The University of the State of New York

The State Education Department
State Review Officer
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No. 22-121

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 H. 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 from the IHO's dismissal. The appeal must be sustained in part. The cross-appeal must be sustained. The matter must be remanded to the IHO 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

A full recitation of the student's educational history is not necessary due to the limited nature of this appeal.

Briefly, the student in this matter has received diagnoses of agenesis of the corpus callosum in utero, dysarthria, polymicrogyria, and pachygyria of the right middle frontal lobe (Dist. Ex. 6 at p. 1). The student contends with significant attention and impulsivity issues, demonstrates little fear of danger or strangers, and does not react in a typical manner to pain or changes in temperature (id.).

For the 2019-20 school year, the student attended Community Resources, a private, State-approved preschool program (see Dist. Ex. 27 ¶ 4). On November 19, 2019, a Committee on Preschool Special Education (CPSE) convened to review the student's programming and developed an IEP with an implementation date of November 25, 2019 (Dist. Ex. 3 at pp. 1-2, 15). The November 2019 CPSE found the student eligible for special education as a preschool student with a disability and recommended that the student attend a 12-month school year program consisting of a 12:1+2 special class placement with a full-time 1:1 paraprofessional in an approved special education program (id. at pp. 1, 15-17). The CPSE further recommended related services consisting of three 30-minute sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual physical therapy (PT), and four 30-minute sessions per week of individual speech-language therapy (id.). The CPSE additionally recommended special transportation in the form of a mini bus, climate control, and an adaptive car seat (id. at p. 17).

School building closures took place in March 2020 as a result of efforts to combat the spread of infection during the COVID-19 pandemic.

The student continued attending Community Resources for the 2020-21 school year (see Dist. Exs. 26 ¶ 7; 27 ¶ 4). On November 20, 2020, a CPSE convened and recommended a program similar to that set forth in the November 2019 IEP with the addition of two 30-minute sessions per week of small group (3:1) counseling services and four 30-minute sessions per year of parent counseling and training (compare Dist. Ex. 4 at pp. 1, 21-24, with Dist. Ex. 3 at pp. 1, 15-17). For the 2020-21 school year, the Community Resources provided the student with a hybrid program consisting of in-person instruction either two or three days per week and received remote instruction for the remaining days, until April 2021 at which time, students returned to full-time in-person instruction (see Dist. Ex. 6 at p. 1; 27 ¶ 5). The private preschool appeared to adjust to schedule to provide as much of the related services in related services in-person as possible (see Dist. Ex. 6 at p. 1; 27 ¶¶ 5, 7).

A. Due Process Complaint Notice

In a due process complaint notice dated January 19, 2021, the parent, through her attorneys, 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).[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.). According to the parent, the district "substantially and materially altered the location"

[1] The hearing record also contains a "corrected" due process complaint notice related to this matter dated November 2, 2021 that does not have an exhibit identification number or letter (Nov. 2, 2021 Corrected Due Process Compl. Not.). Apparently counsel for the parent submitted the "corrected" notice to "to try to move things along" because the January 2021 due process complaint notice had been filed "almost a year" prior and no hearing officer had been assigned (Tr. pp. 4-5). On appeal, there is no indication in the administrative record or allegation by either party that the November 2021 "corrected" due process complaint notice is the operative complaint.

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 [s]tudent's educational program and placement" (id. at pp. 2-3). The parent also requested that the district convene a CSE upon the completion of the evaluations to "review the updated evaluation and make any appropriate changes to the [s]tudent's IEP" (id. at p. 3).

As relief, the parent requested an order from the IHO requiring the district to implement the student's last agreed upon IEP by reopening the student's school or, alternatively, an order "allowing the [p]arent to self-cure the unilateral change in the [s]tudent's status quo educational program and placement," an interim order for the "[d]istrict to conduct an extensive independent evaluation of the [s]tudent to evaluate what, if any, changes need to be made to the [s]tudent's IEP," and an interim order finding that the district denied the student a FAPE and awarding appropriate compensatory services due to the denial of a FAPE (IHO Ex. I at p. 3).

B. Prehearing Conference and Amended Due Process Complaint Notice

The IHO conducted a prehearing conference with the parties on December 21, 2021 (Tr. pp. 1-16). During the prehearing conference the IHO asked if there was a "need for pendency" in the matter, and counsel for the district responded that the district intended to move to dismiss the parent's complaint (Tr. p. 3). The district represented that there had been "many cases filed in similar situations," and the IHO mentioned one case that had been dismissed in a federal court proceeding (see Tr. pp. 3-4). The parent acknowledged that the district had moved to dismiss complaints in similar matters involving other students, which set forth the same allegations as the parent's January 2021 due process complaint notice (Tr. p. 5). However, counsel for the parent then stated that:

> [W]hat we would like to do, just to simplify things, and to have things move forward, and not get into a motion practice, which is really going to be unnecessary, I think what we would like to do is to withdraw this complaint today, without prejudice, refile what we call the corrected DPC as just a stand-alone new DPC, and it would get reassigned to you and then we can go forward and hopefully avoid motion practice

(Tr. p. 6).

The IHO, however, suggested that it would be better for the parent to file an amended due process complaint, noting that if the district did not "consent, and I believe it's a reasonable request, I'll order it" (Tr. p. 7). The parties discussed issues concerning amending versus filing a new due process complaint, the IHO assignment system, and the possibility of the need for a new resolution period (Tr. pp. 7-14). Counsel for the district reiterated the district's intent to move to dismiss the matter, and the IHO responded "[o]kay, go ahead . . . I won't stop you" (Tr. p. 10).

Also on December 21, 2021, the parent submitted an amended due process complaint notice pursuant to the IHO's directive, which largely reiterated the same arguments brought in the January 2021 due process complaint notice (compare IHO Ex II, with IHO Ex. I). However, in the amended due process complaint notice, the parent added an allegation that, because of the alterations in the delivery of the student's IEP program and services during the school closures related to the COVID-19 pandemic, "the [s]tudent experienced substantial regression in [her] educational skills, abilities, and performance" (compare IHO Ex. II at p. 2, with IHO Ex. I at p. 2).

In addition, the parent added an allegation that she "disagree[d] with the [s]tudent's prior evaluations, both at the time of the evaluations as well as currently, because they did not accurately reflect the [s]tudent's needs at the time []or . . . accurately reflect the impact . . . the COVID-19 school closures and unilateral modification of IEP program and services . . . had on the [s]tudent . . . and the magnitude of regression that . . . resulted" (compare IHO Ex. II at p. 3, with IHO Ex. I at pp. 2-3). In the amended due process complaint notice, the parent identified specific areas for the requested IEE, to wit, "neuropsychological, occupational, physical, and speech/language therapy" (compare IHO Ex. II at p. 3, with IHO Ex. I at pp. 2-3).

The parent also modified the relief requested, dropping her request that the district be ordered to re-open the student's school building to in-person instruction and adding a request that the district 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 (compare IHO Ex. II at p. 3, with IHO Ex. I at p. 3).

C. District's Motion to Dismiss, Interim IHO Decisions, and Intervening Impartial Hearing Dates

On December 27, 2021, the district submitted a written motion to dismiss the amended due process complaint notice, arguing first that there was no change in pendency rights caused by the switch to remote instruction mandated by the COVID-19 guidance, such that the parent's claim there had been a change in placement and request for an order requiring the district to implement the student's last agreed upon IEP could not be granted (see IHO Ex. III at pp. 1-4, citing J.T. v. DeBlasio, 500 F.Supp.3d 137 [S.D.N.Y. 2020]). Second, the district argued that the amended due process complaint failed to state a cause upon which relief could be granted because it did not raise any claims with respect to the student's IEP, and claims pertaining to the COVID-19 related closure of schools and remote delivery of instruction were systemic and outside of the jurisdiction of the IHO to adjudicate (IHO Ex. III at pp. 4-7). Third, the district argued that the parent's request for IEEs could not be granted as a matter of law because the parent did not object to a specific evaluation conducted by the district and a general disagreement with any and all evaluations was insufficient (id. at pp. 7-8).

In an interim decision dated December 27, 2021, the IHO acknowledged that the parent had filed an amended to due process complaint notice and indicated that he "granted permission for the Amended Complaint" (Dec. 27, 2021 Interim IHO Decision at p. 2). The IHO denied the motion to dismiss, reasoning that the parent's complaint, "claiming a denial of FAPE and pendency services in the 2020/21 school year and seeking compensatory services as presented in the Amended Due Process Complaint constitute[d] a viable claim under the IDEA" (id. at pp. 2-3).

At an impartial hearing held on March 10, 2022, the parties discussed the parent's request for IEEs in the amended due process compliant, and the district continued to object on the ground that, while there were requests for "a couple of different evaluations" in the amended complaint, there was not an allegation "actually disagree[ing] with any specific [district] evaluations" (Tr. p. 24). The district's attorney noted that the complaint did not reference the "date of any of the evaluations that were done" and argued that "[s]imply having the word disagreement somewhere in the [due process complaint] d[id] not . . . constitute disagreeing with a specific [district] evaluation" (Tr. p. 24). The IHO responded that the district had the right to know specifically what the parent disagreed with and why (Tr. pp. 24-25). Therefore, the IHO suggested that "the Parents submit to the District what they disagree with respect to the evaluations talked about," such as a psychoeducational, PT, OT, and/or speech-language therapy evaluation and "[b]e at least somewhat specific about that," at which the point the district would be able to either " request a hearing to defend [its] evaluations" or grant the parents request for an IEE (Tr. p. 25).

Counsel for the district further objected to this arrangement, arguing that the parent's disagreement had to "either in the [due process complaint] as held by the SRO or prior to the [due process complaint] being filed" (Tr. p. 25). The district further objected to an additional amendment to the parent's due process complaint notice (Tr. p. 28). There were technical difficulties with the remote hearing procedures, and the argument between the IHO and district's counsel became heated, but the ruling with respect to the IEEs remained, with the IHO stating: "I'm going to stick with what I ruled. Provide notice, more specific notice, to the [d]istrict about what you're objecting to with respect to evaluations, specifically, not the reasons, but what exactly you disagree about. That way the [d]istrict can defend those evaluations or grant you independent evaluations" (see Tr. pp. 26-32). The IHO gave the parent ten days to "inform" the district and the district a further ten days to respond (Tr. p. 32).

The impartial hearing continued on April 25, 2022 (Tr. p. 35). The parties discussed an e-mail the parent sent to the district outlining the parent's disagreements with district evaluations, apparently sent on March 21, 2022 (Tr. pp. 38, 48).[2] The district's position remained that the parent had failed to "make out a prima facie claim for an IEE" and that, therefore, the district was "not required to do anything, including file its own due process complaint to defend any prior evaluations" (Tr. p. 40). The IHO related that he had not received the parent's email, asked the parent's counsel to "have them presented as evidence," and stated that the next hearing date would be "for the [d]istrict to defend their recommendation for the [2020-21] school year" (Tr. p. 49).

[2] A copy of the March 21, 2022 email is not present in the hearing record.

The impartial hearing continued on June 3, 2022, but the matter was adjourned after a scheduling mishap (Tr. pp. 55-59).

At the impartial hearing date held on June 7, 2022, the district presented two witnesses who testified with respect to the student's education and evaluations during the 2019-20 and 2020-21 school years (Tr. pp. 73-111; Dist. Exs. 26-27). Additionally, district exhibits 1 through 27 were admitted into evidence (Tr. pp. 68-70; Dist. Exs. 1-27). After the witness testimony concluded, the parties turned to the question of the parent's request for IEEs (Tr. p. 112). After a lengthy discussion regarding the request for IEEs during which the parties revisited their respective arguments, the IHO stated that the parent's March 21, 2022 email that described the specific district evaluations that the parent disagreed with as well as the nature of those disagreements and the IEEs the parent sought "supplement[ed]" the amended due process complaint notice, that the district had "a responsibility to respond to it properly" by requesting a hearing or approving the IEEs, and that the district had not done "the former" and so would be required "to do the latter" (Tr. pp. 112-126, 124-25). However, after further discussion, the IHO decided to issue an interim order that would give the district five days to either initiate a hearing to defend their evaluations or "agree to the independent evaluations" (Tr. p. 134).

In an interim decision dated June 11, 2022, the IHO ordered that the district would have seven days from the date it received the order "to either provide the parent with authorization to obtain an IEE for OT, PT, Speech, and Neuropsychological or to request a due process hearing to defend the appropriateness of the [district] evaluation of [the student] . . . which [the IHO] w[ould] consolidate with this matter" (June 11, 2021 Interim IHO Decision at pp. 3-4). The order also stated that the hearing would continue on July 21, 2021 "for parent's evidence" (id. at p. 3).

D. Final Impartial Hearing Officer Decision

The impartial hearing continued on July 21, 2022, but no parent evidence was taken (Tr. pp. 142-63). At the beginning of the hearing date, the IHO summarized recent events in the hearing and stated that he had "come across, what [he] believe[d] [wa]s, an error on [his] part, in the course of these proceedings" (Tr. p. 144). The IHO then related that the district had not consented to the December 21, 2021 amended due process complaint notice and that the IHO could only grant permission for an amendment at a time not later than five days before the impartial hearing began; according to the IHO, the hearing began on December 21, 2021 (Tr. p. 145). Thus, the IHO expressed his view the amendment was improper and the matter as a whole should be dismissed without prejudice to re-file (Tr. pp. 145-57). Counsel for the parent argued that the IHO had the authority to allow the amendment to the due process complaint because it was filed at least five days prior to the first substantive hearing date, rather than a prehearing conference date (Tr. pp. 147-48). The district argued that the IHO should dismiss the matter, but that the dismissal should be with prejudice (Tr. p. 154). The IHO set a timeline to receive "legal argument" from the parties (Tr. pp. 159-60).

On August 8, 2022, the parties submitted written argument on the question of dismissing the amended due process complaint notice wherein the parent argued that the IHO properly allowed the amendment because the impartial hearing had not yet commenced at the time and the district asserted that the amendment was improper and the matter should be dismissed with prejudice (IHO Exs. IV; V).

In a "Dismissal Order" dated August 14, 2022, the IHO determined that he was "without authority to grant permission to amend the complaint" and rejected the parent's argument "that all prior proceedings were conferences that did not commence the matter" (IHO Decision at p. 3). The IHO also rejected the district's claim that the original January 19, 2021 due process complaint should be dismissed with prejudice because the "parent still has viable claims and should not be further prejudiced by the delay in having appropriate IDEA claims heard" (id.). The IHO ordered that the January 19, 2021 due process complaint notice be dismissed "without prejudice to the filing of an appropriate due process complaint as discussed" (id.).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by failing to dismiss the parent's due process complaint notice with prejudice. Further, the district contends that the IHO erred in failing to grant the district's motion to dismiss the parents' due process complaint notice in his December 2021 interim decision. The district also appeals the IHO's June 2022 interim decision, arguing that it was improper for the IHO to allow the parent to supplement the request for an IEE after the impartial hearing commenced. The district also asserts that it met its burden to show that the district offered the student a FAPE.

In an answer and cross-appeal, the parent responds to the district's allegations. As for her cross-appeal, the parent contends that the IHO erred by dismissing the due process complaint notice. The parent argues that the IHO had the authority to grant the parent permission to amend the due process complaint notice during the prehearing conference because a hearing on the merits of the parent's claims had not yet commenced. The parent submits additional documentary evidence with the answer and cross-appeal.

In an answer to the cross-appeal, the district responds to the parent's allegations. In addition, the district alleges that the parent failed to timely serve the notice of intention to cross-appeal or assert good cause for the delayed service. The district also argues that the parent's cross-appeal was improperly verified and notarized because the notary's commission had expired at the time of verification. The district further objects to the consideration of the additional documentary evidence submitted by the parent.[3]

[3] 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; 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]). Here, the documents offered by the parent as additional evidence were already part of the haring record on appeal (compare Answer & Cr.-Appeal Exs. A-B, with Dist. Ex. 3; IHO Ex. II) or are not necessary to render a decision (Parent Answer Ex. C-E). Accordingly, I decline to accept the proposed additional evidence.

The parent, in a reply to the district's answer to the cross-appeal, responds to the allegations that the parent untimely served the notice of intention to cross-appeal and improperly verified the cross appeal.[4]

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

[4] 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]). Here, 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 reject the parent's answer with cross-appeal. In addition, the failure of the notary public to ensure his commission was current or to accurately identify the expiration of his commission on the verification he notarized will not be held against the parent as a matter within my discretion.

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]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were

[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).

appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Amended Due Process Complaint Notice

A threshold question that must be resolved in this matter is whether the IHO had the authority to allow the parent to amend the due process complaint notice as of December 21, 2021, after the prehearing conference had been conducted.

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's authority to allow the amendment hinges on a determination as to whether a prehearing conference constituted the commencement of the impartial hearing such that the amendment was untimely presented (see 8 NYCRR 200.5[i][7][b]) . While this same question was recently posed in another matter before the undersigned (see Application of the Dep't of Educ., Appeal No. 22-108), it was not necessary to decide the issue. Here, however, it appears that the question is determinative of some of the remaining issues to be addressed.

In the IDEA, Congress specified that

> "A party may amend its due process complaint notice only if--

> (I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or
>
> (II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(20 U.S.C. § 1415[c][2][E][i]). Although State regulation provides a timeline for the commencement of the impartial hearing process, it does not define the precise moment a "hearing" has commenced; however, the wording used (i.e. " the hearing or a pre-hearing conference shall commence") strongly suggests that holding a prehearing conference is not the same as the commencement of the hearing itself (see 8 NYCRR 200.5[j][3][iii]; see also 8 NYCRR 200.5[j][6][i]). Moreover, State regulations set forth the purposes for holding a prehearing conference; to wit, for: "(a) simplifying or clarifying the issues; (b) establishing date(s) for the completion of the hearing; (c) identifying evidence to be entered into the record; (d) identifying witnesses expected to provide testimony; and/or (e) addressing other administrative matters as the [IHO] deems necessary to complete a timely hearing" (8 NYCRR 200.5[j][3][xi]).

Thus, a prehearing conference contemplates "simplifying or clarifying the issues" raised in a due process complaint notice. It follows that an IHO retains the discretionary authority to allow amendment of a due process complaint notice after a prehearing conference has been conducted to achieve that purpose provided that the five days remain before the "hearing" begins, meaning the evidentiary phase of the proceeding.[6] During the impartial hearing, counsel for the parent noted that the parent amended the due process complaint notice in order to simplify and clarify the issues and to "streamline[] and eliminate[] a couple of the claims from the original due process complaint simply because of the passage of time" noting further that one of the "remedies requested was the reopening of schools" which had occurred during the pendency of the proceeding prior to the assignment of the IHO and could be dropped from the matter in the amended due process complaint notice (Tr. pp. 1-5; compare IHO Ex. I at p. 3 with IHO Ex. II at p. 3). The amended due process complaint notice also may have changed the issues, for example, by adding an allegation relevant to the parent's request for IEEs that the parent "disagree[d] with the Student's prior evaluations, both at the time of the evaluations as well as currently, because they did not accurately reflect the Student's needs at the time nor do they accurately reflect the impact of COVID-19 school closures" and by listing the specific evaluations the parent sought as IEEs (IHO Ex. II at pp. 2-3). Whether the allegations set forth in the amended due process

[6] The parent points to State regulation concerning voluntary withdrawal of a due process complaint notice as further evidence that a prehearing conference does not commence an impartial hearing (Answer & Cr.-Appeal ¶ 21). The regulation in question reads "(i) Prior to the commencement of the hearing, a voluntary withdrawal by the party requesting the hearing shall be without prejudice unless the parties otherwise agree. For purposes of this paragraph, the commencement of the hearing shall not mean the initial prehearing conference if one is conducted, but shall mean the first date the hearing is held after such conference" (8 NYCRR 200.5[6][i]). Although this regulation is not controlling for the purpose of this discussion, as it is limited to the paragraph concerning voluntary withdrawal of a due process complaint notice by its own terms, it is nonetheless at least suggestive that a prehearing conference occurs "prior" to an impartial hearing.

complaint notice would be deemed sufficient to put the district on notice of the evaluation(s) being challenged in addressed further below.

As for the question of whether the amended due process complaint notice prejudiced or "sandbagged" the district in that it occurred after the close of the resolution period, such prejudice has not occurred in this matter because the parties conducted a second resolution period after the amended due process complaint notice was accepted (Tr. p. 19; see R.E., 694 F.3d 167 at 187-88 n.4).[7] Additionally, the IHO granted permission to amend the due process complaint notice prior to the phase of the impartial hearing process where evidence and testimony was taken.

In light of the above, I find that the IHO erred in reversing course after the evidentiary phase of the proceeding had been partially completed based upon the reasoning that he did not have authority to allow the amended due process complaint notice. Thus, in accordance with the IHO's original ruling allowing the amendment, the amended due process complaint notice dated December 21, 2021 is the operative complaint going forward this proceeding and, as further described below, upon remand (see Tr. p. 7; Dec. 27, 2021 Interim IHO Decision at p. 2; IHO Ex. II).

B. District's Motion to Dismiss the Amended Due Process Complaint Notice

As summarized above the IHO ironically had allowed the hearing process to continue because he had originally denied the district's motion to dismiss the parent's amended due process complaint notice finding that the parent's allegations relating to "a denial of FAPE and pendency services in the 2020/21 school year" and requesting compensatory education presented "a viable claim" (Dec. 27, 2021 Interim IHO Decision at pp. 2-3; see IHO Ex. II). However, implicit in the IHO's final decision, which determined that the amended due process complaint notice was not properly accepted, was a finding that the district's motion to dismiss was granted at least in part with respect to the claims in the original January 2021 due process complaint notice (IHO Decision at p. 3; see IHO Ex. I). Numerous claims were continued unchanged in the amended due process complaint notice, and these rulings are the subject of the district's appeal and the parent's cross-appeal respectively.

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). 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]).

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[7] Along with the hearing timelines, Congress also specifically required the parties to revisit the procedures for the resolution session process when it referenced them in the amended due process procedures:

> (ii) Applicable timeline
>
> The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(20 U.S.C. § 1415[c][2][E][i] [emphasis added]).

1. Remote Instruction

As for the allegations of a denial of a FAPE, the IHO's dismissal was likely appropriate given the similarity of the allegations to recent matters and a lack of specific facts in the parent's due process complaint notice. That is, as the district notes, the parent's allegations in the due process complaint notice were very similar to those alleged in matters involving different students, which were discussed in Application of the Department of Education, Appeal No. 22-108; Application of the Department of Education, Appeal No. 22-031; Application of a Student with a Disability, Appeal No. 22-017; Application of a Student with a Disability, Appeal No. 22-016; Application of a Student with a Disability, Appeal No. 21-241, Application of a Student with a Disability, Appeal No. 21-210, Application of the Department of Education, Appeal No. 21-188, and Application of the Department of Education, 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, which also involved plaintiffs represented by the same law firm as the parent in the present matter (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, as well as the actions taken by the district to deliver services to students with disabilities during the closure through remote delivery 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.

Further, in the amended due process complaint notice, the parent referenced concepts such as "the student's last agreed upon placement," "status quo," "stay put," and pendency rights (IHO Ex. II at pp. 1-3). However, district-wide school building closures would not trigger pendency rights, and allegations that there was a violation of the student's pendency placement 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 2021 (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.

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 parent a final, limited opportunity with an IHO to revisit the allegations upon remand. In particular, upon 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.

The reason for this limited opportunity is that the parent's December 2021 due process complaint notice included an allegation that "the Student experienced substantial regression in their educational skills, abilities, and performance" as "a result of the modifications of the Student's mandated IEP program and services," and those statements were made in the context of the COVID-19 related building closures (IHO Ex. II at p. 2). It is, however, unclear from the fact allegations whether the parent raised such concern in the first instance with the CPSE as outlined below or whether the CPSE had taken up the any concerns stated by the parents with regard to the student's alleged regression related to building closure and remote aspects of the student's instruction at the private preschool.

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 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 CPSE or 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.

If, upon remand, the IHO clarifies that that allegations of fact in the due process complaint do not involve a meeting of the CPSE at which the parent raised her concerns regarding the effect of the COVID-19 building closures upon the student, the IHO should dismiss the claim as generally related to building closures, and as noted above, may encourage the parent to discuss concerns about this specific student and remote instruction with the CSE.[8] If the IHO is convinced that the parent's allegations relate to such a specific CPSE meeting that was held to address remote instruction concerns (i.e. that such a meeting already occurred) and that that the CPSE allegedly refused to or improperly addressed the parents' concerns, the IHO should hold an evidentiary hearing to address that particular claim.

2. Independent Educational Evaluation at Public Expense

Having found that the IHO should not have reversed course after the evidentiary phase of the hearing was partially completed and dismissed the parent's amended due process complaint notice, the status of the parent's request for IEEs must also be considered in light of the allegation in the amended due process complaint notice that the parent disagreed with a district evaluation (IHO Ex. II at p. 3).

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

[8] At this juncture the student has likely aged out of the CPSE process and transitioned to the school-aged CSE process.

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]).[9, 10]

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). Additionally, although the district "may ask for the parent's reason why he or she objects to the public evaluation," an explanation by the parent "may not be required and the school district may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint notice to request a hearing to defend the public evaluation" (8 NYCRR 200.5[g][1][iii]; see 34 CFR 300.502[b][4]).

If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation, "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (Trumbull, 975 F.3d at 170).

Here, in the amended due process complaint notice the parent stated her disagreement with "the Student's prior evaluations, both at the time of the evaluations as well as currently, because they did not accurately reflect the Student's needs at the time" (IHO Ex. II at p. 3).[11] As an initial

[9] 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]).

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

[11] Within the amended due process complaint notice, in addition to seeking IEEs as final relief in the matter, the parent also requested the IHO issue an interim order for IEEs (IHO Ex. II at p. 3). It is generally within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting

matter, while 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), this is not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). As the Second Circuit observed, at no point does a parent need to file a due process complaint to obtain an IEE at public expense (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 168-69 [2d Cir. 2020]).[12] My own study of the judicial guidance and administrative guidance on the topic has not yet let me to a decision on whether to reverse course on the approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement with the district first), but in cases such as this, it is becoming obvious that the parent is delaying the IEE request in favor of including it in their own due process complaint—perhaps as a means to obtain evidence to support other claims against the district rather than as a means to understand the student's needs—then trying to use the IEE request to allege that their complaint has actionable claims. This is an improper use of the due process procedures. As this matter is remanded, I will leave it to the IHO to determine whether it was appropriate for the parent to express disagreement with a district evaluation and request an IEE in an amended due process complaint notice in the first instance.

As to the parent's purported disagreement with a district evaluation, the district argues that the statement in the amended due process complaint notice is insufficiently specific to satisfy the requirement that the parent disagree with a district evaluation at the time it was conducted because it does not specify a particular district evaluation.[13] Here, there are several district evaluations and teacher and related service progress reports included in the hearing record with dates as early as October 2018 and as late as summer 2021 (see Dist. Exs. 6-25).[14] However, the Second Circuit has recently clarified that, for purposes of the statute, an "evaluation" means a "comprehensive" initial evaluation or reevaluation but not a limited or targeted assessment conducted in between evaluations (Trumbull Bd. of Educ., 975 F.3d at 162-63). In addition, the Court has indicated that

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that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]). However, at this time, the parents seek the IEEs only as a form of final relief based on their alleged disagreement with district evaluations.

[12] The court in Trumbull speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate (Trumbull, 975 F.3d at 169).

[13] A recent decision by an SRO suggested in dicta that such wording would satisfy the requirement (see, e.g., Application of a Student with a Disability, Appeal No. 22-016 [stating "The corrected/amended due process complaint 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, 'which if the complaint notice was accepted, tends to support a finding that the parent expressed disagreement with an evaluation conducted by the district and requested that an IEE be conducted at public expense"]).

[14] The district additionally attached copies of several of these reports to its motion to dismiss (IHO Ex. III at pp. 10-42).

a parent may not obtain a publicly funded IEE "based on their disagreement with an old evaluation" insofar as the "parent's right to disagree with an evaluation and obtain an IEE at public expense is tethered to the frequency with which the child is evaluated" (id. at 169-70). Given this understanding of what is meant by an evaluation, on remand, the IHO may examine whether or not the district was on sufficient notice of the evaluation with which the parent disagreed.

During the impartial hearing, the reasons for the parent's disagreement with the district evaluations was discussed on the record (see Tr. pp. 20-28). The parent's counsel verbally described specific parent disagreements with the "written reports from her therapists during the month of January 2021" (Tr. pp. 20-21).[15] In addition, the parent's counsel indicated that the parent did not agree with the March 2021 psychoeducational evaluation because the parent sought "a full neuropsychological evaluation at that time" particularly given the parent's concerns that the student had experienced regression as a result of transition to remote instruction (Tr. pp. 21-22; see Dist. Ex. 6). However, the IHO asked the parent to give the district a written description of the specific disagreements the parent had with each district evaluation, stating his view that "the district ha[d] the right to know specifically what [the parent] disagree[d] with and why" (Tr. pp. 24-25). It is apparent from the hearing record that the parent provided the district and the IHO with the ordered written description of specific disagreements with district evaluations by email on March 21, 2022, but no such document is present in the hearing record on appeal (see Tr. pp. 124-25; June 11, 2021 Interim Order at pp. 3-4).

Given that it appears that the IHO held that the parent's disagreements contained in the amended due process complaint notice were insufficiently specific and the March 21, 2022 written clarification was required to put the district on notice of the specific evaluations with which the parent disagreed, and given that the parent's written response is not present in the hearing record, I am unable at this time to render an opinion with respect to the parent has sufficiently disagreed with a district evaluation in order to allow a claim for an IEE to go forward. Accordingly, I will remand this matter to an IHO for further consideration and rulings with respect to the sufficiency of the parent's request for an IEE at district expense, and if necessary to determine whether the parent is entitled to district funding of an IEE.

VII. Conclusion

Having found that the IHO erred in changing course on his prior acceptance of the parent's amended due process complaint notice and, therefore, in dismissing the parent's claims, the final decision, dated August 14, 2022, must be vacated. However, further consideration must be given to the district's arguments for dismissal of the amended due process complaint notice and, if necessary, to the parent's underlying claims. Therefore, the IHO's interim decisions, dated December 27, 2021 and June 11, 2022 are also vacated. The matter must be remanded for further administrative proceedings (8 NYCRR 279.10[c]). I was saddened to learn that the IHO who presided over this matter has passed away. Accordingly, a different IHO must be assigned.

[15] The parent's counsel elaborated that the parent disagreed with the related services evaluations because they "were based on written reports from her therapist[s] during the month of January in 2021," were conducted in a "setting [that] was not appropriate" in that "[i]t was highly distractable," and were "very brief, not comprehensive in the least" (Tr. pp. 20-21).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decisions dated December 27, 2021 and June 11, 2022, as well as the IHO's final decision dated August 14, 2022, are vacated;

IT IS FURTHER ORDERED that the matter is remanded to an IHO to reconsider the district's motion to dismiss after clarifying the nature of the parent's allegations in the due process complaint notice in light of this decision, and, if necessary, to consider the parent's request for publicly funded IEEs and compensatory education.

Dated: **Albany, New York**
November 25, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER