The University of the State of New York

The State Education Department
State Review Officer
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No. 21-241

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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Sarah Kahn, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Daniel Levin, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her requests for publicly funded independent educational evaluations (IEEs) of her son and for compensatory educational services to remedy respondent's (the district's) failure to provide an appropriate program and services to her son for the period following closure of school buildings in March 2020. The 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

The parent's allegations in this matter surround the school building closures that took place in March 2020 as a result of efforts to combat the spread of the COVID-19 pandemic.

At the time of the February 26, 2020 CSE meeting, the student was 14 years old (IHO Ex. I at p. 1). The February 2020 CSE developed an IEP for the student with a projected implementation date of February 26, 2020 (id. at pp. 1, 20-22, 26). The February 2020 CSE found the student eligible for special education as a student with autism and recommended that the

student attend a 12-month school year program consisting of a 6:1+1 special class placement for English language arts (ELA), math, sciences, social studies, and career development and adapted physical education at a district specialized school (id. at pp. 1, 20-22, 26-27).[1] The CSE also recommended that the student receive the related services on a weekly basis consisting of two 30-minute sessions of individual occupational therapy (OT) in a separate location, two 30-minute sessions of OT in a group of two in the special education classroom, two 30-minute sessions of individual physical therapy (PT) in a separate location, three 30-minute sessions of individual speech-language therapy in the special education classroom, one 30-minute sessions of speech-language therapy in a group of two in the special education classroom, two 30-minute sessions of individual speech-language therapy in a separate location "outside school/after school hours," as well as school nurse services provided daily in the nurse's office, school nurse services provided on an as needed basis for class trips, three 50-minute sessions per year of parent counseling and training in a group at the school building, and special transportation (id. at pp. 21, 25, 27). The February 2020 CSE further recommended assistive technology consisting of a dynamic display speech generating device (SGD) for daily use at school and at home, supports for school personnel consisting of staff training for the use of an Epi-Pen, a coordinated set of transition activities, and that the student be alternately assessed (id. at pp. 9-10, 21-22, 23-24, 28).

Prior to March 2020, the student received the program and services set forth in his IEP in a district public school (see Tr. pp. 194-95). At some point after school buildings closed in March 2020 due to the COIVD-19 pandemic, the student began to receive remote instruction and services via live video on internet platforms utilized by the district (Tr. pp. 198-200, 202-03). The district developed remote learning plan for the student, dated April 22, 2020, that indicated the student was to receive one 20-minute session per week of individual speech-language therapy via "phone consultation," one 30-minute session per week of OT via "tele therapy," and one 30-minute session per week of PT via "tele therapy" (IHO Ex. II).

A. Due Process Complaint Notice

In a due process complaint notice dated August 19, 2020, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) by "failing to implement the [s]tudent's educational program as established in the [s]tudent's last agreed upon [IEP]" (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.).

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The parent's due process complaint notice was not admitted into evidence at the impartial hearing. Two copies of the due process complaint notice were included with the hearing record and were both dated August 19, 2020. However, one copy was submitted to the district via email on August 19, 2020 and did not include the name of the student's school. The second copy also dated August 19, 2020, reflects that it was submitted to the district on August 31, 2020, and included the name of the student's school. In all other respects, the documents are identical. The district's certification of the impartial hearing record refers to these documents as impartial hearing request and corrected impartial hearing request.

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" (Due Process Compl. Not. at pp. 1-2). In particular, 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, constituted an improper change in the student's program and placement, and by implication violated the student's right to pendency (id.).

After noting that the district's federal and State obligations to continue to provide students with a FAPE during the COVID-19 pandemic—while allowing for flexibility during this transition of services—had not been waived or absolved, the parent alleged that the district violated the student's pendency rights and, as a result, she sought "immediate relief" (Due Process Compl. Not. at p. 2). 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" (id. 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 requiring the district to implement the student's last agreed upon IEP by reopening the student's school or, alternatively, 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 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. Impartial Hearing Officer Decision

An IHO was appointed to preside over the impartial hearing on June 17, 2021 (IHO Index of Record 1 at p. 1).[3] Prehearing conferences were held on July 6, 2021, July 14, 2021, and July 29, 2021 (Tr. pp. 1-74). On August 16, 2021, a hearing date was held at which the parent began presenting evidence in support of her request for district funding of IEEs (Tr. pp. 75-118). By motion to dismiss dated September 10, 2021, the district alleged that the IHO lacked subject matter jurisdiction to order the district to reopen the student's school, that the parent's request to reopen the student's school was moot, that the due process complaint notice failed to state a claim upon which relief could be granted, that the parent's request for interim IEEs could not be granted as a matter of law, and that the IHO lacked the authority to award attorney's fees (Dist. Mot. to Dismiss

[3] The IHO included an "Index of Record" annexed to her decision which lists 17 items and includes each exhibit admitted into evidence and each transcript from the administrative hearing (IHO Decision at p. 19). As part of the administrative record on appeal, the district has grouped five items from the Index of Record together as "Additional Documents in Record by Impartial Hearing Officer," which include the IHO's appointment notice, the district's response to the parent's due process complaint notice, the IHO's notice of prehearing conference, email correspondence regarding the parent's closing brief, and compliance date entries. To the extent it is necessary to cite to any of these documents in this decision, the document will be referenced as IHO Index of Record with the corresponding number from the IHO's list (e.g. IHO Index of Record 1).

at pp. 2, 5, 7, 9, 11).[4] At a September 17, 2021 hearing date, the parties and the IHO discussed the district's motion and the issues to be addressed during the remainder of the impartial hearing (Tr. pp. 119-62).

In an interim decision dated September 20, 2021, the IHO denied the district's motion and indicated that the issues to be decided at the impartial hearing that were "framed" during the prehearing conferences (Interim IHO Decision at pp. 1-2).[5] Specifically, the IHO determined that the issues before her were whether the district denied the student a FAPE from the implementation date of the February 26, 2020 IEP to "its end date, by delivering remote services inappropriately for [the] [s]tudent's needs" and, if so, to what compensatory education services the student was entitled (id. at p. 2). The IHO further indicated that the parent's submission of the April 2020 remote learning plan during the prehearing conference "provided definiteness to a material question of fact" relating to the inappropriateness of the form of remote delivery of services for the student (id. at p. 1). The IHO also indicated that, at a prehearing conference, the parent's request for IEEs was limited to the following: neuropsychological, OT, PT, and speech-language evaluations, which the IHO characterized as a request for "final relief[] to which [the district] had stated it had no objections" (id. at p. 2).[6]

The impartial hearing continued on September 23, 2021 and concluded on October 6, 2021 (Tr. pp. 163-222).

In a decision dated November 5, 2021, the IHO determined that the district did not deny the student a FAPE and denied the parent's requests for IEEs and compensatory education (IHO Decision at pp. 15-17). The IHO noted that the parent had not challenged the appropriateness of the February 2020 IEP, and that her "inquiry must then be whether the virtual method of learning and services offered were appropriate for the [s]tudent" (id. at pp. 4, 10, 13, 16). The IHO found that "phone delivery" of speech-language services was an option for students without internet access but that, according to the parent's testimony, the student accessed the virtual classroom on internet platforms utilized by the district and not by telephone (id. at p. 13).[7]

Before turning to the parent's specific allegations regarding the appropriateness of remote services for the student, the IHO noted that, contrary to the parent's position, a district court had

[4] The district's motion to dismiss is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see Dist. Mot. to Dismiss at pp. 1-11).

[5] The IHO's interim and final decisions are not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-19; Interim IHO Decision at pp. 1-3).

[6] The hearing record reflects that the parent sought an independent psychoeducational evaluation rather than a neuropsychological evaluation (Tr. pp. 13, 19, 44, 103-06).

[7] The IHO found that the issue for the impartial hearing set forth her the interim decision had been based on the district's alleged inappropriate provision of remote speech-language therapy via telephone as referenced on the April 2020 remote learning plan but that, given the parent's testimony, the issue was "misstated" and, instead, the parent's contention was that remote instruction in any form was inappropriate for the student (IHO Decision at pp. 3-4; see Interim IHO Decision at pp. 1-2).

found that a change in the delivery of special education services to remote during the COVID-19 pandemic was not a change in placement and that "online or virtual learning would be considered an alternate mode of instructional delivery" (IHO Decision at pp. 13, 16). With regard to the parent's allegation that the student's self-stimulatory behavior increased during school closings, the IHO found that the student had exhibited an increase in this behavior prior to school closing, noting that according to the February 2020 IEP, the student periodically got up from his chair to look for the preferred item of string and that this behavior had increased in school and the student's instructors were trying to decrease the behavior by teaching the student to "first work then you get your preferred item" (id. at pp. 8-9, 14; see IHO Ex. I at p. 5).[8] The IHO further found that the February 2020 IEP detailed the student's limited attention span and difficulty focusing on tasks and that the student's difficulties with the virtual classroom reported by the parent were consistent with the difficulties the student experienced in the actual classroom prior to school closing (IHO Decision at pp. 6-8, 14). The IHO also noted that the February 2020 IEP reflected that the student enjoyed watching television, used his SGD when he wished, responded to a digital display board in the classroom, and did not often interact with his peers (id. at pp. 14-15). The IHO further considered the parent's testimony that the student recognized classmates on the virtual classroom and would smile when he saw them (id. at p. 15). The IHO determined that the parent's testimony described conditions the student had to adjust to or transition through, which in and of themselves were "experiences of learning activities of daily living," and that the parent's testimony did not demonstrate that remote learning was inappropriate for the student (id.). Concerning the student's lack of home use of his SGD, the IHO found that the student had been taught to raise his hand and indicate his needs in other ways and choosing "one over the other in the home environment [wa]s not an explanation of regression" (id.). The IHO further found that the student's choice to communicate in other ways did not establish the inappropriateness of remote learning (id.).

Next the IHO addressed the parent's other claims in the due process complaint notice and found that they were without merit (IHO Decision at p. 16). Generally, the IHO found that, beyond alleging that the closure of schools and provision of remote instruction during the pandemic "worked a change in pendency," the parent's due process complaint notice did not set forth any other claims directed at the appropriateness of the IEP or the evaluative data relied upon by the CSE or alleging that the student was "adversely impacted by remote instruction" (id.). The IHO found that the evidence in the hearing record did not support a finding the student was denied a FAPE (id.). The IHO also noted that she lacked jurisdiction to order the reopening of schools and that the parent had not pursued a "self cure" remedy (id.). With regard to the parent's request for IEEs, the IHO determined that there was no basis for awarding IEEs as she had found the district had offered the student a FAPE (id. at pp. 16-17).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in failing to find that the student was denied a FAPE during the 2019-20 and 2020-21 school years. The parent further alleges that the district agreed to provide four IEEs during the impartial hearing and the IHO erred in failing to award them. The parent also contends that the IHO erred in failing to award the student

[8] In a section on adaptive behavior in the February 2020 IEP, it was noted that the student's behavior of getting up from his chair to run to the teacher's desk or open a cabinet to locate string did not happen frequently (IHO Ex. I at p. 4).

compensatory educational services. The parent requests that the IHO's decision be reversed, and the parent's requested relief be awarded, or in the alternative, that the matter be remanded for a "full factual investigation and presentation" (Req. for Rev. at p. 2).[9]

Specifically, with regard to the allegation of a denial of a FAPE, the parent argues that. because the district did not present any documentary evidence or witnesses, it effectively conceded that the student had been denied a FAPE, and that the IHO "incredulously" found in favor of the district "and made numerous baseless claims, misinterpretations, and mischaracterizations of both the record and the law" (Req. for Rev. ¶ 13). The parent asserts that the IHO failed to find that the district's "gross procedural violations" rose to the level of a denial of a FAPE and further erred in failing to find that the district's offer of speech-language therapy delivered via telephone was a denial of a FAPE to the student. Next, the parent contends that the IHO erred in finding that the change in delivery of the student's IEP services to remote learning was not a change in placement.

The parent further alleges that the IHO erroneously mischaracterized her due process complaint notice and erred in "determining that certain claims were not raised" in the due process complaint notice (Req. for Rev. ¶ 20). The parent asserts that the due process complaint notice requested compensatory relief and that the IHO erroneously found that the parent failed to challenge the appropriateness of "the Remote IEP or the underlying evaluative data, and misstates that [the p]arent did not allege that [the student] was adversely impacted by remote instruction" (id. ¶¶ 20, 21). Next, the parent contends that the IHO failed to properly conduct the impartial hearing allowing the district to prolong and delay the proceedings. The parent asserts that the IHO "demonstrated a profound misunderstanding of these proceedings, going back and forth on issues, giving contrary and conflicting Orders, and changing the nature of the hearing mid-way through the proceedings" (id. ¶ 23). The parent also argues that the IHO improperly claimed that the parent's attorney asked the parent's witnesses leading questions and prejudiced the parent by claiming that the parent's attorney "elicited this evidence forcefully" (id. ¶ 23).

With regard to IEEs, the parent argues that the IHO initially granted the parent's request for interim relief—to which the parent alleges the district consented—and then the IHO changed her mind and determined that the IEEs would be final relief. The parent further asserts that the IHO wrongfully limited the scope of the hearing to the time period from March 2020 through

[9] In a footnote the parent asserts that the IHO failed to mark for identification and admit into evidence "most of" the parent's exhibits, although they had been timely disclosed (Req. for Rev. ¶ 2 n.3 & ¶ 24). During the impartial hearing, the IHO admitted three parent exhibits into evidence after asking the parent's attorneys if they wished to move their exhibits into evidence (Tr. pp. 112-13; see Parent Exs. A-C). A review of the hearing transcript reflects that the parent's attorneys did not move the student's February 2020 IEP and April 2020 remote learning plan into evidence. The IHO's decision indicates that those documents were submitted during a prehearing conference and were subsequently admitted into evidence by the IHO (IHO Decision at p. 5; see IHO Exs. I; II). No other documents were offered into evidence and, accordingly, the parent's claim that the IHO failed to admit most of her exhibits is not supported by the hearing record.. The parent also indicates that her proposed hearing exhibits were proffered with the request for review for consideration as additional evidence (Req. for Rev. ¶ 24; see generally 8 NYCRR 279.10[b]). However, the Office of State Review did not receive any such documents with the parent's submissions initiating this appeal. Based on the foregoing, no additional evidence has been considered on appeal.

August 2020. The parent also contends that the IHO erred in failing to award all of her requested relief.

In an answer, the district responds to the parent's claims with general denials and requests that the parent's request for review be dismissed in its entirety with prejudice.

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]).[10]

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. Jurisdiction, Scope and Conduct of the Impartial Hearing

The parent's claims on appeal are largely focused on allegations that the IHO improperly limited the scope of the impartial hearing and made findings in her final decision that were inconsistent with rulings that she made during the course of the impartial hearing. The transcript reveals that most of the proceedings were devoted to discussions between the parties and the IHO

[10] 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).

and to argument over the issues that remained to be decided. Although the parent's description of the discussions on the record are accurate relative to some exchanges where issues were redefined during the course of the hearing, overall, the hearing record reflects that the IHO engaged with the parties throughout the proceedings and that she attempted to communicate her thoughts and solicit the parties' positions on the matter before her (Tr. pp. 8-38, 41-58, 66, 69-70, 73, 77-95, 98-99, 120-61, 219). The parent has not alleged that she was prevented from presenting a case or otherwise denied due process, rather the parent disagrees with the IHO's adverse findings (Req. for Rev. ¶¶ 22-26).

While the IHO's view of the focus of the impartial hearing may have shifted—i.e., as related to import of the remote learning plan's reference to delivery of speech-language therapy via telephone—ultimately, a review of the parent's due process complaint notice reveals that the IHO's conclusions regarding the scope of the impartial haring set forth in her final decision were correct. In its answer, the district correctly asserts that the parent's allegations in the due process complaint notice were very similar to those alleged in matters involving different students, which were discussed in recent decisions by State review officers (see Application of a Student with a Disability, Appeal No. 21-110; Application of the Dep't of Educ., Appeal No. 21-188; Application of the Dep't of Educ., Appeal No. 21-187). In all of these matters, the parents' allegations surrounded the school closures that took place as a result of the COVID-19 pandemic. Relevant to such circumstances is the decision of the District Court of the Southern District of New York in J.T. v. de Blasio, which, as it happens involved plaintiffs represented by the same attorneys in the present matters (500 F. Supp. 2d at 145). The Court in J.T. described in detail the March 13, 2020 closure of schools in New York City, and found the actions taken by the district to deliver services to students with disabilities during the closure through remote delivery to be consistent with federal and State guidance (id. at 181-84).

Here, to the extent that the parent took issue with the executive decision to close schools or the district's actions to deliver instruction and services to students with disabilities remotely during the closure, those allegations are systemic in nature, and no provision of the IDEA or the Education Law confers jurisdiction upon a state or local educational agency to sit in review of alleged systemic violations (see Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has "consistently distinguished . . . systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators"], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091). Thus, neither the IHO, nor I for that matter, have plenary authority to pass judgment on the Governor's or district policies affecting all students. Even if I possessed such authority, courts have held that certain summary administrative actions that have the effect of limiting the availability of protections otherwise afforded by law under ordinary circumstances may be justified as part of the government's response to emergency situations (see, e.g., Hernandez v. Grisham, 508 F. Supp. 3d 893, 979 [D.N.M. 2020]), so it is far from clear that the parent would prevail with that argument in the appropriate forum anyway.

In addition, in describing her allegations, the parent referenced concepts such as "status quo" and pendency rights (Due Process Compl. Not. at pp. 1-3). To the extent the due process complaint notice alleged a violation of the student's pendency placement, such an allegation was premature insofar as the student was not entitled to a pendency placement prior to the parent's

filing of the due process complaint notice in August 2020 (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]). That is, the Governor's March 2020 executive order closing schools in the State is not the event that would trigger the student's right to a pendency placement under the IDEA, and it was only the parent's filing of a due process complaint notice that gave rise to the student's rights under stay-put. The parent also requested that an IHO issue an order requiring the district to implement the student's last-agreed upon IEP by reopening the student's school or allowing the parent to "self-cure the unilateral change in the Student's status quo" (Due Process Compl. Not. at p. 3). However, an IHO would not have sufficient authority to countermand Governor Cuomo's executive orders addressing the COVID-19 pandemic response or to direct the district to open an entire school and, in any event, district schools have since re-opened and such request is now moot (see J.T., 500 F. Supp. 3d at 190).[11]

The August 2020 due process complaint notice did not allege that the student did not receive instruction and/or services remotely during the school closure, instead taking issue with the remote delivery itself (see Due Process Compl. Not.). Nor did the parent allege that a CSE considered whether the student may need additional services to make up for lost skills due to the closure of schools and the change in the delivery of services as a result of the pandemic, which as discussed further below, is the process contemplated by the United States Department of Education (USDOE) and the New York State Education Department's (NYSED's) Office of Special Education.

During the impartial hearing, the parent's attorney argued that remote instruction was not appropriate for the student and that, according to the student's remote learning plan, the student who is nonverbal was offered a telephone consultation as the only means of speech-language therapy (Tr. pp. 47-48). The district asserted that these claims were not raised in the due process complaint notice, whereas the parent argues that the IHO improperly limited the scope of the impartial hearing by finding that the parents did not challenge the "Remote IEP" or the sufficiency of the evaluative data or allege that the student was adversely impacted by remote learning (see IHO Decision at p. 16).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order

[11] Further, the Court in J.T. held that the switch to remote learning in light of the pandemic in and of itself did not constitute a change of placement that would trigger a student's right to pendency (500 F. Sup. 3d at 187-90). The Court left open the possibility that an individual parent could assert "that something other than the closure of the schools and the provision of remote educational services during the pandemic worked a change in [a student's] pendency" (id. at 194); however, the parent has made no such allegation here.

for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Although the IHO denied the district's motion to dismiss and found that the parent's due process complaint notice sufficiently raised claims that the district's provision of remote instruction to the student was not appropriate (see Interim IHO Decision at pp. 1-2), in her final decision, she did find that the claims in the parent's due process complaint notice were limited and did not include allegations other than that the closure of schools and provision of remote educational services during the pandemic worked a change in pendency (IHO Decision at p. 16). A review of the parent's due process complaint notice supports the IHO's final decision on this point. In any event, the IHO specifically addressed the parent's allegations about the appropriateness of remote learning for the student and found in favor of the district.[12] However, it is ultimately unnecessary to review the IHO's specific findings in this regard because, as set forth below, it would be premature to order any compensatory education at this juncture.

While the parent has not identified a convincing reason to depart from the IHO's determination that the student was not denied a FAPE, there is insufficient evidence in the record to establish whether or not the student received educational benefit or experienced loss of skill during the remote learning period.[13] Accordingly, to the extent the IHO found that the remote delivery of instruction to the student did not result in regression or otherwise provided the student with educational benefit, I am unable to reach the same conclusion upon my independent review of the hearing record. While, as noted by the District Court in J.T., the USDOE stated unequivocally in its guidance that compliance with IDEA did not preclude any school from offering educational programs through distance instruction (J.T., 500 F. Supp. 3d at 187; see "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]), such guidance merely serves to clarify a district's obligation in the context of an unprecedented public health emergency and does not speak to the actual impact of remote learning on individual students with disabilities. Accordingly, while the pivot to remote learning during the school closure period cannot be the sole basis for finding a denial of FAPE, federal and State guidance suggests that going forward, a CSE should, in the first instance, address questions of

[12] The parent also alleges that the IHO erred in finding that the district offered the student a FAPE because the district did not present any documentary evidence or witnesses, effectively conceding that the student had been denied a FAPE. The hearing record does not reflect that the district conceded the student was denied a FAPE. At all stages of the proceedings, the district expressed its intention to defend its provision of FAPE, and at no time, despite not offering testimonial or documentary evidence, did the district concede that it denied the student a FAPE (Tr. pp. 30-31, 32-33, 42, 79-80, 81-82, 94, 124, 148-49, 157).

[13] With respect to the parent's allegation that the IHO erred in finding that the district's offer of speech-language therapy via a telephone consultation did not deny the student a FAPE, the hearing record supports the IHO's determination. The parent testified that although the remote learning plan indicated that the student was to receive a telephone consultation of speech-language therapy, the student was given access to related services via a remote classroom that included video instruction and the student did not participate in telephonic instruction (Tr. pp. 198-203, 210-12).

educational benefit, loss of academic skills and potential regression during remote learning when recommending educational programming for subsequent IEPs.

For instance, both the USDOE and NYSED's Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

Accordingly, to address these delays and other delivery-related issues that occurred as a result of the pandemic, OSEP and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

> Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(*l*), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

In sum, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. Here, although there is some indication that a CSE created a new IEP for the student in February 2021, there is no evidence in the record concerning the student's needs or program recommendations as reflected in that document. The parent is of the opinion that the student has regressed, however there is no other evidence in the record to support such a finding. Under these circumstances, the IHO did not err in declining to order compensatory education at this juncture. However, the IHO's comparison of the student's functioning at the time of the February 2020 CSE with the parent's testimony about the student's functioning during the remote learning period does not establish that the student received educational benefit and did not experience loss of skill during the remote learning period. Accordingly, the parties, if they have not already done so, should conduct a review of the student's present levels of academic achievement and functional performance as envisioned by federal and State education authorities and convene a CSE to engage in educational planning for the student, which should include a consideration of whether any compensatory services may be warranted to make-up for a loss of skill during school closures and the delivery of instruction and services to the student remotely. Once a CSE conducts such a review, if the parent disagrees with the recommendations thereof, he or she may pursue dispute resolution through one of the mechanisms described above.

Based on the foregoing, the IHO correctly determined that (1) she did not have the authority to reopen schools, and that the request was now moot; (2) the parent made no claims of self-cure; (3) that J.T. was controlling authority establishing that the change to remote delivery of services did not constitute a change in placement; (4) the parent's claims regarding consent and pendency had been addressed by the District Court in J.T.; and (5) other than the district's closure of schools and the provision of remote instruction "work[ing] a change in pendency," the due process complaint notice did not allege any additional violations of the IDEA by the district (IHO Decision at p. 16). Further, the hearing record does not support the parent's allegation that the IHO improperly limited the scope of the impartial hearing or erred by declining to award compensatory education.

B. Independent Educational Evaluations

The IHO determined that the district did not deny the student a FAPE and therefore determined that there was no basis to award relief of any kind, including IEEs (IHO Decision at pp. 16-17). The parent argues that the IHO initially granted the parent's request for interim relief—to which the parent alleges the district consented—and then the IHO changed her mind and determined that the IEEs would be final relief. The parent also contends that the IHO erred in failing to award all of her requested relief. The parent further alleges that the district agreed to provide four IEEs during the impartial hearing and the IHO erred in failing to award them.

During the impartial hearing, the district's representative stated that "if the student hasn't been evaluated for a couple of years, I would not object to these evaluations to be done independently" (Tr. p. 14). The parent correctly notes that the transcript reflects that the parties' positions on the issue of IEEs did fluctuate during the hearing, along with the IHO's opinion as the impartial hearing progressed. However, the record clearly reflects both parties' view that IEEs could not be conducted without an order from the IHO (Tr. pp. 17, 20, 27, 30, 61-63). The IHO never ordered IEEs and the parties never stipulated to the need for IEEs, nor reduced any sort of agreement to writing. As such, the IHO was not bound to order relief based on the shifting positions of the parties articulated during the impartial hearing.

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]).[14]

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).[15] If a

[14] 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]).

[15] 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

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.). A review of the parent's due process complaint notice reflects that 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 to the district's alleged failure to offer the student a FAPE "since mid-March 2020" (Due Process Compl. Not. at pp. 2-3). In addition, the parent noted, with regard to relief, that she sought an interim order by the IHO directing the district to "conduct an extensive independent evaluation of the [s]tudent to evaluate what, if any, changes need[ed] to be made to the [s]tudent's IEP" (id. at p. 3). Further, as noted above, 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.).

Therefore, because the parent 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] [noting that "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]).

To the extent the parent argues that the IHO should have granted IEEs as interim relief, it is generally 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

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not required to take the parents to due process over the issue]; see also Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 968 [5th Cir. 2016] [holding plain reading of federal regulation does not require the district to initiate or request a hearing to demonstrate the appropriateness of its evaluation when the parents first requested an IEE in a due process complaint notice]).

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 with the IHO, the parent's attorney explained the grounds for the parent's request for IEEs, stating that "evaluations [we]re important as a first step," to show whether or not the student experienced regression and, indicated that if they did not the parent "may not pursue the case," and also to determine an appropriate remedy if it was found that the district denied the student a FAPE (Tr. p. 59). However, as it has been determined that the district did not deny the student a FAPE, there was no relief for the IHO to craft as part of the impartial hearing and, as discussed in detail above, the CSE process should address any loss of skill that the student experienced as a result of the delivery of remote instruction during the pandemic, which process should include evaluations of the student. If the parent disagrees with district evaluations, she may wish to express her disagreement and request IEEs at this juncture. But under the circumstances of this case, the IHO did not abuse her discretion in declining to order IEEs as part of the impartial hearing.

VII. Conclusion

In summary, given the allegations in the parent's August 2020 due process complaint notice, the IHO did not err in finding that the district offered the student after March 2020 notwithstanding the shift to remote instruction relating to school building closures as a result of the COVID-19 pandemic. However, even the district's delivery of remote instruction could support a finding that the district failed to provide the student a FAPE, the student would not be entitled to relief in the form of compensatory services or IEEs at this juncture.

In light of these determinations, I need not address the parties' remaining arguments.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 14, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER