The University of the State of New York

The State Education Department
State Review Officer
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No. 21-188

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

Appearances:
Judy Nathan, Interim Acting Special Assistance Corporation Counsel, attorneys for petitioner, by Daniel Levin, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered the district to fund independent educational evaluations (IEEs) of the student. Respondent (the parent) cross-appeals from those portions of the IHO's decision which failed to address all of the issues raised in the due process complaint notice and which dismissed the due process complaint notice without prejudice. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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 limited nature of this appeal. When the IHO issued his decision granting the parent's request for IEEs,[1] neither party had appeared for the impartial hearing, and consequently, an

[1] It is very common in due process proceedings in this State to refer to an independent comprehensive evaluation

impartial hearing had not been conducted and the IHO did not enter any evidence into the hearing record (see Tr. pp. 1-8; IHO Decision at pp. 1, 6). Accordingly, all factual references in this decision are drawn from the administrative hearing record on appeal submitted by the district.[2]

A. Due Process Complaint Notice

In a due process complaint notice dated August 26, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) by "failing to implement the [s]tudent's educational program as established in the [s]tudent's last agreed upon [IEP]" (SRO B at p. 1). In addition, the parent alleged that the district failed to offer the student a FAPE pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) by "unilaterally modifying the [s]tudent's IEP" (id.).[3] More specifically, the parent asserted that, in or around "mid-March 2020," the district "unilaterally, substantially, and materially altered" the student's "'status quo' educational program as it relate[d]" to her pendency rights when the district: "substantially and materially altered the location" for the student's receipt of services from a "school classroom" to the student's home, "substantially and materially altered the delivery of these services" from in-person instruction by a special education teacher or related service provider, and provided the student's services remotely as opposed to direct instruction required by her IEP and without proper notice to the parent; the parent argued that the aforementioned "alterations constitute[d] an improper change" in the student's program and placement under the IDEA (id. at pp. 1-2).

After noting that the district's federal and State obligations to continue to provide students with a FAPE during the COVID-19 pandemic—while allowing for flexibility during this transition of services—had not been waived or absolved, the parent alleged that the district violated the student's pendency rights and, as a result, she sought "immediate relief" (SRO Ex. B at p. 2). Additionally, the parent requested an "extensive independent evaluation" of the student to "determine the need for compensatory services as well as any appropriate changes" to the student's "educational program and placement" to remedy the district's failure to offer the student a FAPE "since mid-March 2020" (id. at pp. 2-3). The parent also requested to convene a CSE upon the completion of the IEE to "review the updated evaluation and make any appropriate changes" to the student's IEP (id. at p. 3).

As relief, the parent requested that the IHO: issue an "interim order" directing the district to implement the student's last-agreed upon IEP by "reopening" the student's school, or,

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that is made up of multiple assessments by different individuals/disciplines as a series of IEEs (in the plural) rather than as a singular (IEE). This decision similarly references the multiple assessments as "IEEs."

[2] The district submitted the following to the Office of State Review as part of the administrative hearing record on appeal: the parent's August 26, 2020 due process complaint notice; a "Corrected" due process complaint notice, dated August 26, 2020 (corrected to include the name of the student's then-current public school); a transcript, dated July 8, 2021; "Petitioner's Statement in Support of Request for an [IEE]," dated July 20, 2021; and the IHO's decision, dated July 27, 2021. However, the documents filed by the district are unmarked; therefore, for ease of reference in this decision, the due process complaint notice will be designated as "SRO Ex. A," the corrected due process complaint notice will be designated as "SRO Ex. B," and the "Petitioner's Statement in Support of Request for an [IEE]" will be designated as "SRO Ex. C."

[3] See 29 U.S.C. § 794(a).

alternatively, allowing the parent to "self-cure the unilateral change" in the student's pendency services "to the best of their abilities"; issue an "interim order" directing the district to "conduct an extensive [IEE]" of the student to "evaluate what, if any, changes need[ed] to be made" to the student's IEP; and issue an "interim order" finding that the district failed to offer the student a FAPE and "determine the appropriate compensatory services" (id.).

B. Impartial Hearing Officer Decision

On July 8, 2021, the IHO opened the impartial hearing by noting that neither party had appeared and that he would expedite the transcript in this case so that both "parties who [were] not in attendance c[ould] get a copy of it as soon as possible" (Tr. pp. 1-2). The IHO then went off the record to await appearances, and when the IHO resumed the impartial hearing, he noted that both parties had still not appeared and he had another impartial hearing that was "scheduled to commence shortly" (Tr. pp. 2-3). Nonetheless, the IHO continued with the impartial hearing and explained that the parent's due process complaint in this case was "comparatively straightforward" (Tr. p. 3). At that point, the IHO set forth what he "would have stated to the parties" had they appeared at the impartial hearing (Tr. pp. 3-6). In closing, the IHO indicated that the transcript would be provided to the parties, that the parties should review it and "let [him] know if they ha[d] any open questions of fact that they believe[d] [we]re in dispute and require[d] the interposition of evidence and witnesses for [the IHO] to resolve" (Tr. pp. 5-6). In addition, the IHO noted that the parties should advise him if they wished to submit "written memoranda of law about any open questions of law" (Tr. p. 6). At that time, the IHO would—after hearing from both sides—determine "whether and how [he] c[ould] go forward to issue a final order in this matter" (id.).

Thereafter, in an email correspondence, the IHO informed the parties that he needed a response "from both sides" to his statements on the record or he would "dismiss or default this matter" (SRO Ex. 1 at p. 2).[4] The parent provided the IHO with a "Petitioner's Statement in Support of Request for an [IEE]," dated July 20, 2021, in which she stated her position that the student was entitled to IEEs as a matter of law and requested that the IEEs be ordered "and their results become part of the record in the instant case," along with the testimony of the evaluators (SRO Ex. C at pp. 1, 4). The parent indicated that the IEEs were necessary "to determine what, if any, compensatory services may be necessary" to remedy the alleged regression that the student experienced as a result of the "abrupt change in the delivery of services" that occurred due to school closures related to the COVID-19 pandemic (id. at pp. 1-2). The district's response to the IHO consisted of an inquiry asking for clarity as to how the district was to surmise from the due process complaint notice that the parent would be entitled to IEEs in every area of need (SRO Ex. 1 at p. 2). The IHO responded, stating his view that the parent was entitled to the IEEs and his intent to issue a final order to that effect unless the parent's attorney indicated "that the family

[4] Although the email correspondence was not included with the record on appeal, it was submitted with the district's request for review (SRO Ex. 1). State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]; 279.9[a]). As the email correspondence generally speaks to the parties' requests to the IHO and the IHO's responses thereto, and as the IHO referenced the email in his final decision (see IHO Decision at p. 2), it shall be considered as part of the hearing record.

[wa]s prepared to go forward . . . on the merits without the IEE having been completed" (id. at p. 1). In a response, the parent's attorney stated that the parent continued to seek the IEEs and, after receipt of the results, she would "then determine the next step they seek" (id.).

In a decision dated July 27, 2021, the IHO ultimately concluded that the parent was entitled to the requested IEEs, and in a footnote, awarded the following: a neuropsychological IEE, a speech-language IEE, an occupational therapy (OT) IEE, and a physical therapy (PT) IEE (see IHO Decision at p. 3 n.1). In reaching this conclusion, the IHO initially described the basis for the impartial hearing, noting in part that the parent challenged the implementation of the student's IEP, which, according to the parent, "was not meaningfully calculated to provide educational benefit to this particular student" during the "Covid-19 Emergency Lockdown" (id. at p. 2). The IHO also noted that, as a result of the district's implementation of the student's IEP, the student "may not have benefited from instruction during all or part of the 2019-20 and 2020-21 school years" (id.). According to the IHO, the parent sought a pendency order "enforcing the pre-Covid program, and a series of [IEEs] in order to ascertain whether the student did in fact benefit from the program offered" (id.).

With respect to conducting the impartial hearing, the IHO indicated that neither party had appeared on July 8, 2021 and that he had advised the parties that the matter would be dismissed unless he "received a basis from either side for not doing so" (IHO Decision at p. 2). The IHO further indicated that the district argued, by email, that the parent "had not demonstrated any reason why [she] w[as] entitled to [IEEs] in every area of need" (id.). According to the IHO, the parent had submitted a "memorandum in support of its IEE demand and pendency assertion" (id.).

Next, the IHO found that it was undisputed that the student was entitled to receive the "program then in place" at the "start of the Covid lockdown" in March 2020 (IHO Decision at p. 2).[5] And moreover, the student—as a result of the parent's due process complaint notice dated August 26, 2020—remained entitled to receive that program (id.). The IHO determined, however, that a dispute had arisen "on the merits and with respect to pendency, with respect to the inquiry into whether the district-provided program, in the context of State and federal action [that arose] in response to the pandemic, constituted implementation of that agreed-upon program" (id.).

According to the IHO, neither the pendency question nor the question concerning the merits of the parent's case could be determined at that time "absent the sort of current clinical information the [parent] here s[ought] to acquire[] via the[] demand for an IEE" (IHO Decision at p. 2).[6] Consequently, the IHO "dismissed without prejudice" "all" of the potential claims "as not yet ripe," noting that sufficient time remained under the statute of limitations for the parent to obtain "such information and refile their newly-supported complaint if the evaluation d[id] indeed support their claims" (id.).

[5] In the decision, it appears that the IHO mistakenly referred to the beginning of the COVID-19 lockdown as "March 2019," as opposed to March 2020 (IHO Decision at p. 2).

[6] In addition, the IHO noted that another question arose, namely, "whether the student was harmed by the inordinate and illegal delay in the appointment of an IHO to hear either or both" of the issues raised by the parent regarding pendency and the merits of the case (IHO Decision at p. 2).

Turning to the issue of the requested IEEs, the IHO found that the "law in that regard [was] clear: [the IEEs] [were] a matter of right, an entitlement not a matter of discretion" (IHO Decision at p. 3, quoting 8 NYCRR 200.5[g][1], [g][1][iv] and citing D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]). The IHO also noted that, pursuant to State regulation, an IHO has the discretion to order IEEs at district expense, sua sponte, in order to complete the hearing record and determine either the merits of the case or to craft a remedy (see IHO Decision at p. 3, citing 8 NYCRR 200.5[g][2]).

In light of the foregoing, the IHO concluded that the hearing record "reflect[ed] that the [parent's] concerns that the student required an evaluation in order to ascertain whether the Covid-modified program was Endrew-appropriate were well-founded and that they made that demand to the district in a timely fashion almost a year ago," and the district had "not responded" (IHO Decision at p. 3). As a result, the IHO concluded that the parent was entitled to the IEEs sought at the applicable rates for said IEEs, and in a footnote, specified that the ordered IEEs included a neuropsychological IEE, a speech-language IEE, an OT IEE, and a PT IEE (id. at pp. 3-4 & n.1).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by awarding IEEs to the parent absent any evidence in the hearing record to support the parent's request and because the IHO ignored the fact that the parent had not asserted any disagreement with a district evaluation, which is a necessary predicate for such relief. In addition, the district argues that the IHO erred by failing to dismiss the parent's due process complaint notice with prejudice. As a final point, the district argues that the SRO should excuse the late service of the notice of intention to seek review. As relief, the district seeks to reverse the IHO's award of IEEs and to dismiss the parent's due process complaint notice with prejudice.

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's award of IEEs. The parent also argues that, contrary to the district's assertion, the IHO's dismissal of the due process complaint notice without prejudice was proper. The parent also submits additional documentary evidence with the answer and cross-appeal. As a cross-appeal, the parent contends that the IHO erred by dismissing the due process complaint notice and that the IHO should have determined whether the district offered the student a FAPE based upon the substantive merits of the parent's claims. Similarly, the parent argues that the IHO should have determined whether the district offered the student a FAPE on procedural grounds. Next, the parent alternatively requests that the SRO remand the matter to the IHO to conduct an evidentiary hearing on the merits of the parent's due process complaint notice. As relief, the parent seeks to uphold the IHO's award of IEEs, and seeks a determination regarding whether the district offered the student a FAPE, or a remand of the matter for such a determination.

In a reply to the parent's answer, the district alleges that the parent failed to timely serve the notice of intention to cross-appeal or assert good cause for the delayed service. Additionally, the district asserts that the parent failed to timely serve the answer and cross-appeal and submits additional documentary evidence in support of that assertion. The district further objects to the consideration of the additional documentary evidence submitted by the parent. In an answer to the parent's cross-appeal, the district argues that the hearing record contains no evidence to support a finding that the district failed to offer the student a FAPE and that the parent fails to point to any

evidence of procedural violations that would result in a finding that the district failed to offer the student a FAPE. As relief, the district seeks to reverse the IHO's award of IEEs and to dismiss the parent's due process complaint notice with prejudice.

The parent, in a reply to the district's answer to the cross-appeal, responds to the allegations that the parent untimely served the notice of intention to cross-appeal, as well as the answer and cross-appeal, as argued by the district.[7] In addition, the parent reargues that the hearing record reflects that the district committed "multiple procedural violations," thereby denying the student a FAPE and that the IHO erred by failing to issue determinations on pendency and the merits of the underlying case. The parent also reargues that the IHO erred in dismissing the parent's "claims without prejudice." In support of these contentions, the parent points to allegations in the due process complaint notice.

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

[7] With respect to the various allegations in both the district's and the parent's pleadings related to compliance with practice regulations—i.e., whether the notice of intention to seek review and the notice of intention to cross-appeal were timely served—I will exercise my discretion and review the IHO's decision notwithstanding each party's failure to timely serve its notice of intention (see 8 NYCRR 279.2[b], [d], [f]). However, as the district points out, the parent's attorney has been cautioned about the failure to timely serve a notice of intention to cross-appeal in a previous appeal and was warned at that time, that, should this become a pattern, the parent's attorney risked the potential of having a cross-appeal dismissed on this basis (see Reply & Answer to Cr. App. at ¶ 2, citing Application of the Dep't of Educ., Appeal No. 20-044). In addition, the district asserts that the parent's attorney also untimely served a notice of intention to cross-appeal in another currently pending appeal (see Reply & Answer to Cr. App. at ¶ 2). The parent's attorney is cautioned, again, about the failure to timely serve a notice of intention to cross-appeal—especially in the absence of good cause shown—and the risk of a potential dismissal of such pleading in light of this developing pattern. With regard to the district's allegation that the parent failed to timely serve the answer and cross-appeal because these pleadings were served after 5:00 p.m. on a business day, this argument is without merit as the district does not point to any legal authority in support of this position and, pursuant to State regulation, the parent would typically have had until 11:59 p.m. to timely serve the answer and cross-appeal by regular mail or overnight mail (see 8 NYCRR 279.5[e]). As a result, the district's allegation that the answer and cross-appeal were not timely served is dismissed.

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]).[8]

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. Independent Educational Evaluation at Public Expense

The crux of the district's appeal is that the IHO erred, as a matter of law, by awarding the parent a neuropsychological IEE, an OT IEE, a PT IEE, and a speech-language IEE at public expense because the parent never disagreed with a district evaluation, which is required in order to trigger a district's obligation to publicly fund IEEs. The parent argues that this argument is "unpersuasive and inaccurate," noting that when a parent requests an IEE at public expense, the district has only two options: either initiate an impartial hearing to defend its evaluation or ensure that the district provides an IEE at public expense unless the requested IEE fails to meet agency criteria. According to the parent, the district's failure to respond to the request for IEEs in the due process complaint notice, alone, warranted the IHO's award of IEEs. Alternatively, the parent asserts that the IHO was well within his equitable authority to award IEEs at public expense to ensure that the student received a FAPE or as part of an impartial hearing pursuant to State regulation (see 8 NYCRR 200.5[g][2]).

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]).[9]

[8] 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).

[9] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the

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 not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation, "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

In this case, the IHO, while reciting relevant legal authority pertaining to IEEs in the decision, either ignored or failed to recognize that the parent, here, had not expressed any disagreement with any district evaluation in her due process complaint notice or within a later filed "Petitioner's Statement in Support of Request for an [IEE]," dated July 20, 2021, when analyzing whether the parent was entitled to an IEE at public expense (compare IHO Decision at pp. 3-4, with SRO Ex. B at pp. 1-3, and SRO Ex. C at pp. 1-4). A review of the parent's due process complaint notice reflects that the parent requested an "extensive independent evaluation of the [s]tudent to determine the need for compensatory services as well as any appropriate changes to the [s]tudent's educational program and placement" due to the district's alleged failure to offer the student a FAPE "since mid-March 2020" (SRO Ex. B at pp. 2-3). In addition, the parent noted, with regard to relief, that she sought an interim order by the IHO directing the district to "conduct an extensive independent evaluation of the [s]tudent to evaluate what, if any, changes need[ed] to be made to the [s]tudent's IEP" (id. at p. 3).

In the "Petitioner's Statement in Support of Request for an [IEE]," dated July 20, 2021, the parent indicated that, "[d]espite [her] request in August 2020," the district failed to "conduct any updated evaluation [of the student] to determine the ways in which [the student] had regressed due to the abrupt change in the delivery of services and to determine what, if any, compensatory services may be necessary for [the student]" (SRO Ex. C at pp. 1-2).[10] The parent also noted that the student had "regressed considerably as a result" of the district's "unilateral transition to remote services," which was "grossly inappropriate" for the student (id. at p. 1). The parent argued that,

parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

[10] The parent did not explain or clarify her statement about requesting an evaluation of the student in "August 2020"; impliedly, this most likely refers to the parent's due process complaint notice, dated August 26, 2020, as there was no evidence that the parent requested an IEE of the student at any other time or through any other separate document (see generally Tr. pp. 1-9; SRO Exs. A-C). However, review of the August 2020 due process complaint notice reveals no request from the parent for the district to conduct an evaluation of the student (see SRO Ex. A).

in her due process complaint notice, she "disagreed with [the district's] actions unilaterally modifying the [s]tudent's mandated IEP services as well as its failure to conduct an appropriate evaluation in light of the unilateral transition to remote learning" (id. at p. 2). In addition, the parent asserted that the district was "on notice" of her "disagreement with [the district's] actions, and its failure to evaluate her son" (id. at p. 3). She further asserted that a "parent's disagreement with a district's evaluation need[] not be sent via any formalized notice to the district, so any opposition to the form of [her] request as set forth in the due process complaint . . . [was] unavailing" (id., citing Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 317 [D. Conn. 2016]). Alternatively, the parent contended that, should the IHO find that it was not appropriate for the parent to request the IEE in the due process complaint notice, then the parent "restate[d] her request for an IEE, including a neuropsychological, OT, and [s]peech/[l]anguage" (SRO Ex. C at p. 3).

While a review of the "Petitioner's Statement in Support of Request for an [IEE]" reflects that the parent used the word "disagreed" and "disagreement" within the document, neither the use of those terms standing alone, nor the parent's "disagreement" with the district's decision to transition to remote instruction during the COVID-19 pandemic constitutes a disagreement with a district evaluation. In the decision, the IHO did not point to any parental disagreement with a district evaluation as a basis upon the parent may be entitled to an IEE at public expense or as a basis that triggers a district's obligation to publicly fund IEEs (see generally IHO Decision).

Therefore, because the parent did not express any disagreement with an evaluation conducted by the district, the parent was not entitled to an IEE at public expense (see Trumbull, 975 F.3d at 163 [noting that "a parent's right to an IEE at public expense is triggered when the parent 'disagrees with an evaluation obtained by the public agency'"]; G.J. v. Muscogee Cty. Sch. Dist., 668 F.3d 1258, 1266 [11th Cir. 2012] [upholding a district court that correctly determined that the statutory provisions for a publicly funded independent educational evaluation never "kicked in" because no reevaluation ever occurred]; P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 740 [3d Cir. 2009] [holding that because the parents were not challenging a district evaluation, the district was not responsible for reimbursement]).

Additionally, to the extent that the parent disagreed with the district's decision to transition to remote instruction during the COVID-19 pandemic, the Second Circuit has made it clear a parent must disagree with a district evaluation as of the time it is conducted, and that subsequent changes in circumstances will not support a disagreement with an evaluation (Trumbull, 975 F.3d at 171, citing N.D.S. by and Through de Campos Salles v. Acad. for Sci. and Agric. Charter Sch., 2018 WL 6201725, at *2 [D. Minn. Nov. 28, 2018] ["'Informing a school that, subsequent to an evaluation, a child's condition has changed is not the same thing as disagreeing with the evaluation'"]). Under those circumstances, the appropriate course of action "would be more frequent evaluations—and the parent is entitled to request one per year—not an IEE at public expense. If the parent disagrees with those evaluations, then they would be free to request an IEE at public expense with which to counter" (Trumbull, 975 F.3d at 171).

Moreover, to the extent that the IHO ordered the IEEs at public expense because the district did not respond to the parent's request for the IEE(s)—which the parent made for the first time in the due process complaint notice—it would be inefficient to require the district to initiate a separate due process hearing to defend its evaluation of the student; nevertheless, as the parent did not

disagree with a district evaluation, the district was not required to initiate due process (see R.L., 363 F. Supp. 2d at 235 [finding that the parent was not entitled to an IEE and holding that the district was not required to take the parents to due process over the issue]).

Turning next to the IHO's statement in the decision—and the parent's argument in the cross-appeal—that an IHO may order an IEE "in order to complete the record and allow for a determination of the merits or the crafting of a remedy" (IHO Decision at p. 3, citing 8 NYCRR 200.5[g][2]), it is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

However, in this case, neither party appeared at the impartial hearing scheduled for July 8, 2021, and the IHO did not conduct an impartial hearing (see Tr. pp. 1-9). Instead, the IHO stated his intention, on the record, to grant the parent's request for publicly funded IEEs; he expedited the transcript in order to elicit the parties' positions regarding his intentions as stated on the record; and then, in the decision, the IHO crafted the IEEs as a remedy because he found—on the "record before [him]"—that the district had not responded to the parent's demand for an "evaluation" (IHO Decision at pp. 4-5). Therefore, it appears that the IHO's citation and reference to this State regulation in the decision, which allows an IHO to order IEEs during an impartial hearing, was wholly irrelevant to the IHO's award of IEEs at public expense because the impartial hearing never occurred. Therefore, the IHO's basis for awarding the publicly funded IEEs was without merit, and as a result, the IHO's award of publicly funded IEEs must be reversed.

B. Unaddressed Issues and Dismissal of the Parent's Due Process Complaint Notice

The parent, in her cross-appeal, argues that the IHO failed to address the substantive merits of her FAPE claim and erred by dismissing the due process complaint without prejudice. The parent also argues that the IHO failed to address the procedural grounds alleged as a basis upon which to conclude that the district failed to offer the student a FAPE. Alternatively, the parent asserts that the matter should be remanded to the IHO to conduct a full evidentiary hearing on the merits. The district contends that the IHO properly summarized the allegations in the parent's due process complaint notice, but systemic allegations—such as the transition to remote instruction for all students, both disabled and nondisabled, as well as the shut-down of schools during the COVID-19 pandemic—were beyond the IHO's jurisdiction, and therefore, properly dismissed. In addition, the district asserts that the parent's due process complaint notice did not include allegations of procedural violations, such as parent participation or a deprivation of educational benefits. Therefore, the district contends that the parent raises these issues for the first time on appeal and that they are beyond the scope of the impartial hearing and review.

While the parent asserts that the IHO erred in dismissing her substantive claims, the parent's attorney agreed to this course upon the IHO's provision of notice that he intended to dismiss the matter. In particular, as noted above, the IHO stated his view that the parent was entitled to the IEEs and stated his intent to issue a final order to that effect unless the parent's attorney indicated "that the family [wa]s prepared to go forward . . . on the merits without the IEE having been completed" (SRO Ex. 1 at p. 1). In a response, the parent's attorney stated that the parent continued to seek the IEEs and, after receipt of the results, they would "then determine the next step they seek" (id.). While the parent's attorney's assent to this course of action was influenced, in part, by the understanding that the IHO would order IEEs, he took the risk that the IHO's decision would be overturned, and the parent cannot now argue that the dismissal to which her attorney agreed was erroneous.

In addition, the IHO's dismissal of the parent's due process complaint notice was warranted for other reasons. The parent's allegations in this matter surround the school closures that took place as a result of the COVID-19 pandemic. Relevant to such circumstances is the decision of the District Court of the Southern District of New York in J.T. v. de Blasio, which, as it happens involved plaintiffs represented by the same attorneys in the present matters (500 F. Supp. 2d at 145). The Court in J.T. described in detail the March 13, 2020 closure of schools in New York City, as well as the actions taken by the district to deliver services to students with disabilities during the closure through remote delivery consistent with federal and State guidance (id. at 181-84).

In the present matter, the parent's due process complaint notice alleges as follows:

> As of mid-March 2020, the School District has unilaterally, substantially, and materially altered the Student's "status quo" educational program as it relates to the Student's pendency rights. First, the School District substantially and materially altered the location of where the Student was to receive services, from a school classroom to the most restrictive setting: at the Student's home. Second, the School District substantially and materially altered the delivery of these services by precluding the Student from receiving in-person services by a special education teacher or related service providers, including any supplemental support as documented in the Student's IEP. Third, since none of these services are directed to be provided remotely in the Student's IEP, these services were to be provided as a direct service to the Student. Fourth, such substantial and material alterations were implemented without proper notice to the Parent. Pursuant to the IDEA and its regulations, such alterations constitute an improper change in the Student's educational program and placement.

(SRO Ex. B at p. 2). The due process complaint notice goes on to cite federal and State guidance and reports regarding districts' responsibilities to provide a FAPE during the COVID-19 crisis (id. at pp. 2-3). As relief for an alleged denial of a FAPE, the parent seeks compensatory education (id. at p. 3).

To the extent that the parent took issue with the executive decision to close schools or the district's actions to deliver instruction and services to students with disabilities remotely during the closure, those allegations are systemic in nature, and no provision of the IDEA or the Education Law confers jurisdiction upon a state or local educational agency to sit in review of alleged systemic violations (see Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has "consistently distinguished . . . systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators"], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]; see also Application of a Student with a Disability, Appeal No. 11-091). Thus, neither the IHO, nor I for that matter, have plenary authority to pass judgment on the Governor's or the district's policies.

In addition, in describing her allegations, the parent referenced concepts such as "status quo" and pendency rights (SRO Ex. B at pp. 2-3). To the extent the due process complaint notice alleged a violation of the student's pendency placement, such an allegation was premature insofar as the student was not entitled to a pendency placement prior to the parent's filing of the due process complaint notice in August 2020 (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]). That is, the Governor's March 2020 executive order closing schools in the State would not have triggered the student's right to a pendency placement. The parent also requested that an IHO issue an order requiring the district to implement the student's last-agreed upon IEP by reopening the student's school or allowing the parent to "self-cure the unilateral change in the Student's status quo" (SRO Ex. B at p. 3). However, an IHO would not have jurisdiction to direct the district to open a school and, in any event, district schools have since re-opened and such request is now moot (see J.T., 500 F. Supp. 3d at 190).[11]

Having found that the parent is not entitled to IEEs, that she may not pursue systemic claims through the administrative hearing process, and that the claims relating to a failure to implement pendency were prematurely stated, there remains no further allegations to adjudicate. The parent has not alleged that the student did not receive instruction and/or services remotely during the school closure, instead taking issue with the remote delivery itself. Nor has the parent alleged that a CSE considered whether the student may need additional services to make up for lost skills due to the closure of schools and the change in the delivery of services as a result of the pandemic (see "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OSEP 2020] ["Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services - IEP teams . . . must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations"]; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OSEP 2020] [same]). Once a CSE conducts such a review, if the parent

[11] Further, the Court in J.T. held that the switch to remote learning in light of the pandemic in and of itself did not constitute a change of placement that would trigger a student's right to pendency (500 F. Sup. 3d at 187-90). The Court left open the possibility that an individual parent could assert "that something other than the closure of the schools and the provision of remote educational services during the pandemic worked a change in [a student's] pendency" (id. at 194); however, the parent has made no such allegation here.

disagrees with the recommendations thereof, she may set forth her compliant in a due process complaint notice and an IHO would have jurisdiction to consider such a specific claim about the district's provision of a FAPE to the student. At this juncture, the parent's allegations are speculative and, as discussed above, she sought the IEEs to define the contours of her claim. However, the United Stated Department of Education has indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic (see "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77).[12] With this in mind, while I will uphold the IHO's dismissal of the parent's due process complaint notice, I will order the district, if it has not already done so, to conduct evaluations of the student and convene a CSE to engage in educational planning for the student, which should include a consideration of whether any compensatory services may be warranted to make-up for a loss of skill during school closures and the delivery of instruction and services to the student remotely.

VII. Conclusion

Based on the foregoing, the IHO erred in ordering the district to fund IEEs of the student. The IHO's dismissal of the other claims in the parent's due process complaint notice is upheld except that the dismissal shall be deemed with prejudice for the reasons described above.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated July 27, 2021, is modified by reversing that portion which ordered the district to fund IEEs and by striking the words "without prejudice" from the IHO's order dismissing the parent's due process complaint notice;

IT IS FURTHER ORDERED that, to the extent it has not evaluated the student since August 2020, within 30 days of this decision, the district shall conduct an evaluation to determine the student's needs with a focus on assessing whether the student experienced a loss of skill as a result of the school closures or remote delivery of instruction and/or services attendant to the COVD-19 pandemic; and

IT IS FURTHER ORDERED that, to the extent it has not already done so, upon the completion of the evaluations ordered herein, the district shall convene a CSE to review the student's educational program and consider whether compensatory services are warranted to make

[12] The parent's elaboration of her claims, set forth in the answer and cross-appeal, is no closer to stating an allegation that may go forward in the administrative forum. Instead, the parent continues to assert that the closure of schools and remote delivery of instruction "resulted in an unlawful change of placement and a denial of FAPE" (Ans. & Cr. App. at ¶ 9). The parent claims that she alleged that the student regressed due to "the unilateral change in IEP services" (id. at ¶ 33). However, a review of the due process complaint notice does not support this reading (see SRO Ex. B) and, in any event, the federal guidance cited above contemplates that the CSE will be the first to take up the issue of such alleged regression.

up for a loss of skill resulting from the school closures or remote delivery of instruction and/or services attendant to the COVD-19 pandemic.

Dated: **Albany, New York**
October 25, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER