The University of the State of New York

The State Education Department
State Review Officer
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No. 19-101

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
The Law Office of Andrew Weisfeld, PLLC, attorneys for petitioner, by Andrew Weisfeld, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for funding from respondent (the district) to conduct certain independent educational evaluations (IEEs) at her requested rates. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The hearing record reflects that the student has received diagnoses of an autism spectrum disorder (ASD), an attention deficit hyperactivity disorder (ADHD), and apraxia of speech (Dist. Exs. 14 at pp. 1, 12; 16 at p. 2). The student demonstrates difficulty with attention and concentration as well as deficits in, age-expected readiness skills, communication, activities of daily living (ADLs), social skills, behavior, and fine motor development (Dist. Exs. 14 at p. 3, 6-8, 10; 30). The student is nonverbal and utilizes an augmentative, alternative communication device (Dist. Ex. 16 at p. 2). During the 2018-19 school year, the student was five years old and attended kindergarten in an 8:1+1 special class with a 1:1 paraprofessional in the ASD Horizon program in the district (Dist. Exs. 14 at p. 3; 16 at p. 2).

By letter dated January 5, 2019, the parent requested the CSE conduct several evaluations including an occupational therapy (OT) evaluation, an assistive technology evaluation, and a classroom observation, and, in a separate letter dated the same day, requested an independent neuropsychological evaluation at district expense (Dist. Ex. 34 at pp. 1-2). The district conducted an OT evaluation on January 23, 2019 and a functional behavioral assessment (FBA) on February 14, 2019 (Dist. Exs. 20; 25; 30).

By prior written notice dated February 14, 2019, the district responded to the parent's request for an independent OT evaluation and informed the parent of its refusal to grant her request for an independent OT evaluation, "because the recent occupational therapy evaluation conducted by [the district] is comprehensive and appropriate" (Dist. Ex. 24).

In a letter dated February 15, 2019, the district requested an impartial hearing from the district's "Impartial Hearing Office" in order to show that the "Occupational Therapy Reevaluation" conducted by the district in January 2019 was appropriate and the parent was not entitled to the independent OT evaluation (Dist. Ex. 22 at pp. 1-2).

By letter dated February 21, 2019, the parent requested an IEE in the area of physical therapy (PT) to assess the student's "gross motor skills, independent living skills, orientation, and mobility skills" (Dist. Ex. 21). On March 1, 2019, the district developed a behavior intervention plan (BIP) for the student (Dist. Ex. 19). The district conducted a PT evaluation on March 13 and March 15, 2019 (Dist. Ex. 16 at pp. 1-8).

On March 19, 2019, the parent acknowledged the district's request for an impartial hearing to assert the appropriateness of the OT reevaluation (Dist. Ex. 15).

The parent had a neuropsychological evaluation of the student conducted in March 2019 (Dist. Ex. 14). The neuropsychological evaluation included a review of the student's academic and evaluation history, observations of the student during testing and at school, and the administration of several standardized assessments (id. at pp. 1-7). Over a two-day period the evaluator assessed certain aspects of the student's intellectual, academic, and social/emotional functioning (id. at p. 1). The neuropsychological evaluation contained diagnostic considerations and recommendations regarding placement, supports, and services (id. at pp. 12-13).

At the request of the impartial hearing officer, on April 5, 2019 the district conducted an assistive technology evaluation of the student (Dist. Ex. 5 at p. 1). As a result of the evaluation the district recommended that the student engage in a trial period of assistive technology use, specifically using a touchscreen tablet to target his graphomotor deficits (id.).

By letter dated May 7, 2019, the parent informed the district that she was requesting the following IEEs: a speech and language evaluation, assistive technology evaluation, OT evaluation, neuropsychological evaluation, FBA, BIP, and an applied behavioral analysis (ABA) skills assessment (Parent Ex. O at p. 1).

In a prior written notice dated May 20, 2019, the district informed the parent that the CSE refused to grant the parent's request for an independent neuropsychological evaluation because in March 2019 an independent evaluator conducted a neuropsychological evaluation (Dist. Ex. 12 at p. 1). The prior written notice also indicated that since there was not a district neuropsychological

evaluation in dispute, the student was not entitled to an independent neuropsychological evaluation (id.). Next, the notice stated that the CSE refused to grant the parent's request for a BIP because a BIP was not an evaluation, rather it was planning conducted at the school level (id.). The notice further indicated that the CSE refused to grant the parent's request for an ABA skills assessment, describing it as an instructional methodology rather than a clinical evaluation (id.).

A CSE convened on June 7, 2019 and found the student eligible for special education as a student with autism (Dist. Ex. 3 at p. 1).[1] The CSE recommended an 8:1+1 special class placement at a non-specialized public school together with individual OT, individual and group speech-language therapy, parent counseling and training, and an individual paraprofessional, as well as assistive technology including a touchscreen tablet and a dynamic display speech generating device (Parent Ex. F at pp. 22-25; Dist. Ex. 3 at p. 1).

An assistive technology report addendum, dated June 13, 2019, recommended the student's continued use of a touchscreen tablet based on his performance during the trial period (Dist. Ex. 5 at pp. 1-8).

In a prior written notice dated June 19, 2019, the CSE noted that it considered the following evaluative documents when determining the student's eligibility for special education services and developing his IEP for the 2019-20 school year: a January 23, 2019 OT evaluation, a February 28, 2019 classroom observation, a March 1, 2019 FBA, a March 26, 2019 PT evaluation, an April 5, 2019 assistive technology evaluation, and a May 3, 2019 neuropsychological evaluation (Dist. Ex. 3 at p. 2).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated June 20, 2019, the parent asserted that she was entitled to several IEEs (Parent Ex. A). The parent asserted that the district had failed to properly evaluate the student and that the parent was entitled to the requested IEEs because the district did not respond to the parent's May 2019 letter requesting IEEs and did not initiate a hearing to prove the appropriateness of its own evaluations (id. at pp. 9-10). Specifically, the parent requested neuropsychology, speech-language, OT, ABA, and assistive technology IEEs, as well as an FBA and "corresponding" BIP" (id. at p. 11). The parent also requested an independent PT evaluation by an evaluator of the parent's choosing at that provider's customary rate (id.). Lastly, the parent requested an order from the IHO requiring the CSE to reconvene within 15 days of the completed evaluations and an order specifying that the parent was "not precluded" from initiating a separate impartial hearing request for compensatory education for prior school years after the IEEs were completed (id.).

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

[2] The prior written notice references a May 3, 2019 neuropsychological evaluation report; however, the only neuropsychological evaluation report contained in the hearing record is undated but indicates the evaluation was conducted on March 26, 2019 and March 28, 2019 (Dist. Exs. 3 at p. 2; 14 at p. 1).

B. Impartial Hearing Officer Decision

On August 14, 2019, the parties met for an impartial hearing, which concluded on the same date (Tr. pp. 1-71). In a decision dated September 9, 2019, the IHO addressed most of the parent's IEE requests, but made no ruling with respect to the requested ABA skills assessment (IHO Decision at pp. 1, 1-8). With respect to the requested IEE in the area of OT, the IHO noted that it was unclear if a hearing with respect to the district's OT evaluation had occurred, but denied the request for an IEE because the hearing record showed that the district had requested such a hearing (IHO Decision at pp. 1, 4-5; see Dist. Ex. 22).

The IHO denied the parent's request for a neuropsychological IEE, finding that the March 2019 neuropsychological evaluation was an IEE and declining to grant a second neuropsychological IEE at public expense (IHO Decision at p. 4). The IHO further noted that assertions from parent's counsel regarding the adequacy of the March 2019 neuropsychological evaluation were not evidence and that there was no evidence in the hearing record indicating the March 2019 neuropsychological evaluation should not be regarded as valid (id.).

The IHO next granted the request for an independent FBA at public expense, but denied the request for an independent BIP, reasoning that a BIP is typically based upon the findings of an FBA, and "the person conducting the FBA would need to refer to what was presented in the BIP [sic]," or may determine that no BIP was required (IHO Decision at p. 4).

The IHO also granted the requests for speech-language and assistive technology IEEs (IHO Decision at p. 5). The speech-language IEE was granted at the rate the parent requested (id.; see Parent Ex. R). However, the IHO reduced the payment for the assistive technology IEE, noting that the same evaluator could conduct both evaluations, per testimony from a witness at the impartial hearing, and that review of existing documents and other preliminary work would be duplicative (id.). Lastly, the IHO noted that "the person who may conduct the speech evaluation and the independent evaluation may not be the witness who testified" (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent contends that the IHO correctly noted during the impartial hearing that once the parent requested IEEs, and the district did not initiate a hearing to prove the sufficiency of its own evaluations, the only remaining question was the correct cost for the requested IEEs. Therefore, the parent asserts, the IHO erred in denying IEE's for the neuropsychological evaluation, OT evaluation, and ABA skills assessment.

Concerning the request for an independent OT evaluation, the parent argues that the IHO should not have relied upon the district's impartial hearing request in February 2019 because the parent's request for IEEs did not occur until May 2019, and it would only be after that request that a district-initiated hearing would be relevant.

With respect to the IHO's failure to order a neuropsychological IEE, the parent argues that the March 2019 neuropsychological evaluation was not an independent evaluation, as the IHO found, because the evaluator had to comply with standards set by the district, including a maximum cost.

With respect to the ABA skills assessment, the parent asserts that the IHO, having found that the only issue was the cost of the evaluations and not the parent's right to obtain the requested evaluations, erred in failing to order the assessment.

The parent also asserts that the IHO erred in refusing to let her testify at the impartial hearing and erred in cutting off investigation into flaws in the existing district evaluations during the impartial hearing. The parent asserts that because the IHO did not grant all of the requested IEEs, there were contested issues at the impartial hearing over and above the question of the cost of the IEEs, and the parent's testimony, among other lines of inquiry, would have been relevant to those issues.

Accordingly, the parent requests an order directing the district to pay for IEEs, including a neuropsychological evaluation, an OT evaluation and an ABA skills assessment, from specific providers at specific rates.

Lastly, the parent asserts that the IHO erred in precluding the speech-language therapist, who testified at the impartial hearing, from conducting the speech-language and assistive technology IEEs the IHO ordered, and requests that the particular speech-language therapist not be precluded from conducting those IEEs in accordance with the parent's May 2019 written IEE request.

In an answer, the district asserts that the IHO retained the authority to consider whether all of the IEE requests should have been granted, despite his statement that the only matter to be addressed at the hearing was the "fees schedule." The district further asserts that the IHO correctly determined that the March 2019 neuropsychological evaluation was independent, because the parent requested a neuropsychological IEE in January 2019, and the district complied with the request and ensured that the IEE was conducted by a qualified independent evaluator in a manner that complied with State regulations regarding IEEs.

With respect to the request for an independent OT evaluation, the district contends that the IHO properly denied the request because the adequacy of the district's OT evaluation was the subject of another proceeding. The district argues that during the hearing it "attempted to essentially merge its defense of its OT evaluation with the instant matter" but "the IHO denied such evidence" (Answer ¶ 23). The district asserts that should an SRO determine that there was an insufficient record, the matter should be remanded to the IHO for further proceedings.

With respect to the request for an independent ABA skills assessment, the district contends that in the event an SRO determines that the IHO should have addressed the claim, the matter should be remanded to the IHO to determine whether to order an IEE.

Next, the district contends that the IHO did not err in precluding the parent from testifying at the hearing, because the IHO considered the possible testimony of the parent and decided it was not necessary to decide the issues presented. Lastly, the district contends that the IHO's use of the word "may" rather than "shall" does not preclude the speech-language therapist who testified at

the impartial hearing from conducting the speech-language and assistive technology IEEs the IHO ordered.[3]

V. Applicable Standards—District and Independent Evaluations

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]). In New York, the CSE develops IEPs for eligible students (Educ. Law § 4402[1][b][1]). However, before determining that a student is eligible to receive a FAPE under the IDEA, the school district is responsible to "conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability" (20 U.S.C. § 1414[a][1][a]; 34 CFR 300.301[a]).

Pursuant to federal and State procedures for determining a student's eligibility and educational needs, a "[CSE] and other qualified individuals must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]; see 34 CFR 300.306[c][i]). To accomplish this task, a district is required, in part, to conduct an initial evaluation of the student referred to the CSE (see 20 U.S.C. § 1414[a][1][B]-[C]; 34 CFR 300.301, 300.306; 8 NYCRR 200.4[a]-[b]).

Under federal and State regulation, a school district is responsible to conduct a "full and individual initial evaluation" before the initial provision of special education and related services to a student with a disability (34 CFR 300.301[a]; see 8 NYCRR 200.5[b][1]). Under federal regulation, an evaluation must assess the student "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 CFR 300.304[c][4] [emphasis added]). Under State regulation, an initial evaluation must include at least:

> (i) a physical examination . . . ;
>
> (ii) an individual psychological evaluation, except when a school psychologist determines after an assessment of a school-age student . . . that further evaluation is unnecessary;
>
> (iii) a social history;
>
> (iv) an observation of the student in the student's learning environment (including the regular classroom setting). . . ; and

[3] The district argues in the alternative that the IHO properly precluded the witness from conducting the evaluations because there was no evidence the witness was "on an approved IEE evaluator list" (Answer ¶25).

> (v) other appropriate assessments or evaluations, including an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities.

(8 NYCRR 200.4[b][1]).[4] A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).[5]

Federal and State evaluation procedures require that any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii] 8 NYCRR 200.4[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or

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[4] Federal requirements do not prescribe specific types of assessments that must be conducted as part of an initial evaluation except that a classroom observation is a federal requirement for students with specific learning disabilities. The terms psychological evaluation, social history and FBA are not defined in federal law or regulation.

[5] Although it may be done without a CSE meeting, as part of a reevaluation (or an initial evaluation if appropriate) a CSE must

> (1) Review existing evaluation data on the child, including—
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> (i) Evaluations and information provided by the parents of the child;
>
> (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
>
> (iii) Observations by teachers and related services providers; and
>
> (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—
>
> (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
>
> (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
>
> (ii) The present levels of academic achievement and related developmental needs of the child;
>
> (iii)(A) Whether the child needs special education and related services; or
>
> (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
>
> (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

(34 CFR 300.305[a]).

developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The IDEA provides parents with a number of procedural safeguards. Among them is the "right . . . to obtain an independent educational evaluation of the child," which in turn means "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question" (34 CFR 300.502[a][1], [3][i]). Parents who express a disagreement with an evaluation conducted by the district also have the right to seek an IEE conducted at public expense in some circumstances (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v. Pearl River 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"]; see also Lauren W. v. DeFlaminis, 480 F.3d 259, 275 [3d Cir. 2007] [explaining that parents do not have the right to an IEE at public expense where parents actually agreed with the school's evaluation]; Edie F. v. River Falls Sch. Dist., 243 F.3d 329, 335 [7th Cir. 2001] [explaining that parents do not have the right to an IEE at public expense where their disagreement was with the result of the child's IEP not with a particular diagnosis or methodology of evaluation]; M.C. v. Katonah/Lewisboro Union Free Sch. Dist., 2012 WL 834350, at *11–12 [S.D.N.Y. Mar. 5, 2012]; M.V. v. Shenendehowa Cent. Sch. Dist., 2013 WL 936438, at *6 [N.D.N.Y. Mar. 8, 2013]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense that was sought for additional information]). "If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation [m]ust be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child" (34 CFR 300.502[c]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although the district will not be required to provide it at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; see A.H. v. Colonial Sch. Dist., 779 Fed. Appx. 90, 94-95 [3d Cir. 2019]). 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]).[6] An IEE must use the same criteria as the public agency's criteria (Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 973–79 [5th Cir. 2016]). Informal guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an

[6] The time period for asserting claims based upon a disagreement with a school district's evaluation can be shorter than the mandatory three-year reevaluation period in some cases (see D.S., 357 F. Supp. 3d at 179).

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 (Letter to Baus, 65 IDELR 81 [OSEP 2015]), however recent caselaw clarifies that parents may not demand a comprehensive IEE at public expense while at the same time refusing to consent to the school district's offer to conduct the same assessments (D.S. v. Trumbull Bd. of Educ., 357 F. Supp. 3d 166, 178 [D. Conn. 2019], citing N.D.S. v. Acad. for Sci. & Agric. Charter Sch., 2018 WL 6201725, at *5–*7 [D. Minn. 2018] [explaining that where parents request an IEE to challenge an obsolete evaluation, they are entitled to a due process hearing limited only to whether the evaluation was appropriate at the time it was completed; if parents wish for a publicly funded IEE with respect to their child's current condition, then they must allow the school district to conduct a current reevaluation and then request an IEE if they disagree]).

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]). In accordance with this burden, the district bears the burden of showing that its evaluation of the student was appropriate in order to prevail in its challenge to the parent's requests for IEEs at public expense.

VI. Discussion

Prior to addressing the parent's claims concerning the IEEs that the IHO did not order, I note that many of the IHO's determinations have not been appealed or cross-appealed. The district does not cross appeal from the IHO's decision precluding the district from defending its evaluations and awarding an FBA, a speech-language evaluation, and an assistive technology evaluation as IEEs (Answer ¶18). The parent does not request an order directing the district to fund either an independent PT evaluation, or a BIP, and does not contest the funding amounts the IHO set for the speech-language or assistive technology evaluations (Req. for Rev. at pp. 8-9; IHO Decision at p. 5; Parent Ex. A at p. 11). Therefore, those decisions are final and binding upon both parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

A. Neuropsychological Evaluation

The IHO denied the parent's request for a neuropsychological IEE, finding that the March 2019 neuropsychological evaluation was already an IEE (IHO Decision at p. 4). The parent argues that the March 2019 evaluation was not an independent evaluation because of the contractual obligations the evaluator must meet as a part of the assessment authorization process, further noting that the evaluation had to comply with an onerous set of criteria set by the district. The district counters that the evaluation was an IEE, asserting the parent requested a neuropsychological IEE in January 2019 and the district complied with the request and ensured that the IEE was conducted by a qualified independent evaluator in a manner that complied with State regulations regarding IEEs.

Initially, as noted above, "[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]). Accordingly, if the IHO and district are correct that the March 2019 neuropsychological evaluation was an IEE, the parent is not entitled to an additional neuropsychological IEE.

The hearing record contains a written request for an independent neuropsychological evaluation from the parent to a district principal and school psychologist dated January 5, 2019 (Dist. Ex. 34 at p. 2). At the impartial hearing, the district's representative stated that an "assessment authorization form" for an independent neuropsychological evaluation had been issued to the parent dated January 24, 2019 (Tr. p. 60).[7] A neuropsychological evaluation was conducted on March 26 and 28, 2019, and the resulting report has been entered into the impartial hearing record (see Dist. Ex. 14 at pp. 1-15). The parent also requested a neuropsychological IEE within the written request for multiple IEEs dated May 7, 2019 (see Parent Ex. O at p. 1). In a prior written notice dated May 20, 2019, the district declined to grant authorization for a second neuropsychological IEE and informed the parent that the March 2019 neuropsychological evaluation was an independent evaluation conducted by an independent evaluator, and that therefore there was no district evaluation in dispute (Dist. Ex. 12 at p. 1). Accordingly, the hearing record supports the IHO's determination that the March 2019 neuropsychological evaluation was an IEE and the parent's claim with respect to the request for a neuropsychological IEE cannot be sustained.

The parent's assertion that the March 2019 neuropsychological evaluation cannot be considered "independent" because of the contractual obligations that the evaluator must meet as a part of the assessment authorization process is likewise unavailing. State law and regulations as well as Federal law and guidance allow a district to set criteria applicable to IEEs, including cost-containment measures. Upon request, the district is required to provide the parents with information regarding where IEEs may be obtained, as well as the district's criteria applicable to IEEs (34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii], [vi]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation to the extent those criteria are consistent with a parent's right to an IEE (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

In this instance, while the parent's attorney asserted that the evaluation was not independent due to the rate and standards set by the district, the parent did not offer any explanation as to how the rate or standards impacted the parent's ability to obtain an independent evaluation (see Tr. pp. 66-67). Instead, the parent focused on alleged inadequacies in the evaluation (see Req. for Rev. ¶4). The parent's disagreement with the manner of testing or the end results of the evaluation, however, does not impact on whether the evaluation met the definition of an IEE, "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a

[7] The district's proposed exhibit list contains a reference to this document as Exhibit 28, but the exhibit itself was not entered into evidence (see NYC DOE Disclosure List at p. 2).

qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]). Accordingly, any flaws or inadequacies the parent may have identified concerning the March 2019 neuropsychological evaluation would not lead to overturning the IHO's determination that the parent was not due a second neuropsychological IEE, because the March 2019 neuropsychological evaluation was an IEE duly conducted upon the parent's request.

B. Occupational Therapy Evaluation

Turning to the parent's claim that the IHO erred in failing to provide the parent with an IEE in the area of OT, the IHO denied the parent's request because the district filed for due process to defend the appropriateness of the district's OT evaluation (IHO Decision at pp. 4-5). In his decision, the IHO also noted that although the hearing record showed that the district had sought to initiate an impartial hearing to prove the appropriateness of the January 2019 OT evaluation the district conducted, there was nothing in the hearing record that showed the impartial hearing had taken place (id. at pp. 1, 4-5). On appeal, the parent asserts that the IHO erred in admitting and relying on the district's February 2019 due process complaint notice, because it predated the parent's May 2019 IEE request and was therefore irrelevant (see Tr. p. 55; Dist. Ex. 22). Furthermore, the parent contends that although the IHO's ruling that the parent was entitled to her requested IEEs precluded testimony regarding the inappropriateness of the district's OT evaluation, there was nonetheless evidence of flaws within the district's OT evaluation in the hearing record. The district asserts that the IHO correctly denied the parent's request for an IEE because the request was the subject of a different impartial hearing and, as an alternative, asserts that the issue of the appropriateness of the district's OT evaluation should be remanded because the district attempted during the hearing to merge its defense of its OT evaluation with this proceeding.

After an initial review, the undersigned determined that additional information on the status of the district's request for an impartial hearing defending the appropriateness of the district's OT evaluation might be relevant and necessary for a full review of the parent's request an OT IEE at district expense (see 8 NYCRR 279.6[d]; 279.10[b]; see also Dist. Exs. 15; 22). Accordingly, at the undersigned's direction, by letter dated November 13, 2019 from the Office of State Review, the district was directed to advise as to the status of the other proceeding and, if a final determination has been reached in that proceeding, provide a copy of the final decision or order. Additionally, the parties were given the opportunity to submit a written statement explaining whether or not they supported or objected to the SRO's consideration of such additional evidence.

By letter dated November 19, 2019, the district stated, upon information and belief and after a review of district records, that although the district submitted a due process complaint notice to defend its OT evaluation, a due process hearing was never opened or commenced as a result. Further, the district did not object to the SRO considering this information.

By letter dated November 19, 2019, the parent asserted, among other things, that the district's February 2019 request (Dist. Ex. 22) remained irrelevant, that the district had not shown that it ever filed a request with respect to its January 2019 OT evaluation, and re-stated the claim for an IEE.

Based on the above, it would be imprudent to simply accept the district's submission of the February 2019 letter as sufficient to show that the district requested an impartial hearing to

establish that its evaluation was appropriate. In addition to the lack of information regarding whether a proceeding is moving forward with respect to the district's request for a hearing, no one testified that the letter was sent to the impartial hearing office and the document itself is not stamped received by the impartial hearing office. Accordingly, the hearing record, as supplemented at the request of the undersigned, supports finding that after the parent requested an IEE in the area of OT at public expense, the district failed to either (1) ensure that an IEE was provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation was appropriate or that the evaluation obtained by the parent did not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]).

Finally, to the extent that the district requests that the issue of the appropriateness of the district's OT evaluation be remanded because the district had made a request to merge the issue during the proceeding, the transcript does not support the district's assertion. In fact, according to the transcript, the attorney for the district contended that the district should have been permitted to defend the appropriateness of the district OT evaluation because the district had sent a prior written notice indicating that the district "will file" a request for a hearing (Tr. pp. 10-11). There is no indication that the district attempted to consolidate the proceedings.

In light of the above, I agree with the parent's position and direct the district to fund the cost of an OT IEE as set forth below.

C. ABA Evaluation

The parent asserts that the IHO erred in failing to order the district to fund an independent "ABA [skills] assessment". The parent asserts that the IHO identified the parent's request for an ABA skills assessment in his decision, and simply erred in failing to order one. Further, the parent contends that the district chose not to cross-examine any parent witness concerning the cost of the requested ABA skills assessment, or make any argument against the rate for the assessment before the IHO. The district does not contest the parent's claim directly; instead, the district argues that should an SRO find that the IHO should have addressed the issue, the matter should be remanded.

The hearing record contains no evidence, nor does the district assert, that after the parent requested an ABA skills assessment IEE at public expense, the district either ensured that an IEE was provided at public expense or initiated an impartial hearing to establish that its evaluation was appropriate or that the evaluation obtained by the parent did not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). In light of the above, it appears that the IHO's failure to address the parent's request was an oversight. I agree with the parent's position and direct the district to provide the parent with an ABA skills assessment IEE at the requested rate as set forth below.

D. Speech-Language and Assistive Technology Evaluations

Lastly, the parent requests that the speech-language pathologist who testified at the hearing not be precluded from conducting the speech-language and assistive technology IEEs that the IHO ordered (Tr. pp. 41-50; Parent Ex. R). The parent objects to a statement in the IHO's decision wherein the IHO noted that, "the person who may conduct the speech evaluation and the independent evaluation may not be the witness who testified" (IHO Decision at p. 5). The district submits that the IHO's use of the word "may" rather than "shall" does not preclude the witness

from conducting the evaluations (Answer ¶25). In the context of the impartial hearing record and the entirety of the IHO's decision, it is reasonable to construe the IHO's statement as his recognition that the speech-language pathologist who testified might not personally conduct both of the evaluations; rather, she may use a subcontracted evaluator (see Tr. pp. 42-43). Accordingly, I find that the wording of the IHO's decision does not have the effect of precluding the speech-language pathologist who testified at the impartial hearing from conducting the speech-language and assistive technology IEEs that the IHO ordered, and I clarify the IHO's decision as set forth below.

VII. Conclusion

In light of the foregoing, I find that the IHO erred in denying the parent's request for an OT IEE and erred in failing to order an ABA skills assessment IEE at public expense.

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.

IT IS ORDERED that the IHO's decision dated September 9, 2019, is modified by reversing that portion which denied the parent's request for an occupational therapy independent educational evaluation at public expense; and

IT IS FURTHER ORDERED that the district shall fund the parent's requested occupational therapy independent educational evaluation at a rate not to exceed $1,500; and

IT IS FURTHER ORDERED that the district shall fund the parent's requested ABA skills assessment independent educational evaluation at a rate not to exceed $3,375; and

IT IS FURTHER ORDERED that the IHO's decision dated September 9, 2019 is clarified to ensure that the wording of the decision does not have the effect of precluding the speech-language pathologist who testified at the impartial hearing from conducting the speech-language and assistive technology independent educational evaluations ordered therein.

Dated: **Albany, New York**
December 6, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER