal may be contingent upon a request for an extension of the regulatory timeline for file the answer and cross-appeal.

In correspondence dated September 24, 2021 and received by the Office of State Review on September 27, 2021, parent's counsel asserted that the parent's answer and cross-appeal had been filed electronically with the Office of State Review on September 20, 2021. Review of the system used for electronic document submission to the Office of State Review reflects that an answer and cross-appeal were received from the parent's attorney on September 23, 2021; however, the submitted pleading was related to a different student in a different proceeding. Parent's counsel has not, in the answer and cross-appeal or in the subsequent reply to the district's answer to the cross-appeal, acknowledged or responded to the direction in my September 24, 2021 letter indicating that acceptance of an untimely filed answer and cross-appeal was unlikely without a specific request for an extension of time to file the pleading.

In general, documents that do not comply with the provisions of sections 279.4, 279.5, and 279.6 may be rejected at the sole discretion of the SRO (8 NYCRR 279.8[a]). In this case, the hearing record reflects that the parent's answer and cross-appeal was filed electronically with the Office of State Review on September 27, 2021, seven days after service was complete. The parent's answer and cross-appeal was, therefore, filed late. While I am not permitted to unilaterally alter the 30-day timeline for issuing State-level review decisions, I am also not required to accept late filings whenever a party sees fit to do so. Considering that the parent in this case was given the opportunity to seek a timeline extension to correct the filing noncompliance and declined to do so, the answer and cross-appeal and any defenses raised therein, as well as the subsequent answer to the cross-appeal and the parent's reply to the answer to the cross-appeal will not be accepted late and are rejected (8 NYCRR 279.8[a]).[6]

2. Sufficiency of the Due Process Complaint Notice

The district alleges that the IHO erred by finding that the parent's due process complaint notice was sufficient and that the district's sufficiency challenge was untimely. The district argues that the parent's due process complaint notice failed to identify the student's school and further that it filed a timely sufficiency challenge with the impartial hearing office because an IHO had not been appointed. The IHO noted that the "[i]mpartial [h]earing [r]epresentation [o]ffice" immediately "logged a challenge to the sufficiency of the complaint" on August 27, 2020; however, the impartial hearing office failed to appoint an IHO until June 21, 2021, approximately ten months after the parent filed the due process complaint notice (IHO Decision at p. 2; see Dist. Ex. 1 at p. 1). The IHO noted that the sufficiency challenge was also not raised within 15 days of his appointment (IHO Decision at p. 2; Interim IHO Decision at p. 2). In his August 10, 2021 interim order—dated the same day as the final IHO decision—and in his decision, the IHO found

[6] As the district alleges and the parent agrees, the notice of intention to cross appeal was also served late upon the district in this matter. The district points out that there has been a pattern of noncompliance by the parent's attorney. While late service of the notice of intention to cross-appeal alone might not have warranted rejection of the answer with cross-appeal, I note that the parent has also failed to file the notice of intention to cross-appeal with the Office of State Review in violation of 8 NYCRR 279.5(c).

that the district's challenge was untimely and, also, that the parent's due process complaint notice was sufficient on its face (Interim IHO Decision at pp. 2-3; IHO Decision at p. 2).

The district argues that the failure to appoint an IHO did not result in a waiver of its right to file a sufficiency challenge and that the IHO erred by finding that the district was required to raise the sufficiency challenge within 15 days of the appointment of the IHO. The district further alleges that the parent acknowledged timely notice of the sufficiency challenge during the hearing but failed to amend the due process complaint notice.

State regulations provide that a parent or district may file a due process complaint notice "with respect to any matter relating to the identification, evaluation or educational placement of a student with 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][7][A][ii]; 34 CFR 300.508[b]). Specifically, 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 (id.). Further, a due process complaint notice is insufficient if it does not meet the requirements of "paragraph (1) of this subdivision" (8 NYCRR 200.5[i][3]).

The due process complaint notice in this matter omitted the name of the student's school (Due Process Compl. Not. at p. 1).

As noted above, the district submitted a document into the hearing record that was described as "an undated IHS insufficiency record" that, according to the district, proves that that on August 27, 2020, the district challenged the sufficiency of the parent's due process complaint notice on the ground that the name of the school the student was attending had been omitted (Dist. Ex. 1 at p. 1; Tr. p. 25). However, no other evidence regarding the district's sufficiency challenge was submitted into evidence (see Tr. pp. 1-28; Dist. Exs. 1-2).

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 notice 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]).

The district correctly noted that the State regulations do not provide that an IHO must be notified within 15 days of appointment. However, this does not end the inquiry. Here, although the "Case Details" document submitted by the district suggests that a sufficiency challenge may

have been made on August 27, 2020, within 15 days of the submission of the due process complaint notice, the evidence does not demonstrate that the parent and the IHO were notified in writing of the sufficiency challenge within the statutory timeline (see Dist. Ex. 1). The document submitted into evidence does not appear to be the notice of insufficiency itself, but merely a tracking screen from a computer system. Notably, the district did not offer the notice of insufficiency itself that was sent to the parent into the hearing record. With regard to the district's assertion that the parent acknowledged timely notice of the sufficiency challenge, the hearing transcript reflects that the parent's attorney did not dispute that a sufficiency challenge had been made (Tr. p. 5). However, the parent's attorney did not concede that written notice of a timely sufficiency challenge to the parent's due process complaint notice had been received (id.). While the district's argument that the IHO's sufficiency analysis was flawed may have some merit, a review of the evidence in the hearing record supports the IHO's ultimate determination that the parent's due process complaint notice must be deemed sufficient. If a party cannot show that it complied with the procedures for asserting s sufficiency challenge, the regulation mandates that the parent's due process complaint notice be "deemed" sufficient (8 NYCRR 200.5[i][3]).

B. Independent Educational Evaluations and District Reevaluation

Turning to the district's appeal from the IHO's award of IEEs, the district asserts several reasons for why it was error for the IHO to order an independent neuropsychological evaluation, an independent OT evaluation, and an independent speech-language evaluation at public expense. The district first alleges that in order to obtain an IEE at public expense, the parent was required to disagree with a district evaluation. The district also alleges that the IHO improperly construed the parent's allegation in the due process complaint notice—that the student's program and placement had been unilaterally changed—as a disagreement with a district evaluation.

In his decision, the IHO noted that the parent did not disagree with any district evaluations but then deemed the parent's request for an IEE as a "demand for an evaluation" to which the district was required to respond by conducting a district reevaluation of the student (IHO Decision at p. 3; Tr. p. 20). The district argues that even if the IHO correctly found the district failed to timely reevaluate the student after a request made by the parent in the due process complaint notice, the parent has still not disagreed with a district evaluation and, accordingly, awarding an IEE was not an appropriate form of relief.

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]).[7]

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).[8] 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" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

In this instance, the district correctly asserts that the parent did not disagree with a district evaluation in accordance with the procedures governing public funding of independent evaluations. A full review of the parent's due process complaint notice shows that the parent did not include any allegations related to an evaluation conducted by the district (see Due Process Compl. Not.). Therefore, because the parents did not express any disagreement with an evaluation conducted by the district, the parent was not entitled to an IEE at public expense (see Trumbull, 975 F.3d at 163 [2d Cir. 2020] ["a parent's right to an IEE at public expense is triggered when the parent 'disagrees with an evaluation obtained by the public agency'"]; G.J. v. Muscogee Cty. Sch. Dist., 668 F.3d 1258, 1266 [11th Cir. 2012] [upholding a district court that correctly determined that the statutory provisions for a publicly funded independent educational evaluation never "kicked in" because no reevaluation ever occurred]; P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 740 [3d Cir. 2009] [holding that because the parents were not challenging a district evaluation, the district was not responsible for reimbursement]).

Additionally, to the extent that the IHO noted during the hearing that the shift to remote instruct was "a credible reason for disagreeing with the student's current evaluation" (Tr. p. 17), the Second Circuit has made it clear a parent must disagree with a district evaluation as of the time it is conducted, and that subsequent changes in circumstances will not support a disagreement with

---

[7] 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]).

[8] As the parent's request for an IEE was first made in the due process complaint notice, it would be inefficient to require the district to initiate a separate due process hearing to defend its evaluation of the student; nevertheless, as the parent did not disagree with a district evaluation, the district was not required to initiate due process (see R.L., 363 F. Supp. 2d at 235 [finding that the parent was not entitled to an IEE and holding that the district was not required to take the parents to due process over the issue]).

an evaluation (Trumbull, 975 F.3d at 171 [2d Cir. 2020] citing N.D.S. by and Through de Campos Salles v. Acad. for Sci. and Agric. Charter Sch., 2018 WL 6201725, at *2 [D. Minn. Nov. 28, 2018] ["'Informing a school that, subsequent to an evaluation, a child's condition has changed is not the same thing as disagreeing with the evaluation'"]). Under those circumstances, the appropriate course of action "would be more frequent evaluations—and the parents are entitled to request one per year—not an IEE at public expense. If the parent disagrees with those evaluations, then they would be free to request an IEE at public expense with which to counter" (Trumbull, 975 F.3d at 171).

A request for an evaluation or reevaluation conducted by the district was not among the relief requested by the parent.[9] To the contrary, the parent explicitly requested "an extensive independent evaluation" (Due Process Compl. Not. at pp. 2, 3). Further, the due process complaint notice does not contain any challenges to the appropriateness of the student's current IEP and does not contain any allegations related to the evaluative information relied on by the CSE in developing the student's current IEP (see Due Process Compl. Not.). Rather, the parent alleged that remote instruction constituted a failure to implement the then-current IEP, an allegation that the IHO determined could not be proven (IHO Decision at p. 3; Due Process Compl. Not. at p. 2; see Tr. pp. 10-17). As such, the IHO erred by finding that the district had violated 8 NYCRR200.4(b)(4) because it had failed to conduct its own reevaluation of the student during the time period after the due process complaint was filed and before the impartial hearing convened (IHO Decision at p. 3).

Turning next to the IHO's statement that an IHO may order an IEE "in order to complete the record and allow for a determination of the merits or the crafting of a remedy" (IHO Decision at p. 4), 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]).

In a discussion on the record the IHO asked the parent's attorney if he "want[ed] to litigate that case before you get your IEEs or do you want me to order the IEEs and dismiss the complaint for now, and then you refile when you have the actual clinical basis for arguing… whether there was, in fact, failure to make progress" (Tr. pp. 10-11). The parent's attorney stated that having the

---

[9] The parent's due process complaint notice includes a request for an order for the "[d]istrict to conduct an extensive independent evaluation of the [s]tudent to evaluate what, if any, changes need to be made to the [s]tudent's IEP" (Due Process Compl. Not. at p. 3). To the extent that the IHO relied on this phrasing to construe a demand for a district reevaluation, this was error. The hearing transcript clearly reflects that the parent sought IEEs, and further by definition an independent educational evaluation is "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]; Tr. pp. 6-7).

IEEs completed "would indicate after we received those results what the next appropriate step would be. That may be pursuing the case by refiling and subsequently challenging any recommendations, or it may not" (Tr. p. 11). The IHO then stated "it seems to me it terms [sic] entirely on one's capacity to determine whether or not the student was able to benefit from remote instruction, and that the evaluations that you're seeking would be pretty much the only way to find that out" (Tr. p. 12).

In his decision, the IHO cited the regulation noted above as an apparent catch-all rationale for awarding three IEEs stating that an IHO could order "sua sponte, the provision of an independent evaluation at district expense in order to complete the record and allow for a determination of the merits or the crafting of a remedy" (IHO Decision at p. 4). However, none of those legitimate bases for awarding IEEs apply to this matter, which was clearly borne out in the IHO's finding that the due process complaint notice "provide[d] no further cognizable claim against the district… beyond their demand for IEEs" (id.; see 8 NYCRR 200.5[g][2]; [j][3][viii] [referring to 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).

The IHO correctly noted that the parent's due process complaint notice failed to claim that the student was adversely impacted by remote instruction stating, "[she] raise[d] the specter of that possibility but neither do[es] [she] assert the capacity to demonstrate it or even allege that it took place" (IHO Decision at p. 4). As indicated above, 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 any 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, which was precisely the purpose of the IEEs according to the discussion on the record detailed above (Tr. pp. 10-12). Given that the ultimate relief sought in the matter was "an extensive independent evaluation" and that, the IHO ordered three IEES without holding 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]).

Having addressed the IHO's order for an evaluation, the final issue remaining is whether the IHO erred in dismissing the parent's due process complaint notice "without prejudice." The IHO determined that "to the degree that the family believe they have articulated a complaint on the merits against the district beyond their demand for IEEs, that complaint is here dismissed, without prejudice, subject to their review of the results of the evaluations here ordered" (IHO Decision at p. 4). As the award of IEEs is being reversed, the dismissal "without prejudice" is no longer subject to review of the ordered evaluations. Accordingly, as I do not find fault with the IHO's analysis that the due process complaint notice did not present any cognizable claims against the district, other than the claim for IEEs (IHO Decision at p. 4), which was not proper for the reasons set forth above, there is no longer any basis for the directive that the dismissal is "without prejudice." Accordingly, as requested by the district, the IHO's order will be modified to remove that language.

VII. Conclusion

Based on the foregoing, the IHO erred in ordering the district to directly fund an independent neuropsychological evaluation, an OT evaluation, and a speech-language evaluation.

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 TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 10, 2021, is modified by reversing those portions which ordered the district to directly fund three IEEs and by striking the words "without prejudice" from the IHO's order dismissing the parent's due process complaint notice.

Dated: **Albany, New York**
October 1, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER