The University of the State of New York

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

No. 22-108

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

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Daniel Levin, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by Peter G. Albert, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which dismissed respondent's (the parent's) due process complaint notice without prejudice. The parent cross-appeals. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

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

[1] At the time the IHO dismissed the matter without prejudice, no exhibits had yet been admitted into the hearing record except those offered by the IHO (IHO Decision at p. 4; see Tr. pp. 1-17; IHO Exs. I-III). In addition to the three IHO exhibits, the district provided the following documents to the Office of State Review as part of the administrative record on appeal: the district's January 31, 2022 sufficiency challenge to the parent's due process complaint notice; a transcript of proceedings that took place on June 17, 2022; an Interim Order of the IHO dated

A. Due Process Complaint Notice

In a due process complaint notice dated January 28, 2022, 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, "[a]s of mid-March 2020, [the district] unilaterally, substantially, and materially altered the [s]tudent's 'status quo' educational program as it relate[d] to [his] pendency rights" (id. at p. 2). According to the parent, 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.). The parent argued that the aforementioned "alterations constitute[d] an improper change" in the student's program and placement under the IDEA (id.). Due to the alleged changes, the parent asserted that "the [s]tudent experienced substantial regression in [his] educational skills, abilities, and performance" (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" (IHO Ex. I at p. 2). Additionally, the parent requested "comprehensive independent educational evaluations 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 p. 3). According to the parent, he "disagree[d] 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 [s]tudent's needs at the time nor do they accurately reflect the impact of the COVID-19 school closures and unilateral modification of IEP program and services have had on the [s]tudent . . . and the magnitude of regression that has resulted" (id.). The parent also requested to convene a CSE upon the completion of the evaluations to "review the updated evaluations and make any appropriate changes to the [s]tudent'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 April 1, 2019 by "allowing the [p]arent to self-cure the unilateral changes in the [s]tudent's status quo educational program and placement"; issue an "interim order" directing the district to "conduct comprehensive independent educational evaluations . . . of the [s]tudent," specifically identifying a neuropsychological evaluation, an occupational therapy (OT) evaluation, and a speech-language therapy evaluation; issue an order requiring the district to reimburse the parent for any services unilaterally provided to the student that the district failed to provide and were mandated by the student's IEP; and an order finding that

June 17, 2022; an Amended due process complaint notice dated July 13, 2022; the IHO's decision dated July 24, 2022; and notices of appearance by the district's representatives.

the district failed to offer the student a FAPE and "determine appropriate compensatory services" (IHO Ex. I at p. 3).

On January 31, 2022, the district challenged the sufficiency of the parent's due process complaint notice; according to the sufficiency challenge, the due process complaint notice did not contain any facts specific to the student and only contained boilerplate allegations related to remote instruction that appeared in numerous filings from the same attorney. On the same day, the district moved to dismiss the parent's due process complaint notice asserting that it failed to state a cause of action and the IHO lacked authority and jurisdiction to award parent's requested relief (IHO Ex. II).

B. Impartial Hearing Officer Decision

The parties convened for a prehearing conference on June 17, 2022 (Tr. pp. 1-17). At the hearing, the IHO denied the district's sufficiency challenge, then allowed the parties to present arguments on the district's motion to dismiss (Tr. pp. 3-10). Counsel for the district contended that the parent was attempting to use the hearing process to adjudicate systemic violations (Tr. pp. 3-5). The IHO agreed with the district's point noting that "the mere fact that there was a change in location of the services caused by the pandemic and remote learning doesn't constitute a claim," but also noted that a hearing could be used to determine if "the delivery of the services remotely resulted in loss of services that the student was intended to receive through the student's IEP" (Tr. pp. 5). Counsel for the parent then asserted that the parent was "focus[ed] on the student's individual needs" and that the claim should move forward because it specifically addressed how the school closures affected the student's individual needs (Tr. p. 7). Counsel further asserted that the complaint included an allegation that the student's IEP was not implemented (Tr. p. 8). However, in reviewing the allegations contained in the due process complaint notice with the parent, the IHO determined that it did not include any "individual allegations of services that weren't provided" (Tr. pp. 8-9). The IHO then decided that he would dismiss the parent's due process complaint notice; however, in response to counsel for the parent's request to amend the due process complaint notice instead, the IHO indicated he would give the parent 10 business days to amend the due process complaint notice (Tr. pp. 9-10, 16).

In a June 17, 2022 interim decision, issued the same day as the hearing, the IHO summarized his findings at the hearing and provided the parent with 15 business days from receipt of the interim decision to amend the due process complaint notice to include allegations specific to the student regarding the implementation of the student's IEP during the period of remote instruction (IHO Interim Decision). In addition, the IHO determined that the parent's request for an independent educational evaluation (IEE) was insufficient as a generalized statement that the parent disagreed with district evaluations did not provide the district with a sufficient notice to defend its evaluations (id. at p. 3).

The parent provided the district with an amended due process complaint notice dated July 13, 2022 (July 13, 2022 Amended Due Process Compl. Not.). In the amended due process complaint notice, the parent alleged that the district had failed to evaluate the student since the 2015-16 school year and asserted that the district denied the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years (id. at p. 1). The main focus of the FAPE allegations related to asserted failures of the district to conduct appropriate evaluations of the student in all areas of suspected need (id. at p. 2). The amended due process complaint notice also continued and

expanded on the parent's prior allegations related to school closures during the COVID-19 pandemic, adding an assertion that specific mandated services were not delivered during the school closures (id.). The parent requested an interim order directing the district to "conduct comprehensive independent educational evaluations (neuropsychological, psychoeducational, occupational therapy, and speech/language therapy) of the student"; an order requiring the district to reimburse the parent for the cost of any services unilaterally provided to the student that the district failed to provide and were mandated by the student's IEP; a finding of a denial of FAPE with an award of compensatory services; and any other relief the IHO deemed appropriate (id. at p. 3).

In a decision dated July 24, 2022, the IHO noted that he had provided the parent with an opportunity to amend the due process complaint notice in this proceeding; however, the IHO determined that he had provided a remedy that was not authorized (IHO Decision at p. 3). The IHO found that he was only permitted to allow a party to amend a due process complaint notice if it was filed five days prior to the commencement of the hearing (id.). The IHO found that the hearing commenced on June 17, 2022 and that at that point he did not have the authority to grant permission to amend the complaint (id.). The IHO dismissed the parent's due process complaint notice without prejudice (id.).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in dismissing the parent's due process complaint notice without prejudice and that the IHO should have dismissed the parent's due process complaint notice with prejudice.[2] The district asserts that the parent's allegations related to school closures were systemic and the parent cannot pursue those claims in the due process hearing system. According to the district, the due process complaint notice only involved allegations that services were provided remotely instead of in person. The district contends that the parent's due process complaint notice did not include allegations that the student did not receive remote instruction during the pandemic and accordingly, any such claim is outside the scope of the hearing. The district also appeals from the IHO's interim decision permitting the parent to file an amended due process complaint notice, asserting that the IHO prejudiced the district by advising counsel for the parent of what had to be included in the amended due process complaint notice in order to avoid dismissal.

The parent submits an answer with cross-appeal, responding to the district's allegations, and asserting that the IHO erred in dismissing the parent's due process complaint notice and that the IHO should have accepted the parent's amended due process complaint notice. The parent contends that the due process complaint notice should have been permitted to go forward as it included individual claims and not systemic claims related to the closure of schools and change to remote instruction. The parent's cross-appeal relates solely to the parent's amended due process complaint notice.[3] More specifically, the parent asserts that the amended due process complaint

[2] The district's request for review includes a copy of the parent's opposition to the district's motion to dismiss dated May 25, 2022.

[3] The parent does not cross-appeal from the IHO's determination that the parent's request for an IEE was insufficient and, accordingly, the IHO's decision on this issue has become final and binding on both parties and

notice "lays out a factually accurate, and legally viable, claim alleging the denial of services and the provision of inappropriate services, which resulted in the denial of a FAPE." Additionally, the parent contends that the IHO erred in finding that he did not have the authority to grant permission to amend the due process complaint notice as the June 17, 2022 hearing date was a prehearing conference and the hearing had not yet been scheduled. The parent includes additional evidence with the answer with cross-appeal consisting of copies of the parent's July 13, 2022 amended due process complaint notice, a March 11, 2019 IEP, a May 11, 2022 email from the IHO, and the June 17, 2022 interim IHO decision (Answer with Cross-Appeal Exs. A-D).

The district answers the parent's cross-appeal and argues that the parent's answer with cross-appeal should be dismissed for failure to comply with the practice regulations. The district asserts that the parent initially served an answer with cross-appeal on the district on September 29, 2022 and then served a subsequent answer with cross-appeal on October 2, 2022.[4] According to the district, the subsequent answer with cross-appeal contained a number of material changes from the initial answer with cross-appeal, which included a number of allegations related to a different student. The district acknowledges that it was not prejudiced by the error, but requests dismissal of the parent's answer with cross-appeal. The district also asserts that the parent served a late notice of intention to cross-appeal and objects to the parent's inclusion of additional evidence with the answer with cross-appeal. With respect to the merits of the parents' cross-appeal, the district asserts that the IHO was correct in not accepting the amended due process complaint notice over the district's objection. The district notes that the parent did not file the amended due process complaint notice until six months after the district had submitted its motion to dismiss and two months after the appointment of the IHO. According to the district, it was proper for the IHO to rule on the motion to dismiss prior to reviewing the substance of the parent's amended due process complaint notice.

The parent replies to the district's answer and acknowledges that the file served on the district via email on September 29, 2022 was a "corrupted file," in that it combined two separate files—the answer with cross-appeal in this proceeding and an answer with cross-appeal in another matter involving a different student. The parent attributes the problem to "the interface of two different word processing programs and file names." The parent further contends that upon discovering the issue on October 2, 2022, the correct file was served on the district. According to the parent, the minimal delay warrants good cause to accept the answer with cross-appeal. The parent also requests that an SRO exercise discretion and excuse the parent's late service of the notice of intention to cross-appeal, asserting that the delay was minimal and was due to not knowing if, or when, the district would file a request for review. With respect to the submitted additional evidence, the parent contends that it is relevant to the appeal and that it be considered.

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

will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[4] The document served on the district on September 29, 2022 was not filed with the office of State Review.

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]).[5]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

As an initial matter, the district contends that the parent's answer with cross-appeal should be rejected because of an error in the service of the answer with cross-appeal and because the parent filed a late notice of intention to cross-appeal.

State regulation requires that "a respondent who wishes to cross-appeal to seek review by a State Review Officer of the decision of an impartial hearing officer shall personally serve upon the opposing party, in the manner prescribed for the service of a request for review pursuant to section 279.4 of this Part, a notice of intention to cross-appeal within 30 days after the decision of the impartial hearing office" (8 NYCRR 279.2[d]). An SRO "may, in his or her discretion . . . review the determination of an impartial hearing officer notwithstanding a party's failure to timely serve a notice of intention to seek review" (8 NCYRR 279.2[f]).

[5] 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).

In addition, the regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served within" five business days after the date of service of the request for review (8 NYCRR 279.4[f], 279.[5][a]).

In this instance, the parent did not file a copy of the notice of intention to cross-appeal or an affidavit of service of the notice of intention to cross-appeal in violation of State regulation (see 8 NYCRR 279.5[c]). The district asserts that the notice of intention to cross-appeal was served on the district on August 31, 2022—more than 30 days after the IHO's July 24, 2022 decision (Answer to Cross-Appeal ¶5). However, the district was the party that initiated this State-level review proceeding and does not assert that the delay in service of the opposing party's response inhibited its ability to respond to the answer with cross-appeal. Additionally, review of the district's request for review shows that the district also violated State-regulations insofar as it failed to file a copy of the notice of intention to seek review as required under the practice regulations (see 8 NYCRR 279.4[e]), although the district's declaration of service filed with the Office of State Review did indicate the notice of intention to seek review was served upon the parent on July 27, 2022.

Similarly, in requesting that the answer with cross-appeal be dismissed for failure to timely serve it, the district acknowledges that it was not prejudiced by the service error (Answer to Cross-Appeal ¶3). The parent requested two extensions of the time to file an answer, which were granted in this matter, extending the parent's time to serve an answer to September 29, 2022. As noted above, the parent concedes that the answer with cross-appeal was not served on the district on September 29, 2022, as the parent inadvertently served the district with "a corrupted file"; the parent contends that the error was corrected after discovering it on October 2, 2022, which is consistent with the argument presented by the district.

Considering the short delays with respect to the noncompliance with State regulation as identified by the district, and the acknowledged lack of prejudice in responding to the parent's answer with cross-appeal, I decline to exercise my discretion to dismiss the parent's answer with cross-appeal. Nevertheless, counsel for both parties are reminded that State regulation requires that both a notice of intention to seek review and a notice of intention to cross-appeal be filed with the Office of State Review along with the request for review and answer with cross-appeal, respectively (8 NYCRR 279.4[e], 279.5[c]). While a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (Application of a Student with a Disability, Appeal No. 19-021).

2. Additional Evidence

Both parties submit additional evidence on appeal. The district's request for review includes a copy of the parent's opposition to the district's motion to dismiss (Req. for Rev. Ex. 1). The parent's answer with cross-appeal includes copies of the parent's July 13, 2022 amended due process complaint notice, a March 11, 2019 IEP, a May 11, 2022 email from the IHO, and the June 17, 2022 interim IHO decision (Answer with cross-Appeal Exs. A-D).

Generally, documentary evidence not presented at an impartial hearing is 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; Application of a Student with a Disability, Appeal No. 08-003; 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]).

Initially, the parent's opposition to the district's motion to dismiss should have been included with the hearing record (see 8 NYCRR 200.5[j][5][vi] [the hearing record includes "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer"]). As it was not included in the hearing record submitted to the Office of State Review it is accepted as additional evidence on appeal.

Turning to the documents submitted by the parent, the hearing record as submitted already included copies of the parent's July 13, 2022 amended due process complaint notice and the June 17, 2022 interim IHO decision. The May 11, 2022 email from the IHO to the parties is the email scheduling the June 17, 2022 hearing date; this email is not necessary to the decision herein. Accordingly, those documents are not accepted for inclusion in the hearing record. Finally, considering the outcome of this appeal, the relevance of the March 11, 2019 IEP is uncertain; however, as it is the only document in the hearing record that purportedly describes the student or the student's educational needs or programming it is accepted for purposes of providing some basic context regarding the student.

3. Scope of the Impartial Hearing

The parent cross-appeals from the IHO's decision not to accept the parent's July 13, 2022 amended due process complaint notice. According to the parent, the IHO had granted permission for the amendment and erred in later reversing his order and finding that he did not have the authority to grant the parent the opportunity to amend the due process complaint notice.

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]).

The IHO initially granted the parent's request to amend the due process complaint notice over the district's objection (Tr. pp. 10-13; Interim IHO Decision). The IHO then reversed his own decision finding that "a hearing officer can only permit an amended due process if filed not less than five days before the hearing commenced" (IHO Decision at p. 3). The parent mainly appeals from this determination and requests a finding that the IHO erred in reversing his own decision.

The answer to this question requires a determination as to whether the June 17, 2022 hearing date constituted the commencement of the hearing, as an IHO may only grant a request to amend a due process complaint notice "at any time not later than five days before an impartial due process hearing commences" (8 NYCRR 200.5[i][7][b]). Although State regulation provides a timeline for the commencement of a hearing, it does not define the precise moment a hearing has commenced. However, whether it was permissible for the IHO to theoretically allow an amendment of the due process complaint is of little consequence because the parents failed to present sufficient information on appeal to show that the parent submitted an amended due process complaint notice in compliance with the IHO's June 17, 2022 interim decision.

In the IHO's June 17, 2022 interim decision, the IHO granted the parent permission to amend the due process complaint notice within 15 business days from receipt of the decision (IHO Interim Decision). In recounting the issuance of the decision, the parent asserts that it was issued on June 17, 2022 and does not assert that it was received at a later date (Answer with Cross-Appeal ¶15). The parent submitted an amended due process complaint notice dated July 13, 2022—17 business days after the IHO's interim decision was issued.[6] In this instance, the IHO's grant of permission to amend the due process complaint notice was limited to a specific time period and the parent has not shown that the amendment to the due process complaint notice was made within that time period. A due process complaint notice may only be amended if the other party consents in writing or if the IHO grants permission (8 NYCRR 200.5[i][7]).

Accordingly, the IHO's ultimate decision not to accept the July 13, 2022 due process complaint notice is upheld and the January 28, 2022 due process complaint notice is the operative complaint in this proceeding.

B. Dismissal of the January 28, 2022 Due Process Complaint Notice

The district appeals from the IHO's dismissal of the January 28, 2022 due process complaint notice asserting that the IHO's disposition of this matter should have been "with prejudice."

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).

In this instance, the district moved to dismiss the parent's due process complaint notice because it did "not allege any actual deficiency in the IEP or placement nor d[id] it allege a denial

[6] A copy of the July 13, 2022 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.

of FAPE, and therefore fail[ed] to put the [district] on notice to defend against [the] parent's unspecified claims" (Dist. Mot. To Dismiss at p. 4). According to the district, the parent's complaint only included allegations regarding school closures and the switch to remote instruction due to the COVID-19 pandemic, which the district argued was systemic in nature and therefore outside the scope of the administrative hearing process (id.at pp. 5-6).

The parent opposed the district's motion, asserting that the due process complaint notice "addresse[d] [the student's] individual needs, as reflected in his Individualized Education Program, and how procedural[] and substantive changes to that IEP adversely affected that individual Student" (Req. for Rev. Ex. 1 at p. 2). According to the parent, the change in the IEP to which he was referring was that the district "'precluded [the student] from receiving in-person services by a special education teacher or related service provider,'" an allegation that was included in the due process complaint notice (id. at p. 3).

The IHO reviewed the parent's due process complaint notice and was referred by the parent's counsel to the allegation that the district "'altered the delivery of [] services by precluding the student from receiving any in-person services'" (Tr. p. 8). The IHO found the due process complaint notice did not assert that the district did not implement the student's IEP (Tr. p. 9). In the IHO's final decision, he noted "that the allegation that the [district] unilaterally, substantially, and materially altered the student's status quo during the 2019/20 school year in violation of the IDEA constitutes the very systemic claims that have been reviewed and rejected" (IHO Decision at pp. 2-3). The IHO dismissed the due process complaint notice "without prejudice to the filing of an appropriate due process complaint" (id. at p. 3).

The district appeals, seeking that the dismissal be made with prejudice.

Initially, it must be noted that the allegations in the parent's due process complaint notice are similar to allegations raised by counsel for the parents on behalf of other students in the district which have been discussed in a number of decisions issued 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. 21-210; 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 building 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 school buildings in New York City, and found that the actions taken by the district to deliver services to students with disabilities during the building 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 school buildings or the district's actions to deliver instruction and services to students with disabilities remotely during the building 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.[7]

In addition, although the parent's due process complaint notice included an allegation that "the Student experienced substantial regression in [his] educational skills, abilities, and performance"; this assertion is based on such regression being "a result of the modifications of the Student's mandated IEP program and services (IHO Ex. I at p. 2). As noted above, the only modification to the student's IEP identified in the parent's due process complaint notice was the switch from an in-person to a remote program (id. at pp. 1-5).

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 building 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 school buildings 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

[7] Further, in the due process complaint notice, the parent referenced concepts such as "status quo" and pendency rights (IHO Ex. I at pp. 1-2). The parent has omitted these types of allegations on appeal, and therefore appears to have tacitly acknowledged that district-wide school building closures 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 January 2022 (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 school buildings 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.

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. If the parent is of the opinion that the student has regressed, the parent must first bring those concerns to 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 building closures and the delivery of instruction and services to the student remotely. As the parent's 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's allegations are based solely on the district's failures related to school building closures and the appropriateness of the IHO's decision to dismiss those allegations.

Nevertheless, as noted by the IHO there are possible allegations regarding the provision of special education to the student that may be properly addressed in an administrative proceeding. In particular, the IHO found that allegations that "special education services recommended on the student's IEP were denied or inadequately provided during the remote learning process . . . may constitute a violation of the IDEA" (IHO Decision at p. 3). In fact, the parent shifted course during the hearing and attempted—by way of the July 13, 2022 amended due process complaint notice—to raise allegations asserting a denial of FAPE for the 2019-20, 2020-21, and 2021-22 school years, such as allegations that the district failed to evaluate the student since the 2015-16 school year, failed to conduct appropriate evaluations, failed to evaluate the student in all areas of suspected need, as well as that the student did not receive any services from mid-March 2020 through April 9, 2020, that the student was intermittently denied services from March 2020 through July 2020, and that the remote services provided to the student were not appropriate to address the student's needs (July 13, 2022 Amended Due Process Compl. Not.). Although, as discussed above, the parent's attempt to amend the due process complaint notice in this proceeding was not proper, the parent should nevertheless have the opportunity to raise allegations that are not systemic in nature. Accordingly, while the district's appeal is granted, and the systemic allegations raised in the January 2022 due process complaint notice are dismissed with prejudice, this does not prevent the parent from raising the allegations noted above related to a failure to evaluate the student and implement the student's program, issues that were not raised in the January 2022 due process complaint notice.

VII. Conclusion

In sum, the parent has not presented a sufficient basis for departing from the IHO's determination not to accept the July 2022 amended due process complaint notice. In addition, the IHO's dismissal of the January 2022 due process complaint notice should have been with prejudice as to the claims raised in that due process complaint notice. If the parent continues to disagree

with the actions taken by the district, the parent may bring a complaint challenging non-systemic actions taken by the district with respect to the student's education.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated July 24, 2022, is modified by noting that the systemic allegations raised in the January 28, 2022 due process complaint notice are dismissed with prejudice.

Dated: **Albany, New York**
November 2, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER