The University of the State of New York

The State Education Department
State Review Officer
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No. 21-104

Application of a STUDENT WITH A DISABILITY, by her 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 Elisa Hyman, PC, attorneys for petitioner, by Erin O'Connor, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed, without prejudice, her due process complaint notice that sought compensatory education services. The appeal must be sustained, and for reasons set forth below, the matter is remanded for further administrative proceedings.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student's educational history is not possible but is, in any event, unnecessary due to the procedural posture of the impartial hearing proceedings and the limited nature of this appeal. When the IHO dismissed the matter without prejudice, no evidence had been admitted into the hearing record (IHO Decision at pp. 10, 14). Accordingly, unless otherwise specified, all

factual references in this decision are drawn from the parent's allegations in her September 8, 2020 due process complaint notice (SRO Ex. A).[1]

According to the parent, for the 2018-19 school year, the student attended preschool as a regular education student (SRO Ex. A at p. 3). The parent indicated that the student attended the same preschool for the 2019-20 school year and in fall 2019 was referred for an initial evaluation to determine whether she was eligible for special education as a preschool student with a disability (id.). According to the parent, on November 20, 2019, a Committee on Preschool Special Education (CPSE) meeting was held, and an IEP was developed for the student, which set forth the CPSE's recommendations for five, one-hour sessions per week of special education itinerant teacher (SEIT) services, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of speech-language therapy in a group (2:1) (id. at p. 4).

The parent further set forth that, on May 13, 2020, a CSE convened to conduct the student's "Turning 5" review and determined that the student was eligible for special education as a student with a speech or language impairment (SRO Ex. A at p. 5). According to the parent, the May 2020 CSE recommended two 30-minute sessions per week of individual OT, one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (2:1) (id. at pp. 5-6).

A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2020, consisting of 15 pages and 124 enumerated paragraphs together with over 80 lettered subparagraphs, the parent asserted that the district failed to meet its child find obligations to the student for the 2018-19 school year and failed to offer or provide the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years based on various procedural and substantive allegations pertaining to the November 2019 CPSE and the May 2020 CSE meetings and the resultant IEPs (see generally SRO Ex. A). The parent also asserted claims concerning various district policies, including systemic violations of the IDEA and section 504 of the Rehabilitation Act of 1973 (section 504), affecting the CSE's ability to offer specific programming and services (see id.).

As relief, the parent requested: a declaration that the district violated the IDEA, section 504, and the State Education Law and that the student was denied a FAPE for the 2018-19, 2019-20, and 2020-21 school years; pendency consisting of the services set forth in the most recent CPSE IEP; independent educational evaluations (IEEs) including speech-language, auditory processing, neuropsychological, OT, and assistive technology evaluations, as well as an independent functional behavioral assessment (FBA) and "positive behavior plan for home and

[1] The parent has submitted the following documents to the Office of State Review with her request for review: a September 8, 2020 due process complaint notice (SRO Ex. A); an email exchange between counsel for the parent and the IHO dated March 17 and March 18, 2021 (SRO Ex. B); an April 13, 2021 due process complaint notice (SRO Ex. C); a pendency form signed by the parent on September 29, 2020 and by the district on "10/20" (SRO Ex. D); and an email exchange dated May 4, 2021 between counsel for the parent and the district's impartial hearing office pertaining to the appointment of an IHO for the April 13, 2021 due process complaint notice (SRO Ex. E). Some of these exhibits are duplicative of documents already included in the hearing record (i.e., the September 2020 due process complaint notice and the pendency form); however, the documents filed by the district are unmarked; therefore, for ease of reference in this decision, the exhibit designations assigned by the parent will be used.

school"; and compensatory education (SRO Ex. A at pp. 13-14).[2] Regarding compensatory education, the parent requested: 1:1 instruction, SEIT services, tutoring, behavior therapy, assistive technology, vision services, OT, physical therapy (PT), speech-language therapy, counseling, social skills training, and if warranted, "1:1 instruction with a researched-based strategy, including behavior therapy, such as ABA" (id. at pp. 14-15).

B. Impartial Hearing Officer Decisions

In an interim decision dated January 29, 2021, the IHO ordered the district to fund certain IEEs (Jan. 29, 2021 Interim IHO Decision at p. 3). More specifically, the IHO ordered the district to pay the cost of the following IEEs: speech-language, auditory processing, neuropsychological, OT, and assistive technology evaluations, as well as an observation by an expert in behavior, an FBA and positive behavior plan for both home and school (id.).[3]

The impartial hearing convened on March 17, 2021, on which date the parties discussed the status of the matter and the expected date for completion of the ordered IEEs, and the IHO expressed his "willingness" to proceed in one of two ways (Tr. p. 7; see Tr. pp. 1-17). Specifically, the parent's attorney represented that the IEEs had been scheduled, including a speech-language evaluation (April 7, 2021), an auditory processing evaluation (April 10, 2021), and a neuropsychological evaluation (May 7 and 10, 2021), while the FBA, assistive technology evaluation, PT evaluation, and OT evaluation had not yet been scheduled (Tr. pp. 3-4). Given the timeline for the IEEs, the IHO stated that he was willing to schedule the hearing within the month for the district to defend its IEPs or, if the parent believed that she could not "adequately make [her] case without the information from the IEEs," he was willing to dismiss the matter without prejudice or the parent could withdraw her complaint (Tr. pp. 7-8). The parent's attorney expressed that the parent's preference was "to keep the matter open" while the IEEs were completed, expressing concerns about the statute of limitations if she had to re-file; however, the IHO opined that her claims would not accrue until the IEEs were completed (Tr. pp. 9-10). As for the option of keeping the matter open, the IHO expressed "pragmatic" concerns about case management and judicial resources and further opined that "conceptual[ly]" the IEEs were necessary, not only to calculate compensatory education, but to evaluate the parent's claims that the district failed to offer the student a FAPE (Tr. pp. 10-11). While the parent's attorney and the district's representative ultimately agreed to the IHO's proposal that the parent would withdraw the complaint and re-file once the IEEs were completed (Tr. pp. 14-16), the parent's attorney later informed the IHO by email, dated March 17, 2021, that the parent could not withdraw her complaint, noting the potential that claims would be barred by the statute of limitations if she withdrew and later re-filed (SRO

[2] The parent and district agreed that pendency arose from the November 2019 IEP, which consisted of five one-hour sessions per week of direct SEIT services, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of speech-language therapy in a group (2:1), all on a 12-month basis (SRO Ex. D at pp. 1-2).

[3] During the impartial hearing, the parent's attorney notified the IHO that the parent had intended to request an independent FBA and behavioral intervention plan (BIP) and not a "positive behavior plan" and requested that the January 2021 interim decision be amended to reflect such change (Tr. p. 4; IHO Decision at p. 9). The IHO issued a separate interim order reflecting this change (see March 28, 2021 Interim IHO Decision).

Ex. B at pp. 2-4). The IHO responded that, if the parent did not withdraw the claims, he would "simply dismiss them without prejudice" (id. at pp. 1-2, 3).

On March 28, 2021, the IHO issued a final decision dismissing the parent's claims without prejudice (Tr. pp. 1-17; see IHO Decision). The IHO reiterated his determination that the parent was entitled to the IEEs listed in his January 2021 interim decision (IHO Decision at pp. 8-9). The IHO opined that:

> [I]n the absence of these IEEs, and the district's mandated review of the reports upon receipt, I am unable adequately to evaluate the family's potential compensatory claims or their proposed definition of what would constitute FAPE for this student. While the family was in a position to assess whether the district's evaluations and programs were successful, as they have done here and concluded that they were not, they have not been able meaningfully to assert their claims for relief, or even to articulate in what way the district's programs did not meet the student's needs because, at root, their claim is that neither they nor the district adequately knew what those needs were.

(id.). The IHO further held that once the IEEs were completed and reviewed by the CSE, the parent could then challenge the specific IEPs and their recommendations (id. at p. 10). The IHO held that until such time the parent's remaining claims and requests were dismissed, without prejudice (id.). The IHO reasoned that, at the time of her due process complaint notice, she did not know and could not have known "whether the district ha[d] failed adequately to serve this student" and, therefore, her claims were not ripe (id.).

According to the IHO, one issue remained, which the parent could not have known about: that being the district's "collapsed" impartial hearing process (IHO Decision at pp. 10-11). The IHO recognized that the due process complaint notice was filed in September 2020 but not assigned to him until January 22, 2021 (id. at p. 11). Consequently, the IHO found that there was a six-month delay in the parent obtaining the requested IEEs (id.). As relief for the student's loss of six months of "educational due process," the IHO ordered the district to "create a bank of 200 hours of 1:1 services by a duly licensed special education teacher or speech pathologist" to be used on or before August 31, 2023 (id.). The IHO further held that this award of compensatory services should not "be counted against any potential compensatory award for any deprivation of FAPE that may be determined" later (id.). Finally, the IHO directed the district to determine if the student did not receive any pendency services and, if the student did not receive pendency services, to provide "a bank of make-up services" equal to the services missed (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that the IHO failed to allow for the completion of the IEEs ordered by the IHO before dismissing the parent's claims. The parent argues that the IHO's dismissal of the parent's claims before the IEEs were completed "was an abuse of discretion and error of law, as it deprived her of her due process rights." Next, the parent asserts that the IHO

failed to consider all issues raised in the due process complaint notice and deprived her the opportunity to present evidence at an impartial hearing.

The parent additionally argues that the IHO improperly shifted the burden of proof to the parent by determining that all claims except the parent's request for IEEs were not ripe. The parent contends that it was the district's obligation to raise the issue of "ripeness" and it was error for the IHO to independently raise such issue. Further, the parent contends that the IHO's dismissal of the due process complaint notice without prejudice failed to protect her compensatory education claims for the 2018-19 school year. Specifically, the parent argues that the IHO's finding that the parent "did not know and could not know whether the district has failed to adequately to serve this student" without the IEEs and then opining that the parent's claims would accrue once the IEEs were completed did not adequately protect the parent's child find and compensatory education claims for the 2018-19 school year. Although the parent argues that the IHO's finding about accrual should be deemed "law of the case," the parent notes that the IHO could not guarantee a new IHO would apply this ruling.

The parent also argues that the IHO's dismissal of the due process complaint notice "effectively terminated" the student's pendency rights leaving the student without a placement or services in the middle of the 2020-21 school year, and the IHO failed to order continuation of the student's pendency program in his final decision.[4]

Based upon the foregoing, the parent argues that the IHO's dismissal should be reversed and the matter remanded to the IHO for a full hearing on the merits.[5] The parent also requests a finding that the student is entitled to pendency services through the remainder of the school year and the relief sought in the due process complaint notice.

In an answer, the district agrees that the IHO erred in dismissing the parent's claims prior to the completion of the IEEs and states that it has no objection to the matter being remanded for a full hearing on the merits. The district further agrees that, without the IEEs and without a full development of the hearing record, the issue of FAPE for the three years in question cannot be determined. Additionally, the district argues that the IHO's dismissal of the case without prejudice

[4] To avoid a lapse in pendency, the parent notes that she filed a subsequent due process complaint notice prior to the present appeal. The parent's second due process complaint notice dated April 13, 2021, contained similar allegations of a denial of FAPE for the 2018-19, 2019-20, and 2020-21 school years (compare SRO Ex. C, with SRO Ex. A).

[5] The parent also argues that the IHO failed to make any determination with respect to the parent's section 504 claims. An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504. In any event, given the disposition of this matter, the IHO may address the parent's 504 claims upon remand.

"created undue delay and expense" and the IHO should have granted an extension of the compliance deadline until the completion of the IEEs. The district also agrees with the parent's position that the case should not be dismissed "because of the implications regarding the two-year [statute] of limitations period on the [p]arent's claim for the 2018[-]19 school year."

In connection with pendency, the district alleges that there has been no termination or lapse in pendency. Furthermore, the district argues that the parent's claim that the IHO shifted the burden of proof to the parent is without merit as there was no finding of a FAPE denial. Finally, the district notes that it has not appealed the issues pertaining to the statute of limitations or "ripeness."

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

VI. Discussion

Having reviewed the parent's appeal and the district's answer, this matter must be remanded to the IHO for further proceedings.

The IHO's dismissal of the parent's due process complaint notice on ripeness grounds is not supported by precedent.[7] Generally, claims are ripe once a cause of action accrues, and under the IDEA a cause of action accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint (Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). While the analysis of compensatory education may, at times, feel like speculative assessments of future educational needs, it has been held that, since the injury has been done, the issue is ripe for review (see Lester H. v. Gilhool, 916 F.2d 865, 868 [3d Cir. 1990]).

Here the IHO reached his determination that the parent would not or should not know about her claims until the completion of the IEEs without a hearing record, without an examination of the nature of the parent's claims, and despite that the parent had already articulated her claims in a due process complaint notice, thereby demonstrating her knowledge of such claims prior to completion of the IEEs (see SRO Ex. A). Given the "fact-specific inquiry" necessary for a determination regarding accrual (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]), the IHO's finding was insufficiently supported by any evidence. For example, taking the parent's claim that the district violated its child find obligation during the 2018-19 school year, it is entirely unclear what the IEEs would have added to the parent's knowledge about whether the district had reason to suspect a disability and that the student needed special education during the 2018-19 school year to address that disability (see J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. 2011]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). While the IEEs may shed further light on some on the parent's claims, particularly those that allege that the district failed to adequately evaluate the student, the parent's knowledge of detailed claims relating to deficiencies in the evaluations were explicitly stated in the due process complaint notice before completion of the IEEs (i.e., "Clearly, there is some inconsistent issues relating to testing. It is obvious that the Student's bilingualism, severe expressive and receptive language delays and possible [autism spectrum disorder] were interfering with the accuracy of the prior cognitive scores") (SRO Ex. A at p. 6). It is perhaps arguable that there is some as of yet unknown claim that the parent could assert based on information gleaned from the IEEs; however, the IHO's approach of delaying the impartial hearing proceedings, in which claims have been asserted, runs counter to the IDEA and the goal of "resolving the dispute without undue delay lest the disabled student's best interests be compromised by the passage of too much time" C.M.E. v. Shoreline Sch. Dist., 2020 WL 2850296, at *3 [W.D. Wash. June 2, 2020], quoting Fresno United Sch. Dist. v. K.U., 980 F. Supp. 2d 1160,

[7] Here, while the district represents that it does not appeal the IHO's determinations about ripeness, it was not aggrieved thereby and, therefore, was not required to appeal. Further, while the parent characterizes the IHO's findings about the accrual date of her claims as "[a]rguably . . .'law of the case'"—no doubt in an effort to avoid exposing her claims to dismissal as outside the statute of limitations in a future proceeding—the IHO's rationale on ripeness grounds underlies his dismissal of the parent's claim without prejudice and the parent appeals the dismissal, so the question of ripeness must be addressed.

1176 [E.D. Cal., 2013]). While the IHO's reticence in calculating a compensatory education award without the IEEs is understandable, as they may offer insight into what position the student would have been in had the district complied with its obligations under the IDEA and provided the student with the special education services she should have received (Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005]; see Newington, 546 F.3d at 123), the dismissal based upon the contention that the parent's claims were not "ripe" cannot be upheld under the circumstances of this case.

In addition to ripeness, the IHO expressed "pragmatic" and "conceptual" concerns with keeping the impartial hearing open (Tr. pp. 10-11). However, such concerns must yield to or be resolved in a manner consistent with the requirements of federal and State regulations, which set forth the procedures for conducting an impartial hearing and address the minimum due process requirements that shall be afforded to both parties (34 CFR 300.512; 8 NYCRR 200.5[j]). Among other rights, each party "shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses" (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][2]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]).[8, 9]

The IHO's attempts to manage his caseload are particularly understandable given the now well-documented problem in the district of "an unprecedented volume of special education due process complaints [that] is overwhelming the New York City due process system" (N.Y. Reg., July 29, 2020, at p. 15). However, absent a legally sound basis for dismissing the parent's complaint, the IHO was bound to follow State regulations and either schedule the matter for a hearing before the timelines expired or within an extended timeframe if one of the parties so requested and after considering the factors set forth in State regulation (see 8 NYCRR 200.5[j][5][ii]). However, the IHO's dismissal of claims that are ripe for review simply deflects the IHO's responsibility to the parties elsewhere and compounds the problems faced by the system.

To be sure, there is a tension between the requirements that an IHO issue a decision within short timeframes and the provision which allows a hearing officer to order IEEs to be performed during the impartial hearing given the time that may be required to complete evaluations (see 8 NYCRR 200.5[j][3][viii]; see also 8 NYCRR 200.5[g][2]), which in this instance was further complicated by delays in the appointment of the IHO, not to mention the timing of the hearing and

[8] However, State regulation did allow for extensions beyond 30 days but for no more than 60 days during the time that schools are closed pursuant to an Executive order issued by the Governor pursuant to a State of emergency for the COVID-19 crisis (8 NYCRR 200.5[j][5][i]).

[9] Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.).

the scheduling of the evaluations in the midst of the COVID-19 pandemic. However, the IHO was still required to move the hearing forward and could have made accommodation for the completion of the IEEs by granting extensions to the timelines if requested by the parties.

In terms of moving the impartial hearing forward while awaiting the completion of the IEEs, it would seem that the district could have in the meantime presented its evidence regarding child find and its offer of a FAPE to the student for the school years at issue. Among the "conceptual concerns" expressed by the IHO was that the IEEs were necessary to evaluate the parent's claims that the district failed to offer the student a FAPE (see Tr. p. 11). However, the IEEs would be of limited utility in evaluating the parent's claims, particularly since child find inquiries "must focus on what the [d]istrict knew and when" (K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *8 [S.D.N.Y. Oct. 28, 2019], quoting J.S., 826 F. Supp. 2d at 652) and analysis of the IEPs is prospective, focusing on what the CPSEs or CSEs knew at the time the IEPs were formulated (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]; J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004] [explaining that the placement determination is "necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of [the student's] subsequent progress]). It would be unlikely that information set forth in the IEEs would be germane to these analyses except perhaps as part of a limited rebuttal to the district's case in chief.[10]

Based on the foregoing, the IHO erred by failing to receive evidence from the parties or reach the merits of the parent's claims. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the appropriate remedy

[10] As alluded to above, the IEEs would likely be most useful to the IHO for the purpose of crafting a compensatory education award (see Butler v. District of Columbia, 275 F. Supp. 3d 1, 5 [D.D.C. 2017] ["A hearing officer who finds that he needs more information to make such an individualized assessment [of needs for compensatory education due to denial of FAPE] has at least two options. He can allow the parties to submit additional evidence to enable him to craft an appropriate compensatory education award . . . , or he can order the assessments needed to make the compensatory education determination"]).

for the IHO's improper dismissal of the parent's due process complaint notice is a remand to continue these proceedings.[11]

Hopefully, by now, the IEEs that the IHO ordered have been completed and there will be no obstacles to a swift resolution to the impartial hearing.

VII. Conclusion

Having determined that the IHO erred in finding the parent's claims were not ripe and in dismissing the due process complaint notice without prejudice, this matter is remanded to the IHO for a full and complete hearing on the merits.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.[12]

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 28, 2021, is modified by reversing that portion which dismissed the claims in the parent's September 8, 2020 due process complaint notice without prejudice; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to resume the impartial hearing and issue a determination on the parent's claims as set forth in her September 8, 2020 due process complaint notice.

Dated: **Albany, New York**
June 23, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[11] Given that the parent has initiated a new due process complaint notice setting forth the same claims for the same school years (compare SRO Ex. C, with SRO Ex. A) and there does not appear to have been a lapse in the student's pendency (see Answer ¶ 22), I considered dismissing the parent's appeal and allowing the matter initiated by the parent's April 13, 2021 due process complaint notice to proceed. However, the parent represents that, as of the date of her appeal, an IHO had not yet been assigned to that matter (SRO Ex. E; Req. for Rev. ¶ 5). Moreover, having found that the IHO erred in finding the parent's claims would not accrue until receipt of the IEEs, the parent's claims are susceptible to dismissal based on the two-year statute of limitations (see Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Accordingly, to ensure that the parent's claims are preserved, the matter is remanded.

[12] Neither party has appealed those portions of the IHO's decision ordering compensatory education and make-up services relating to the delay in his appointment or the provision of pendency services (see IHO Decision at pp. 10-12). As such, these orders for relief have become final and binding on the parties and have not been reviewed on appeal and should not be further addressed after remand (34 CFR 300.514; 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]).