The University of the State of New York

The State Education Department
State Review Officer
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No. 20-049

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:
Lawrence D. Weinberg, Esq., attorney for petitioner.

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 that part of a decision of an impartial hearing officer (IHO) which failed to address his request to be reimbursed for a privately obtained neuropsychological evaluation of his son. The appeal must be sustained.

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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The CSE convened on August 3, 2018, to formulate the student's IEP for the 2018-19 school year (see generally Parent Ex. G). The parent disagreed with the recommendations contained in the August 2018 IEP and, as a result, notified the district of his intent to unilaterally place the student at York Preparatory School (York Prep) (see Parent Ex. K). [1] In a due process complaint notice, dated September 3, 2019, the parent alleged

[1] The Commissioner of Education has not approved York Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (see Parent Ex. A).

An impartial hearing convened on November 22, 2019 and concluded on January 21, 2020 after two days of proceedings (Tr. pp. 1-40).[2] In a decision dated February 7, 2020, the IHO determined that the district failed to offer the student FAPE for the 2018-19 and 2019-20 school years, that York Prep was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 4-6). As relief, the IHO ordered the district to reimburse the parent for the cost of the student's tuition at York Prep for the 2018-19 and 2019-20 school years (IHO Decision at p. 6).

IV. Appeal for State-Level Review

The parent filed a "Verified Petition" dated March 13, 2020 with the Office of State Review and the district sought an extension of the timelines to file an answer. However, by letter dated March 19, 2020, the Office of State Review informed the parent through his attorney that the parent's request for review "denominated as a 'Petition'" was rejected, and was being returned to his attorney, and would not be considered because the request for review failed to comply with several aspects of State regulations which included exceeding the permitted page length, failing to clearly specify the reasons for challenging the IHO's decision and failing to separately number and set forth specific issues for review, among other things. Nevertheless, the attorney for the parent had a history of general compliance with the practice regulations in Part 279, but apparently had moved out of state and had not appeared before the Office of State Review at any point after the practice regulations were last amended in 2016 and he did not have a pattern or practice of noncompliance. Accordingly, the parent was granted leave to prepare an amended request for review in conformity with the practice regulations which was required to "be verified and served upon the district no later than April 9, 2020." In the same letter, the parent was informed that no further action would be taken and the matter would be closed if an amended request for review was not served upon the district by the deadline and thereafter filed with the Office of State Review. The district was directed to respond to the amended request for review in accordance with the practice regulations, absent a request for a specific extension of the timelines.

The events described above occurred contemporaneously with the statewide shutdown of New York State businesses known as "New York on Pause" and similar curtailment and restructuring of nonessential State and local government operations in response to the COVID-19 pandemic. Rather than respond to an amended request for review as directed, the district responded to the parent's claims set forth in the rejected "Verified Petition" in an answer dated April 15, 2020. By letter dated April 17, 2020, the Office of State Review inquired as to whether the parties had received the March 19, 2020 letter regarding the rejected and returned March 2019 Verified Petition for noncompliance.

In a response to the Office of State Review dated April 17, 2020, the attorney for the parent indicated that he had not received the March 19, 2020 letter and requested an extension of time to serve and file an amended request for review. By letter dated April 20, 2020, the attorney for the

[2] Prehearing conferences were held on September 11, 2019 and October 30, 2019 (Tr. pp. 1-11).

district also notified the undersigned that she had not received the March 19, 2020 letter from the Office of State Review. Given the unique circumstances precipitated by the COVID-19 pandemic and that neither party received the March 19, 2020 letter from the Office of State Review, by letter dated April 20, 2020, the parent was granted an extension of the timelines to serve an amended request for review upon the district by May 1, 2020.

On April 22, 2020, the parent served an amended request for review dated April 20, 2020 on the district, which was received by the Office of State Review on April 24, 2020. The parent also provided an affidavit of verification, but the verification was not properly endorsed by a notary public or other official authorized to witness a sworn statement. On April 29, 2020, the district responded to the parent's amended request for review in an answer and indicated the amended request for review did not comply with the practice regulations. The parent responded to the district's answer in a reply dated April 30, 2020, which reply included a properly executed verification. Again, recognizing that the parties were learning new and different processes for complying with procedural requirements such as notarization during a pandemic, the undersigned authorized the Office of State Review to issue a letter dated May 1, 2020 directing the parent to file a verification of the amended request review by May 8, 2020 that was properly signed and notarized. On May 3, 2020, the Office of State Review received an affidavit of verification of the amended request for review dated April 30, 2020 from the parent which was endorsed by a notary public.

Although the adjustments in the procedures called for by the practice regulations in light of the pandemic was complex, the limited issues remaining in dispute with regard to the merits are relatively straightforward. As to the substance of the parent's appeal of the IHO's decision, the parent asserts that the IHO failed to address his request to be reimbursed for a privately obtained neuropsychological evaluation. The parent argues that the privately obtained neuropsychological evaluation was timely shared with the district's CSE and utilized by the August 2018 CSE to develop the student's IEP for the 2018-19 school year. In an answer to the amended request for review, the district contends that the parent is not entitled to reimbursement for the privately obtained neuropsychological evaluation. The district also alleges that the parent's amended request for review should be dismissed for failure to conform to the practice regulations.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New

York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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 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. Preliminary Matters

1. Compliance with Practice Regulations

As noted above, the district asserts in the answer that the parent's amended request for review was not properly verified in accordance with State regulations and requests that the parent's amended request for review be dismissed. Specifically, the district asserts that although the parent signed the affidavit of verification, it was not properly endorsed by a notary.

State regulations provide that "[a]ll pleadings and papers submitted to a[n] [SRO] in connection with an appeal must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must

[3] 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).

be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

The affidavit of verification annexed to the amended request for review was signed by the parent on April 20, 2020. However, the verification included an additional paragraph stating that the parent "[was] unable to provide a notarized declaration pursuant to 8 NYCRR §279.7 due to the Executive Order … issued … on March 18, 2020 due to COVID-19, which was extended on April 18, 2020" (Parent Aff. of Verification). The district contends that absent a proper endorsement by a notary, the affidavit is "not 'under oath'" and was therefore improper (Answer at p. 4). The district further cites to Executive Order 202.7 of the Governor of the State of New York, which was extended through May 7, 2020 by Executive Order 202.14, wherein a notary public is permitted to witness a signature via "audio-video technology" and then notarize the document (see "Guidance to Notaries Concerning Executive Order 202.7" available at https://www.dos.ny.gov/licensing/notary/DOS_COVID19_RemoteNotaryGuidance.pdf). As such, the district argues that the parent's amended request for review should be dismissed. In the parent's reply—which included a properly notarized verification—the parent's attorney expressed astonishment over the district's objection to the lack of endorsement by a notary public of the affidavit of verification accompanying the amended request for review.[4] Nevertheless, as noted above, the Office of State Review specifically requested and the parent subsequently provided a properly endorsed affidavit of verification.

Thus, the district is correct that the parent's filing of the amended request for review was initially out of conformance with State regulations, even after the State had acted to relax the requirements for the notarization of documents (8 NYCRR 279.7[b]). However, the district was able to respond to the allegations raised in the amended request for review, and there is no indication that the district suffered any prejudice in its ability to respond to the parent's pleading. Furthermore, the parent corrected the defect almost immediately. Considering the heretofore unprecedented circumstances surrounding the filing of the amended request for review in this matter, and that the parent subsequently provided an affidavit of verification that was properly endorsed by a notary public, as a matter within my discretion I decline to dismiss the parent's amended request for review on this ground (Application of the Dep't of Educ., Appeal No. 20-027; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; see J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015] [noting that "judgments rendered solely on the basis of easily

[4] I also point out here that the correctly executed verification of the amended request for review was dated on the same date as the parent's statements made in the reply, April 30, 2020.

corrected procedural errors or 'mere technicalities,' are generally disfavored"]). Nevertheless, I caution the parent's attorney that he has been alerted as to the requirements of: 1) the amended practice regulations; and 2) the appropriate avenues for addressing the difficulties related to the pandemic. Should the attorney for the parent decide to appear in other appeals I expect him to comply in the future with the pleading requirements expressly prescribed by State regulations or risk outright dismissal.

2. Scope of Impartial Hearing and Review

The parties agree that the IHO erred in failing to address the parent's request for reimbursement of a private evaluation during the impartial hearing. However, the parties disagree on the issue of the parent's entitlement to reimbursement for a May 2018 neuropsychological evaluation.

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]).

In the September 3, 2019 due process complaint notice, the parent alleged that the CSE failed to respond to his request for an evaluation (Parent Ex. A at p. 6). As a result, the parent obtained a private neuropsychological evaluation and sought reimbursement (id.). The district argues that the parent is not entitled to an independent educational evaluation (IEE). Notwithstanding the parent's properly raised request for reimbursement, the IHO's decision was silent on this issue.[5] I find that the IHO should have addressed the parent's claim for reimbursement of the private neuropsychological evaluation during the impartial hearing.

[5] While not obligated to do so, the hearing record reflects that neither party made an opening or closing statement during the hearing nor submitted closing briefs to the IHO. The hearing record prior to the IHO's decision did not include a separate request for reimbursement of the neuropsychological evaluation beyond the contention that the "parent is entitled to reimbursement for the [May 2018] evaluation" and the request for the "[c]ost of evaluations" set forth in the due process complaint notice (Parent Ex. A at pp. 6, 7). As such, it is not outside the realm of possibility that the IHO's failure to rule on reimbursement of the neuropsychological evaluation was an oversight. In the future, it would behoove the IHO to issue a prehearing order that identifies his understanding of the factual and legal issues that he is being asked to resolve (with a limited opportunity for the parties to clarify or object). Additionally, the parties could have further articulated their respective requests for relief in some fashion prior to the close of the hearing record. It is unfortunate that the parent, the district and the Office of State

Next, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

Neither party has appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, that the parent's unilateral placement was appropriate, and that equitable considerations favored the parent (see IHO Decision at pp. 4-6). Therefore, the IHO's determinations on these issues have become final and binding on both parties and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

As discussed below, although framed as an IEE dispute, at issue in this appeal is whether the parent is entitled to reimbursement for a privately obtained evaluation as additional relief after having been awarded tuition reimbursement to remedy the district's two-year denial of a FAPE.

B. Reimbursement for Neuropsychological Evaluation

The parent requests reimbursement for a privately obtained May 2018 neuropsychological evaluation. The district argues that the parent is not entitled to an IEE. The IHO did not address the parent's request for reimbursement for the privately obtained neuropsychological evaluation.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]); 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];

Review have expended considerable time and resources to correct an avoidable oversight.

M.V. v. Shenendehowa Cent. Sch. Dist., 2013 WL 936438, at *6 [N.D.N.Y. Mar. 8, 2013]; "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 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]).

Here, the evidence shows that the parent did not disagree with an evaluation conducted by the district. In a letter dated April 27, 2018, the parent stated that the student had not been evaluated for over two years and asserted that "[h]e needs an update to determine the extent that his needs have changed" (Parent Ex. D). The parent further stated that "[b]arring action by the CSE, I will schedule an evaluation update with [private evaluator], the psychologist who evaluated my son in 2016, and seek reimbursement for that evaluation" (id.). The private neuropsychological evaluation was conducted on May 17 and May 23, 2018 (Parent Ex. C at p. 1). The parent shared a copy of the evaluation with the CSE by letter on June 21, 2018 (Parent Ex. E).[7] The June 21, 2018 letter to the CSE did not reiterate a request for reimbursement of the private

[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).

[7] The invoice for the private neuropsychological evaluation includes a third service date of June 13, 2018—presumably the date the report was completed—however the June date is not reflected within the body of the evaluation report (compare Parent Ex. F at p. 1, with Parent Ex. C at pp. 1-12).

neuropsychological evaluation (id.). The CSE convened to recommend the student's program and placement for the 2018-19 school year on August 3, 2018 (Parent Ex. G). The parent wrote to the CSE on August 24, 2018 and on September 17, 2018 to reject the August 2018 CSE's recommendations and to provide 10-day notice to the district of his intention to unilaterally enroll the student at York Prep for the 2018-19 school year and seek tuition reimbursement (Parent Exs. K at p. 1; L at p. 1). The parent did not request reimbursement for the neuropsychological evaluation in either of those letters (id.). In the due process complaint notice dated September 3, 2019, the parent claimed that more than two years had elapsed between the student's evaluations, the CSE failed to contact the parent and failed to conduct or schedule a reevaluation in response to the parent's April 27, 2018 letter (Parent Ex. A at p. 6). The parent further asserted that "[t]he CSE failed to file a hearing request defending the most recent evaluation," the parent obtained a private evaluation, shared it with the CSE and is therefore entitled to reimbursement (id.). The district argues in its answer that the parent is not entitled to an IEE because the parent has not challenged a district evaluation.

In his argument on appeal, the parent has conflated the procedure for obtaining an independent educational evaluation at public expense with a request for reimbursement of a privately obtained evaluation as equitable relief for the district's alleged failure to reevaluate the student (compare 8 NYCRR 200.5[g][1][iv]; with 8 NYCRR 200.4[b][4]). As such, the district correctly asserts that the parent is not entitled to an independent neuropsychological evaluation, however, this does not end the inquiry. While the parent has relied upon the wrong legal theory, that does not alter the fact that the parent clearly sought reimbursement for the neurophysiological evaluation in the due process complaint notice because the district allegedly failed to conduct a reevaluation of the student or the fact that the parent continues to seek reimbursement for the private evaluation in an appeal from the IHO's decision. Thus, I will examine the hearing record to determine if the district was required to reimburse the parent for the evaluation as equitable relief due to a denial of a FAPE.

Under the IDEA, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). 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]). An 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]; 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 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]).

In this case, the hearing record reflects that the student received early intervention services and special education itinerant teacher (SEIT) services (Parent Ex. C at p. 2). The student has a history significant for difficulties related to sensory processing, expressive and receptive language, attention, auditory memory, response inhibition, executive functioning, graphomotor and visual motor integration and has received special education services to address his learning difficulties through private school placements from an early age to the current time (id. at pp. 2-3). The student's performance on formal assessment during eighth grade was consistent with attention deficit/hyperactivity disorder, inattentive presentation as well as specific learning disabilities with impairment in both reading and mathematics (id. at p. 2). The hearing record contains unrebutted evidence that indicates that the student was not evaluated by the district for 10 years (Parent Ex. B at p. 4). In an unappealed IHO decision upon which pendency was determined, the parent successfully obtained tuition reimbursement for the 2016-17 school year as well as reimbursement for a February 2016 privately obtained evaluation as relief for the district's failure to offer the student a FAPE (Parent Ex. B at pp. 7-14). Despite failing to conduct an evaluation of the student in the decade leading up to the 2016-17 school year, the hearing record reflects that the district has not further evaluated the student in the years since except to obtain a March 2018 social history (Parent Exs. C at p. 1; D; G at pp. 1-2; R at p. 1).[8] The evidence indicates that the CSE did not convene at all for the 2019-20 school year (Parent Exs. P at p. 1; R at p. 2).

Although the parent's April 27, 2018 letter did not mirror regulatory language word-for-word, it made clear that the parent was seeking reevaluation. The evidence in the hearing record does not indicate that the CSE responded. A prominent feature of this case is that the district did not attempt to defend itself at the impartial hearing against the parent's claim that a reevaluation of the student was needed and that the district failed to conduct one. While the student's May 2018 private evaluation was conducted within weeks of the parent's request, the parent did not act unreasonably given the unique facts of the district's past conduct in failing to evaluate the student for 10 years prior to the previously litigated proceeding and then continuing to limit reevaluation of the student to a social history since that proceeding. All of the available evidence points to the conclusion that the district has not taken its obligation to evaluate the student seriously for a long period of time, despite previously losing on the issue in a due process proceeding and then continuing to receive reevaluation requests from the parent. Accordingly, under these circumstances, I find that the IHO erred by failing to address the issue and award reimbursement for the May 2018 neuropsychological evaluation to the parent as equitable relief.

VII. Conclusion

Having determined that the IHO should have addressed the parent's request for reimbursement of a private evaluation and that the evidence in the hearing record supports reimbursement, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

[8] The March 2018 social history was not admitted as a separate exhibit.

IT IS ORDERED that the decision of the IHO dated February 7, 2020 is modified by granting the parent's request for reimbursement of a private neuropsychological evaluation in the amount of $5,500 as equitable relief for the district's failure to reevaluate the student and denying the student a FAPE for the 2018-19 and 2019-20 school years.

Dated: **Albany, New York**
May 26, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER