The University of the State of New York

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

No. 22-017

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 Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Given the undeveloped state of the hearing record in the present matter, a full recitation of the student's educational history is not possible but is, in any event, unnecessary due to the limited nature of this appeal.[1]

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

A. Due Process Complaint Notice

In a due process complaint notice dated December 30, 2020, the parent alleged 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]" (IHO Ex. I at p. 1). In addition, the parent alleged that the district failed to offer the student a FAPE pursuant to section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a), by "unilaterally modifying the [s]tudent's IEP" (id.). More specifically, the parent asserted that, in or around "mid-March 2020," the district "unilaterally, substantially, and materially altered the Student's 'status quo' educational program as it relate[d] to [his] pendency rights" when the district: "substantially and materially altered the location" for the student's receipt of services from a "school classroom" to the student's home, "substantially and materially altered the delivery of these services" from in-person instruction by a special education teacher or related service provider, and provided the student's services remotely as opposed to as a direct service to the student as required by his IEP and without proper notice to the parent (id. at pp. 1-2). The parent argued that the aforementioned "alterations constitute[d] an improper change" in the student's program and placement under the IDEA (id. at p. 2).

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" (IHO Ex. I at p. 2). Additionally, the parent requested an "extensive independent evaluation of the Student to determine the need for compensatory services as well as any appropriate changes to the Student's educational program and placement" to remedy the district's failure to offer the student a FAPE "since mid-March 2020" (id. at pp. 2-3). The parent also requested to convene a CSE upon the completion of the IEE to "review the updated evaluation and make any appropriate changes to the Student's IEP" (id. at p. 3).

As relief, the parent requested that the IHO: issue an "interim order" directing the district to implement the student's last-agreed upon IEP dated October 13, 2020 by "reopening" the

[1] When the IHO dismissed the matter with prejudice, no exhibits had yet been admitted into the hearing record except those offered by the IHO (IHO Decision at p. 8; see Tr. pp. 1-16; IHO Exs. 1-4). In addition to the four IHO exhibits, the district provided the following documents to the Office of State Review as part of the administrative record on appeal: a "Corrected" due process complaint notice dated November 2, 2021; a transcript of proceedings that took place on December 10, 2021; the IHO's decision dated January 14, 2022; and notices of appearance by the district's representatives.

student's school, or, alternatively, allowing the parent to "self-cure the unilateral change" in the student's pendency services "to the best of their abilities"; issue an "interim order" directing the district to "conduct an extensive [IEE]" of the student to "evaluate what, if any, changes need[ed] to be made" to the student's IEP; and issue an "interim order" finding that the district failed to offer the student a FAPE and "determine the appropriate compensatory services" (IHO Ex. I at p. 3).

The parents provided the district with a "Corrected" due process complaint notice dated November 2, 2021 (Nov. 2, 2021 Due Process Compl. Not.). Among the changes was additional language stating that the student had experienced "substantial regression" in his educational skills, abilities and performance as a result of the modifications to his IEP, as well as language stating that the parent "disagrees with the [s]tudent's prior evaluations, both at the time of the evaluation as well as currently" because they did not accurately reflect the student's needs, the impact of school closures due to COVID-19 and concomitant "unilateral modification of IEP program and services," and the "magnitude" of the student's regression (id. at pp. 2-3).[2] The parent requested that "the School District . . . conduct comprehensive independent educational evaluations" of the student, including a neuropsychological, occupational therapy (OT), and speech-language therapy evaluations and that the CSE "conduct a new [CSE meeting] to review the updated evaluations and make any appropriate changes to the [s]tudent's IEP" (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 10, 2021 for a prehearing conference, the only day of the hearing (Tr. pp. 1-16). The IHO began the hearing by stating that he "wanted to understand what the current status of [the] case [wa]s and how the parties would like to proceed" (Tr. p. 3). The parent's attorney stated that the matter involved a student "with a disability classification of speech and language impairment" who received prior to the COVID-19 school closures "special education classes . . . speech and language, PT, and OT therapies that were mandated in his IEP" (Tr. p. 3). The parent's attorney further stated that subsequent to the school shutdown "there was no remote plan put in place for the student" and he "did not receive any in-person therapy services for the remainder of the 2019[-]20 school year and into the 2020[-]21 year" (Tr. p. 3). The parent's attorney noted that the parent was "very concerned about the regressions that have occurred during that time" and was "seeking independent evaluations of the student to determine the need for . . . any compensatory services for those regressions that took place because the [p]arent currently disagrees with any of the student's prior evaluations because those did not reflect any of the impact that COVID-19 had on the IEP" (Tr. pp. 3-4). The district's representative stated that the district would present a case if the matter went to hearing and also requested a pendency hearing (Tr. p. 5). With respect to the parent's request for independent evaluations, the district representative stated that it was his understanding that "the last evaluations done for the student, they were private and privately done, and they were funded by the [d]istrict" and the district was "open to doing this evaluation, the psychoeducational, occupational therapy, and speech language" (Tr. pp. 5-6). Before addressing the district's position, the parent's attorney indicated that the parent had filed a "corrected" due process complaint notice in November 2021

[2] As regards to pendency, the corrected due process complaint notice referred to a September 2019 IEP as the student's last agreed upon IEP, rather than the October 2020 IEP referred to in the initial due process complaint notice (compare Nov. 2, 2021 Due Process Compl. Not. at p. 3, with IHO Ex. I at p. 3).

because "there's a lot of changes that have occurred . . . during the passage of time" and the corrected due process complaint notice didn't "add anything but only eliminate[d]some claims" and therefore was not "technically" an amended complaint (Tr. pp. 6-7). In response to an inquiry from the parent's representative concerning which evaluations the district was "open to providing" the district reiterated that it could "do . . . a psychoeducational and occupational therapy and a speech-language" (Tr. at pp. 7-8). The parent's attorney indicated that she was seeking those evaluations, as well as a physical therapy evaluation (Tr. at p. 8).

The IHO noted that although he had a copy of the due process complaint notice dated December 30,2020, he had not received any notification of an amended due process complaint notice and asked the district representative if an amended due process complaint "ha[d] been accepted by the district" (Tr. p. 8). The district representative stated that "it was processed . . . as a corrected request" and that the IHO could "reach out to the case manager so that way it is confirmed" (Tr. pp. 8-9). Upon questioning by the IHO, the parent's attorney reiterated the nature of the changes to the "corrected" due process complaint notice and further stated that "when the original [due process complaint notice] was filed … in December 2020, there was no assignment of a hearing officer" and so the parent "couldn't reach out to get consent for an amended complaint or have an IHO review it" (Tr. pp. 9-10). According to the parent's attorney, the corrected due process complaint notice removed the request for the district to reopen the public schools from the pendency portion of the relief; the attorney also indicated that they dd not request a pendency hearing (Tr. pp. 11-12). The IHO determined that a pendency hearing was not necessary and, as the IHO thought the parties might be in agreement as to the requested evaluations, he set a date of January 19, 2022 for a status conference in the matter (Tr. p. 12-15).

By motion to dismiss dated January 4, 2022, the district stated that it objected to any amendment or correction to the due process complaint notice and noted that pursuant to 8 NYCRR 200.5(i)(7) a due process complaint notice can only be amended, not corrected, and such amendment must be approved by either the district or the IHO (IHO Ex. II at p. 2).[3] The district alleged that, with respect to the parent's request for an interim order requiring the district to implement the student's last agreed-upon IEP, there was no contested pendency for the 2021-22 school year and recent case law (J.T. v. de Blasio, 500 F. Supp. 3d at 137 [S.D.N.Y. 2020]) established that there was no change in pendency rights caused by the switch to remote instruction from the COVID-19 pandemic " (id. at p. 3). The district's motion further alleged that the parent's due process complaint notice failed to state a claim upon which relief could be granted because it did not allege any factual deficiencies in the IEP or placement or allege a denial of a FAPE, aside from the remote instruction claim (id. at p. 4-6). The district's motion also asserted that to the extent the parent claimed the student experienced substantial regression, that claim was based solely on the change in delivery of services occasioned by the COVID-19 school closures and not any substantive deficiencies in the student's IEP (id. at p. 6). The district's motion stated that the district objected to "any allegations raised orally at hearing as outside the four corners" of the parent's due process complaint notice (id. at p. 6). The district's motion also asserted that the parent's request for interim IEEs could not be granted as a matter of law because the parent did not

[3] Although the due process complaint notices at issue herein are dated December 30, 2020 (original) and November 2, 2021 (corrected), respectively, the district's motion to dismiss refers to a due process complaint notice filed on January 4, 2021. This appears to be an error.

include any specific allegations related to her disagreement with an evaluation conducted by the district (id. at pp. 7-8). Finally, the motion objected to the parent's use of vague "catch-all" language in the due process complaint notice for "[a]ny other relief the IHO deemed appropriate" (id. at p. 9). The district requested that the IHO dismiss the parent's due process complaint notice with prejudice (id.).

In a decision dated January 14, 2022, the IHO granted the district's motion to dismiss (IHO Decision at p. 6).[4] Initially, the IHO found that the parent's due process complaint notice did not meet the statutory requirements because it "d[id] not set forth the name of the school the [s]tudent [wa]s attending" or a "sufficient factual description of the nature of the [s]tudent's problem" such as the student's "grade level or facts regarding the [s]tudent's disabilities, special needs, or educational program" (id.). Regarding the parent's request for IEEs, the IHO found that the parent did not satisfy the legal standard for a publicly-funded IEE, as the due process complaint notice did not state a disagreement with a specific evaluation conducted by the district (id.). Finally, noting that recent legal authority established that "dismissal with prejudice is appropriate under the circumstances," the IHO granted the district's motion and dismissed the parent's due process complaint notice with prejudice (id., citing Application of a Student with a Disability, Appeal No. 21-188, and Application of a Student with a Disability, Appeal No. 21-187).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing her due process complaint notice with prejudice. Initially, the parent argues that the IHO erred in failing to consider the parent's "corrected/amended" November 2021 due process complaint notice as the "operative" due process complaint notice despite making "references to reviewing" it at the prehearing conference, noting that the IHO only referenced the December due process complaint notice in his decision. The parent also notes that the district referenced the language of the parent's November 2021 due process complaint notice at the prehearing conference. The parent further argues that the IHO erred by failing to give the parent an opportunity to respond to the district's motion to dismiss, and never advised the parties of his intention to rule on any prospective motion to dismiss, thereby denying the parent her fundamental due process rights.

Next, the parent asserts that the IHO erred by concluding that the due process complaint notice failed to satisfy the statutory requirements, noting that both due process complaint notices contained the name of the student's school and that the due process complaint notice was sufficient in its factual description of the nature of the student's problem and proposed resolutions. The parent also contends that the IHO erred in concluding that her due process complaint notice failed to properly request IEEs as the November 2021 due process complaint notice "explicitly" stated that the parent "'disagreed with [the student's] prior evaluations'" and "unmistakably" requested the district fund extensive IEEs, also noting that a parent's request need not contain "magic words" or be sent by any formalized notice and that the IHO had authority to order the IEEs at public expense. The parent further contends that the IHO erred in concluding that the SRO decisions cited in the district's motion to dismiss were controlling authority as they were "distinguishable

[4] Consistent with the district's motion to dismiss, the IHO refers to a January 4, 2021 due process complaint notice. However, as noted above, the hearing record does not include a January 4, 2021 due process complaint notice.

both factually and procedurally," and that the November 2021 due process complaint notice stated that the parent disagreed with the district's evaluations and the student was adversely impacted by the switch to remote instruction. As relief, the parent requests reversal of the IHO's decision to dismiss the parent's due process complaint notice with prejudice and deny the district's motion or, alternatively, that the matter be remanded to the IHO for further proceedings.[5]

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 and the IHO's decision affirmed. The district contends that the IHO justifiably dismissed the parent's due process complaint notice with prejudice. First, the district argues that the IHO correctly referred to the December 2020 due process complaint notice in his order of dismissal because there were no material differences between the December 2020 and November 2021 due process complaint notices and neither the district nor the IHO "accepted" the November 2021 due process complaint notice. Second, the district argues that the IHO did not fail to give the parent an opportunity to respond to the district's motion to dismiss, as the IHO did not rule on the motion until 10 calendar days (8 business days) after it was filed, affording the parent "sufficient opportunity to respond . . . or at least seek to respond" to the motion to dismiss. The district asserts that summary disposition of claims that cannot be successfully adjudicated at the administrative level is "entirely appropriate" and that the IHO was not required to give the parent any further opportunity to respond to the district's motion. Third, the district contends that the IHO correctly found that the due process complaint notice failed to meet certain statutory requirements, and, although the district acknowledged that the school the student was attending was properly identified, the district argues that the IHO correctly determined that sufficient detail was not provided for any claims that were within his authority to adjudicate such as claims of any actual deficiency in the IEP or placement or any allegation of a denial of a FAPE (aside from the remote instruction claim) or allegations related to the evaluative information relied on in developing the IEP or specific adverse effects on the student related to remote instruction. Further, the district argues that to the extent the parent now seeks to raise claims not included in the due process complaint notice, they are outside the scope of review. Fourth, the district alleges that the IHO correctly found that the due process complaint notice failed to properly request IEEs because the parent did not specifically identify her disagreement with a district evaluation. Fifth, the district asserts that although the parent claims the SRO decisions

[5] The parent also requests that the SRO accept additional evidence attached to the request for review: the "corrected" November 2, 2021 due process complaint notice; the student's last-agreed upon IEP dated October 16, 2019; and an email from the district dated December 30, 2021 advising of a policy to accept corrected due process complaint notices as amended due process complaint notices (Req. for Rev. ¶ 50). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). First, the parent's "corrected" November 2021 due process complaint notice was also received as part of the hearing record from the district in this proceeding (see 8 NYCRR 279.9[a]). The October 2019 IEP was available at the time of the impartial hearing and is not necessary in order to render a decision in this appeal. Although the December 2021 email was sent after the December 10, 2021 hearing date, it is likewise not necessary to the determination of the appeal. As this matter is being remanded, the parent may offer the documents to the IHO for consideration, and it is within the IHO's sound discretion to determine whether to receive them into evidence.

cited in the IHO's order of dismissal were "somehow distinguishable" from this matter, the request for review only makes vague and conclusory statements in support of that claim.

The parent replies and asserts that: the November 2021 due process complaint notice was the "operative" due process complaint notice; the IHO denied the parent her fundamental due process rights when he failed to give her the opportunity to respond to the district's motion to dismiss; the parent's due process complaint notice properly met statutory requirements and she is not claiming a deficiency with the IEP but with its implementation; the parent properly requested IEEs in her November 2021 due process complaint notice and raised the issue of regression in the November 2021 due process complaint notice; and case law and SRO decisions cited by the district are not controlling.

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]).[6]

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).

[6] 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).

VI. Discussion

A. Scope of the Impartial Hearing

The parent argues that the IHO erred in failing to consider the parent's "corrected/amended" November 2021 due process complaint notice as the "operative" due process complaint notice, despite referencing his potential review of the November 2021 due process complaint notice, including that he would review the corrected/amended due process complaint notice upon receipt. The district argues that the IHO correctly declined to mention the corrected/amended due process complaint notice in his dismissal order because the original due process complaint notice was not materially different from the amended/corrected due process complaint and neither the district nor the IHO accepted the amended/corrected due process complaint notice as operative.

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 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]).

Here, the parent sent her November 2, 2021 "corrected" due process complaint notice to the impartial hearing office prior to the IHO being assigned on November 17, 2021 and prior to the start of the impartial hearing on December 10, 2021 (IHO Decision at p. 3; Nov. 2021 Due Process Compl. Not.).[7] At the impartial hearing, the parent stated that the corrected due process complaint notice did not add any claims and only eliminated some of the pendency claims involving the reopening of schools so that what the parent was seeking at the time of the hearing was the IEEs listed in the November 2021 corrected due process complaint notice (Tr. pp. 9-10). The IHO indicated that he had not been provided with a copy of a corrected due process complaint notice (Tr. p. 8). The parent's attorney offered to forward the IHO a copy of the November 2021 corrected due process complaint notice during the hearing, and the IHO responded "Okay"; however, the hearing record is not clear as to whether the document was forwarded to the IHO (Tr. p. 10). A copy of the November 2021 due process complaint notice was included with the hearing record on appeal but was not entered into evidence as an exhibit at the impartial hearing. The

[7] As previously noted, a comparison of the parent's original and "corrected" due process complaint notices shows additional language stating that the student had experienced "substantial regression," that the parent "disagree[d] with the [s]tudent's prior evaluations, both at the time of the evaluation as well as currently," and a request for the district "to conduct comprehensive [IEEs]" including independent neuropsychological, OT, and speech-language therapy evaluations (Nov. 2, 2021 Due Process Compl. Not. at pp. 2-3).

district did not voice disagreement with the November 2021 corrected due process complaint notice at the December 2021 prehearing conference but stated in its motion to dismiss that the district "object[ed] to any amendment or 'correction'" to the due process complaint notice and "object[ed] to any allegations orally raised at hearing as outside the four corners" of the parent's due process complaint notice (IHO Ex. II at pp. 2, 6).[8]

There is nothing in the hearing record to indicate that the district consented to an amendment of the due process complaint notice. However, the IHO did not make a definitive ruling as to whether the November 2021 due process complaint notice was accepted and did not address it in his decision (see IHO Decision). Considering that the district, in its motion to dismiss, argued against acceptance of the November 2021 due process complaint notice and included a comparison of the original due process complaint notice with the corrected due process complaint notice, and also considering that the motion to dismiss was filed following a discussion of the November 2021 corrected due process complaint notice at the December 2021 hearing date and the IHO's assent during that hearing to receive a copy from the parent, the IHO's omission of any reference to the November 2021 corrected due process complaint notice in his decision is perplexing.[9, 10] The lack of a clear ruling as to whether the IHO granted permission for the parent to amend her due process complaint notice not only caused confusion for the parties as to the purpose of the impartial hearing but it also resulted in a lack of clarity regarding the key issues on appeal. As explained further below, this matter must be remanded for further administrative proceedings and, upon remand, the IHO should initially rule on whether the November 2021 due process complaint notice is accepted.

B. District's Motion to Dismiss

The parent argues that the IHO erred by failing to give the parent an opportunity to respond to the district's motion to dismiss. The parent asserts that by issuing a decision dismissing the

[8] The district also argues that "there is no such term in existing law for a 'correction'" to a due process complaint notice. According to the district, a due process complaint notice can only be amended and any amendment must be approved "by the district or IHO" pursuant to 8 NYCRR 200.5(i)(7). Regardless of the terminology employed, a "corrected" due process complaint notice would still be subject to the requirements of 8 NYCRR 200.5(i)(7), mandating either consent by the district or permission from the IHO to change the due process complaint notice.

[9] While there is State guidance that implies that a parent may not file an amendment to a due process complaint notice prior to obtaining the district's consent or the IHO's permission ("Guidance on Procedures Relating to Special Education Impartial Hearings," Office of Special Educ. Mem. [June 2016], available at https://www.p12.nysed.gov/specialed/publications/2016-memos/procedures-relating-to-impartial-hearings.html), it is unclear how in this instance the parent would have obtained permission from an IHO where none had been assigned until approximately ten months after the parent filed her original due process complaint notice.

[10] The lack of clarity is only compounded by the fact that both the district in its motion to dismiss and the IHO in his decision refer to a January 4, 2021 due process complaint notice, an error which seems to have originated as early as during the December 10 hearing when the parent's attorney states that the due process complaint notice was originally filed in "January of 2021 (Tr. p.)," although elsewhere during the hearing the December 2020 due process complaint notice and the November 2021 amended/corrected due process complaint notice were referred to correctly.

parent's due process complaint notice with prejudice without giving the parent an opportunity to respond, the IHO denied the parent her fundamental due process rights under the IDEA.

As a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA (see, e.g., Application of a Student with a Disability, Appeal No. 19-102; Application of the Dep't of Educ., Appeal No. 11-004), but generally regulations do not address the particulars of motion practice.[11] Instead, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in such matters so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]).

Here, the district submitted a motion to dismiss dated January 4, 2022 (IHO Ex. II), and the IHO ruled on the motion in a final decision dated January 14, 2022, less than two weeks after submission of the motion and just five days prior to the next scheduled hearing date of January 19, 2022, which the IHO scheduled as a status conference to allow the parties time to explore settlement of the parent's request for evaluations (IHO Decision; see Tr. pp. 12-14). There is no indication in the hearing record that the IHO communicated with the parties about the motion after it was submitted or whether the parent informed the IHO that she did not intend to respond to the motion. While permissible, summary disposition procedures should be used with caution and are only appropriate in instances in which "parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]).[12] Here, the parent was not given a meaningful opportunity to identify genuine issues of material fact or otherwise exercise her rights during the impartial hearing and, accordingly, the IHO's ruling on the motion to dismiss was premature.

Based on the foregoing, the IHO erred in ruling on the district's motion to dismiss without first giving the parent an opportunity to respond. While I considered evaluating the merits of the dismissal in light of the opportunity the parent has now had on appeal to articulate her position, the threshold inquiry into the operative due process complaint notice must first be addressed by the IHO as it may be determinative to some of the issues and, in particular, to the viability of the parent's request for publicly funded IEEs. However, I will offer some discussion of the three main grounds cited by the IHO for dismissing the matter as at least one ground relied on by the IHO (sufficiency of the due process complaint notice) was clear error. The remaining grounds may be revisited by the IHO on remand after the parent's have an opportunity to present their position to the IHO as a response to the district's motion to dismiss.

1. Sufficiency of the Due Process Complaint Notice

The parent alleges that the IHO erred in finding that the due process complaint notice failed to satisfy the statutory requirements for a due process complaint notice by failing to set forth the

[11] The exception is a sufficiency challenge, which is discussed further below.

[12] As the matter must be remanded for further administrative proceedings as explained below, the IHO will also be able to consider any response the parent may submit to the district's motion at that time.

name of the school the student was attending and a sufficient factual description of the nature of the student's problem.

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]). A due process complaint notice must contain, at a minimum, (i) the name of the student; (ii) the address of the residence of the student; (iii) the name of the school the student is attending; (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and (v) a proposed resolution of the problem to the extent known and available to the party at the time (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). The other party may challenge the sufficiency of the due process complaint notice it if does not meet these requirement (8 NYCRR 200.5[i][3]).

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]).

Initially, a review of both the December 2020 and November 2021 due process complaint notices shows that they identified the name of the school the student was attending, and the district in its answer acknowledges that the student's school was properly identified (IHO Ex. I at p. 1; Nov. 2, 2021 Due Process Compl. Not. at p. 1). Accordingly, the IHO erred in determining that the parent's due process complaint notice failed to satisfy the statutory requirements by failing to set forth the name of the school the student was attending (IHO Decision at p. 6).

As for the sufficiency of the factual description of the nature of the student's problem, the IHO did not clearly indicate which due process complaint notice he was examining for sufficiency, making it unclear which allegations were at issue. Moreover, there is no indication that the district interposed a sufficiency challenge within 15 days of receipt of either the December 2020 or November 2021 due process complaint notices and the IHO did not render a determination within five days of receipt of any notice of insufficiency; thus, to the extent the IHO relied on the sufficiency of the parent's due process complaint notice as a basis for dismissing the parent's case, this was error.

2. Independent Educational Evaluations at Public Expense

Turning to the request for publicly funded IEEs, the parent contends that the IHO erred in concluding that the parent's due process complaint notice failed to properly request IEEs. In particular, the parent asserts that the November 2021 due process complaint notice "explicitly" stated that the parent "disagreed with [the student's] prior evaluations" and "unmistakably" requested that the district conduct extensive IEEs (Req. for Rev. ¶¶37, 38). The parent also noted that a parent's request need not contain "magic words" or be sent by any formalized notice and that the IHO had equitable authority to order the IEEs at public expense. The district alleges that the IHO correctly found that the parent's due process complaint notice failed to properly request IEEs for the reasons stated in its motion to dismiss, that the request for review improperly supports its IEE claim by relying on the November 2021 due process complaint notice.

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]).[13]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]. If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation, "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

[13] 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]).

Here, as noted above, the IHO did not make a clear ruling as to whether the November 2021 due process complaint notice was accepted, making it difficult to ascertain whether there is any merit to the issue of evaluations as it is being raised on appeal, i.e. whether a request for an IEE was raised in the November 2021 due process complaint notice. To the extent the November 2021 due process complaint notice may be accepted as operative, it includes a claim stating that "[t]he [p]arent disagrees with the [s]tudent's prior evaluations, both at the time of the evaluation as well as currently" (Nov. 2, 2021 Due Process Compl. Not. at p. 3). In its motion to dismiss, the district argued that this statement was insufficient to raise a claim for an IEE because it was too general and did not set forth a disagreement with a specific evaluation conducted by the district (IHO Ex. II at pp. 7-8).[14, 15, 16]

If the IHO accepts the November 2021 due process complaint notice, he should consider the merits of the parent's request for IEEs at public expense. In the event that the IHO declines to accept the November 2021 due process complaint notice, the IHO may ultimately reaffirm his finding that the parent did not allege disagreement with a district evaluation (see IHO Ex. I). At the very least, the parent should have the opportunity to argue the issue before the IHO.

3. Remaining Allegations

As for the remainder of the parent's allegations, the IHO's dismissal may have been appropriate given the similarity of the allegations to recent matters. That is, the parent's allegations in the due process complaint notice were similar to allegations raised by counsel for the parents on behalf of other students in the district which have been discussed in recent decisions by State review officers (see Application of a Student with a Disability, Appeal No. 22-016; Application of a Student with a Disability, Appeal No. 21-110; Application of the Dep't of Educ., Appeal No. 21-

[14] While not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]), in past decisions, SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094).

[15] To the extent the language in the November 2021 due process complaint notice referenced the parent's disagreement with district evaluations "currently" because they failed to "reflect the impact of the COVID-19 school closures and unilateral modification of IEP program and services have had on the Student . . . and the magnitude of regression that has resulted" (Nov. 2021 Due Process Compl. Not. at p. 3), this alleged disagreement would not support an award of publicly funded IEEs because, as the Second Circuit has made clear, a parent must disagree with a district evaluation as of the time it is conducted and subsequent changes in circumstances will not support a disagreement with an evaluation (Trumbull, 975 F.3d at 171, 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"]). However, the November 2021 due process complaint notice also alleged that the parent disagreed with the district evaluations at the time of the evaluations because they did not accurately reflect the student's needs (Nov. 2021 Due Process Compl. Not. at p. 3)

[16] During the hearing, the attorney for the district indicated that the last evaluation of the student, including a neuropsychological evaluation, an OT evaluation, and a speech-language therapy evaluation, were private evaluations and were not funded by the district (Tr. pp. 5-6). Although the hearing record is not developed enough to determine the accuracy of this statement, the district may raise this argument before the IHO on remand as "[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]).

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 (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 that 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.[17]

Notwithstanding that certain of the parent's allegations may be properly dismissed on jurisdictional grounds or for failure to state a cognizable claim, I will give the IHO the opportunity to revisit the allegations on remand. In particular, on remand, the IHO should give the parent an opportunity to argue why this matter is distinguishable from recent cases involving allegations that the district has not delivered sufficient or appropriate special education to students with disabilities during building closures related to the COVID-19 pandemic. To the extent the November 2021

[17] Further, in her original December 2020 due process complaint notice, the parent referenced concepts such as "status quo" and pendency rights (IHO Ex. I at pp. 1-2). In the November 2021 corrected/amended due process complaint notice, the parent has omitted some of these allegations, and therefore appears to have tacitly acknowledged that school closure would not trigger pendency rights. In any event, if the parent attempted to pursue allegations that there was a violation of the student's pendency placement, such allegations would be 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 December 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 initially 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 and continued in the November 2021 due process complaint notice to request that she be allowed to "self-cure the unilateral change in the Student's status quo" (IHO Ex. I at pp. 1-3; Nov. 2, 2021 Due Process Compl. Not. at p. 3). However, an IHO would not have sufficient authority to countermand the Governor'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 a request is now moot (see J.T., 500 F. Supp. 3d at 190).

due process complaint notice is accepted, it includes an allegation that the student suffered regression during remote instruction (Nov. 2, 2021 Due Process Compl. Notice). It is, however, unclear from the allegations contained in the November 2021 due process complaint notice whether a CSE has had the opportunity to address the question of the student's alleged regression.

While, as noted by the District Court in J.T., the United States Department of Education (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 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 the State Education Department's (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; see also Z.Q. v New York City Dep't of Educ., 2022 WL 903003, at *5 [S.D.N.Y. Mar. 28, 2022] [noting that "[t]he 2020 COVID-19 guidance . . . provides that CSEs may coordinate with parents to make [an] individualized determination" about whether a student is entitled to compensatory services]).

In the event that a CSE "decides not to provide compensatory services to a parent and the parent disagrees with that decision," State guidance provides 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. The parent is of the opinion that the student has regressed, however it is unclear from the undeveloped hearing record if the parties have since conducted a review of the student's present levels of academic achievement and functional performance as envisioned by federal and State education authorities and convened a CSE to engage in educational planning for the student, including 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.

The parent stated in her November 2021 due process complaint notice that "as a result of the modifications of the [s]tudent's mandated IEP program and services, the [s]tudent experienced substantial regression in [his] educational skills, abilities, and performance" and that the student's prior evaluations did not accurately reflect the impact of the COVID-19 school closures and

unilateral modification of the IEP program and services on the student and "the magnitude of regression that has resulted" (Nov. 2, 2021 Due Process Compl. Not. at pp. 2-3). The parent further requested that after completion of IEEs in the student's areas of need (neuropsychological, OT, and speech-language therapy), that the district "promptly conduct a new" CSE meeting to review the updated evaluations and make any appropriate changes to the student's IEP (id. at p. 3).

To the extent that the parent's November 2021 due process complaint notice does not contain an allegation that a CSE has inappropriately addressed or refused to consider the student's alleged regression, the parent will not get far with her FAPE claims based solely on the district's failures related to school closure.

Upon remand, the IHO is free to consider whether the parent has any actionable claims with respect to the student's alleged regression due to the COVID-19 school closures, taking into account that a school closure during the relevant time period would not, in and of itself, constitute a denial of a FAPE. To the extent the IHO ultimately deems the corrected/amended due process complaint notice to be the operative one and considers the parent's regression claims contained therein, it may be a prudent use of limited due process resources for the parent to seek a further amendment of the due process complaint notice (or to withdraw and refile her claims) to include any FAPE claims related to the CSE's consideration of the student's current educational performance and possible regression, including any recommended compensatory services. To the extent a CSE has not yet had the first opportunity to consider these issues, the IHO's ability to determine whether FAPE has been denied to the student on the basis of the district's alleged failure to remediate the student's regression may be seriously curtailed and, therefore, it may be appropriate for the IHO to reaffirm his dismissal of these claims as premature at this juncture. The parent's corrected/amended due process complaint notice is close to being on the right track with respect to pursuing claims related to the student's alleged regression resulting from the COVID-19 school closures, but the parent is urged, if she has not already done so, to present these outstanding issues to the CSE in the first instance

VII. Conclusion

In sum, the IHO's dismissal of the parent's due process complaint notice is problematic given that there is no indication in the hearing record that the parent had a meaningful opportunity to respond to the motion. Further, the IHO erred in dismissing the parent's due process complaint notice on sufficiency grounds. As to the remaining grounds for the IHO's dismissal, absent a ruling from the IHO as to whether he accepted the November 2021 corrected/amended due process complaint notice, further review of his decision is not possible and/or is not preferable without further opportunity accorded to the parent to respond to the district's motion. The lack of clarity as to the operative due process complaint notice is particularly limiting with respect to any meaningful consideration of the parent's request for publicly funded IEEs given the allegation in the November 2021 due process complaint notice that the parent disagreed with district evaluations of the student.

Having determined that the IHO erred in dismissing the parent's due process complaint notice without ruling on the parent's request to amend the due process complaint notice or giving the parent an opportunity to respond to the district's motion to dismiss, the IHO's decision must be vacated and remanded for further administrative proceedings consistent with this decision.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 14, 2022, is vacated;

IT IS FURTHER ORDERED that the matter is hereby remanded to the same IHO who issued the January 14, 2022 decision to rule on the parent's request to amend the due process complaint notice, to reconsider the district's motion to dismiss taking into account the parent's response thereto, and, if necessary, to consider the parent's request for publicly funded IEEs and compensatory education services.

Dated: **Albany, New York**
May 11, 2022

STEVEN KROLAK
STATE REVIEW OFFICER