The University of the State of New York

The State Education Department
State Review Officer
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No. 22-016

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 her requests for publicly funded independent educational evaluations (IEEs) of her son and for compensatory educational services to remedy respondent's (the district's) alleged failure to provide an appropriate program and services to her son for the period following closure of school buildings in March 2020. The appeal must be sustained in part and the matter 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 limited nature of this appeal.[1]

The parent's allegations in this matter surround the school building closures that took place in March 2020 as a result of efforts to combat the spread of the COVID-19 pandemic.

A. Due Process Complaint Notice

In a due process complaint notice dated January 6, 2021, 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]" (IHO Ex. I 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), 29 U.S.C. § 794(a), by "unilaterally modifying the [s]tudent's IEP" (id.). 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 his 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 the direct instruction required by his 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" (IHO Ex. I at p. 2). Additionally, the parent requested an "extensive independent evaluation" of the student to "determine the need for compensatory services as well as any appropriate changes" to the 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 dated April 23, 2020 by "reopening" the student's school, or, alternatively, allowing the parent to "self-cure the unilateral change" in the student's

[1] When the IHO dismissed the matter with prejudice, no exhibits had yet been admitted into the hearing record except those offered by the IHO (IHO Decision at p. 8; see Tr. pp. 1-9; IHO Exs. 1-4). In addition to the four IHO exhibits, the district provided the following documents to the Office of State Review as the administrative record on appeal: a "Corrected" due process complaint notice dated November 2, 2021; a transcript of proceedings that took place on December 10, 2021; the IHO's decision dated January 14, 2022; notices of appearance by the district's representatives; and an order issued by the IHO, dated January 4, 2022, granting an extension request.

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" (IHO Ex. I at p. 3).

The parents provided the district with a "Corrected" due process complaint notice on November 2, 2021 (Nov. 2, 2021 Due Process Compl. Not.).[2] Among the changes wase additional language stating that the student had experienced "substantial regression" in his educational skills, abilities and performance as a result of the modifications to his IEP program and services, as well as language stating that the parent "disagrees with the [s]tudent's prior evaluations, both at the time of the evaluation as well as currently" because they did not accurately reflect the student's needs or the impact of school closures due to COVID-19, and a request for district funding of specific IEEs including independent psychoeducational, occupational therapy (OT), physical therapy (PT), and speech-language therapy evaluations (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 10, 2021 for a prehearing conference, the only day of the hearing (Tr. pp. 1-9). The IHO began the hearing by stating that he "wanted to understand where the case st[ood] . . . , and how the parties would like to proceed, and whether there ha[d] been any kind of a discussion about resolution, or any other changes to the case" (Tr. p. 3). The parent's attorney stated that the matter "involve[ed] a student with a disability classification where their services were not provided during the remote school shut down" and so the original due process complaint was filed in January 2021; however, the attorney indicated that the parent had also filed an "updated corrected" due process complaint notice in November 2021 that "didn't add any claims, [but] only eliminated some of the pendency claims involving the reopening of schools, et cetera" so that what the parent was "seeking now [were] the [IEEs]" including publicly-funded independent psychoeducational, OT, PT, and speech-language therapy evaluations (Tr. p. 3). The district's representative stated that the district was objecting to the parent's IEE request and would "present a case" should the parties proceed to a hearing on the merits (Tr. p. 4). In response to the IHO's question as to the basis of the district's objection, the district's representative referenced the statement in the parent's November 2021 due process complaint notice that "the parent disagree[d] with the student's prior evaluations, both at the time of the evaluation, as well as currently," and stated the district's position "that the [d]istrict c[ould] do . . . evaluations" (Tr. pp. 4-5). In response to the district representative's inquiry, the IHO stated that his "permission to submit a motion" was not required and that "[i]f any motions [were] submitted he w[ould] rule on them accordingly" and "the other party [would] ha[ve] the opportunity to respond to the motion" further stating that he "would not rule on the motion until" he received from the other party "either a response or confirmation that there w[ould] be no response" (Tr. pp. 5, 6). The IHO also stated as to the "mention of a corrected due process complaint" notice that he had not been provided a copy from the impartial hearing office when he received the original due process complaint and that "the parties [were] free to send [him] a copy of that" (Tr. p. 5). In planning a status hearing for January 2021, the IHO further indicated that

[2] An email accompanying the due process complaint notice shows that the document was provided to the impartial hearing office on November 2, 2021, and it appears that the document was logged by a "Case Coordinator" with the impartial hearing office (see Nov. 2021 Due Process Compl. Notice).

leading up to such date he would "review the corrected [due process complaint notice]" and the district could "submit anything they would like to submit" (id.).

By motion to dismiss dated January 3, 2022,[3] the district alleged that, with respect to the parent's request for an interim order requiring the district to implement the student's last agreed-upon IEP, there was no contested pendency for the 2021-22 school year, that recent case law (J.T. v. de Blasio, 500 F. Supp. 3d at 137 [S.D.N.Y. 2020]) established that there was no change in pendency rights caused by the switch to remote instruction from the COVID-19 pandemic, and that three recent State-level administrative appeal decisions related to remote instruction with "nearly identical" due process complaint notice allegations "dismissed the [parent's claims] and/or denied all relief" (IHO Ex. II at pp. 2-3). The district's motion further alleged that the parent's due process complaint notice failed to state a claim upon which relief could be granted because it did not allege any factual deficiencies in the IEP or placement or allege a denial of a FAPE, aside from the remote instruction claim (id. at pp. 4-6). The motion stated that the district objected to "any allegations raised orally at hearing as outside the four corners" of the parent's due process complaint notice (id. at p. 7). The district's motion also asserted that the parent's request for interim IEEs could not be granted as a matter of law because the parent did not include any allegations related to an evaluation conducted by the district in their due process complaint notice[4]; did not request an evaluation or reevaluation conducted by the district as relief in the due process complaint notice, which relief was, therefore, outside the scope of review; did not specifically disagree with any district evaluations (which had been conducted within the last three years); and refused consent for a district psychological evaluation after having requesting it in December 2021 as well as refusing remote services (id. at pp. 7-9). Finally, the motion objected to the parent's use of "catch-all" language in the due process complaint notice for "[a]ny other relief the IHO deemed appropriate" as vague and insufficient (id. at pp. 9-10). The district requested that the IHO dismiss the parent's due process complaint notice with prejudice (id. at p. 10).

In a decision dated January 14, 2022, the IHO granted the district's motion to dismiss (IHO Decision at p. 6). Initially, the IHO found that the parent's due process complaint notice did not meet the statutory requirements because it "d[id] not set forth the name of the school the [s]tudent [wa]s attending" or "sufficient factual description of the nature of the [s]tudent's problem" such as the student's "grade level or facts regarding the [s]tudent's disabilities, special needs, or educational program" (id.). Regarding the parent's request for IEEs, the IHO found that the parent did not satisfy the legal standard for a publicly-funded IEE, as the due process complaint notice did not state a disagreement with a specific evaluation conducted by the district (id.). Finally, noting that recent legal authority established that "dismissal with prejudice is appropriate under the circumstances," the IHO granted the district's motion and dismissed the parent's due process

[3] The date stated on the motion of January 3, 2021 is a typographical error.

[4] The district stated that the only sentence in the parent's due process complaint notice that related to an evaluation was as follows "[t]he Parent disagrees with the Student's prior evaluations, both at the time of the evaluations as well as currently, because they did not accurate reflect the student's nor do they accurately reflect the impact of the Covid-19 school closures . . ." (IHO Ex. II at p. 7 [alteration in the original]). The quoted language referenced by the district follows closely the language from the parent's November 2, 2021 "Corrected" due process complaint notice (Nov. 2, 2021 Due Process Compl. Not. at p. 3).

complaint notice with prejudice (id., citing Application of a Student with a Disability, Appeal No. 21-188, and Application of a Student with a Disability, Appeal No. 21-187).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing her due process complaint notice with prejudice. Initially, the parent argues that the IHO erred in failing to consider the parent's "corrected/amended" November 2021 due process complaint notice as the "operative" due process complaint notice despite making "references to reviewing" it at the prehearing conference, noting that the IHO only referenced the parent's January 2021 due process complaint notice in his decision. The parent also notes that the district referenced the language of the parent's November 2021 due process complaint notice at the prehearing conference. The parent further argues that the IHO erred by failing to give the parent an opportunity to respond to the district's motion to dismiss, despite the IHO's statement at the December 10, 2021 prehearing conference that he would not rule on the motion until he received either a response from the parent or confirmation that there would be no response. The parent asserts that, by issuing a decision dismissing the parent's due process complaint with prejudice on January 14, 2022, the IHO denied the parent her fundamental due process rights under the IDEA.

Next, the parent asserts that the IHO erred by concluding that the due process complaint notice failed to satisfy the statutory requirements, noting that both due process complaint notices contained the name of the student's school and that the due process complaint notice was sufficient in its factual description of the nature of the student's problem and proposed resolutions. The parent also contends that the IHO erred in concluding that her due process complaint notice failed to properly request IEEs as the November 2021 due process complaint notice "explicitly" stated that the parent "disagreed with [the student's] prior evaluations" and "unmistakably" requested the district fund extensive IEEs, also noting that a parent's request need not contain "magic words" or be sent by any formalized notice and that the IHO had authority to order the IEEs at public expense. The parent further contends that the IHO erred in concluding that the SRO decisions cited in the district's motion to dismiss were controlling authority as they were "distinguishable both factually and procedurally," and that the November 2021 due process complaint notice stated that the parent disagreed with the district's evaluations and the student was adversely impacted by the switch to remote instruction.[5] As relief, the parent requests reversal of the IHO's decision to dismiss the parent's due process complaint notice with prejudice and deny the district's motion or, alternatively, that the matter be remanded to the IHO for further proceedings.

[5] The parent requests that the SRO accept additional evidence attached to the request for review (Req. for Rev. ¶ 54). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). First, the parent's "corrected" November 2021 due process complaint notice was also received as part of the record from the district in this proceeding (see 8 NYCRR 279.9[a]). The remaining documents were available at the time of the impartial hearing and they are not necessary in order to render a decision in this appeal. As this matter is being remanded, the parent may offer the documents to the IHO for consideration, and it is within the IHO's sound discretion to determine whether to receive them into evidence.

In an answer, the district responds to the parent's claims with general denials and requests that the parent's request for review be dismissed and the IHO's decision affirmed. The district contends that the request for review should be dismissed for failure to comply with the regulations governing practice before the Office of State Review because "[i]n particular, numerous paragraphs within the [request for review] fail to include page-specific citations to the record of the impartial hearing." The district also contends that the IHO justifiably dismissed the parent's due process complaint notice with prejudice for a number of reasons. First, the district argues that the IHO correctly declined to "cite, place any reliance on, or even mention" the "corrected/amended" November 2021 due process complaint notice, stating that it was "not relevant" that the IHO stated an intention to review it, or that the district referenced it, during the prehearing conference, and that the motion to dismiss objected to efforts to amend the due process complaint notice, the district "generally must approve" such amendments, there is no mechanism for a "corrected" due process complaint notice, and the nature of the changes confirmed that the November 2021 submission "sought to amend the [due process complaint notice] rather than merely 'correct' it." Second, the district argues that the IHO did not fail to give the parent an opportunity to respond to the district's motion to dismiss, as the IHO did not rule on the motion until 11 days after it was filed, affording the parent "ample opportunity" to respond, and it was of "no moment" that the IHO stated his intention to either wait for a response or a confirmation that there would be no response, because any motions to be filed by the district were "hypothetical" at that time and the IHO did not know the district would file a motion or what the contents would be and, in any event, the motion to dismiss filed by the district "left no genuine issue of material fact."[6] The district asserts that summary disposition of claims that cannot be successfully adjudicated at the administrative level is "entirely appropriate" and that the IHO was not required to give the parent any further opportunity to respond to the district's motion.

Third, the district contends that the IHO correctly found that the due process complaint notice failed to meet certain statutory requirements, and although the district acknowledged that the school was properly identified, argues that the IHO correctly determined that sufficient detail was not provided for any claims that were within his authority to adjudicate such as claims of any actual deficiency in the IEP or placement or any allegation of a denial of a FAPE (aside from the remote instruction claim) or allegations related to the evaluative information relied upon in developing the IEP or specific adverse effects on the student related to remote instruction. Further, the district argues that to the extent the parent now seeks to raise claims not included in the due process complaint notice, they are outside the scope of review. Fourth, the district alleges that the IHO correctly found that the due process complaint notice failed to properly request IEEs for the reasons stated in its motion to dismiss, that the request for review improperly supports its IEE claim by relying on the "corrected/amended" November 2021 due process complaint notice which is not a "valid" due process complaint notice, and that the parent improperly raises for the first time on review that the student experienced regression, which was not raised in the January 2021 due process complaint notice or at the impartial hearing and should not be addressed on appeal.

[6] As argued in its motion to dismiss, the district asserts that the parent's claims are nearly identical to the allegations raised in several recent State-level administrative appeals which dismissed similar claims as not presenting a cognizable claim, moot, and raising systemic allegations or other claims that were beyond the jurisdiction of the SRO and IHO, and citing J.T. v. de Blasio (500 F. Supp. 3d at 137) for the proposition that there was no change in pendency rights caused by the switch to remote instruction due to the COVID-19 pandemic.

Fifth, the district contends that the parent's final challenge to the IHO's decision incorrectly asserts that the SRO decisions cited in the district's motion to dismiss were "somehow distinguishable" and further that the parent's argument is vague, conclusory and relies on the November 2021 due process complaint notice which is not valid. The district requests that the parent's appeal be dismissed.

The parent replies and asserts that: the parent's request for review complies with the regulations governing practice before the Office of State Review; the November 2021 due process complaint notice was the "operative" due process complaint notice; the IHO denied the parent her fundamental due process rights when he failed to give her the opportunity to respond to the district's motion to dismiss; the parent's due process complaint notice properly met statutory requirements and she is not claiming a deficiency with the IEP but with its implementation; the parent properly requested IEEs in her November 2021 due process complaint notice and raised the issue of regression in the November 2021 due process complaint notice rather than improperly raising the issue for the first time on appeal as argued by the district; and case law and SRO decisions cited by the district are not controlling.

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]).[7]

[7] 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).

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district in its answer requests that the parent's request for review be dismissed for failure to comply with the regulations governing practice before the Office of State Review. State regulation requires that pleadings include "citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[c][3]). In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Here, the district argues that "numerous paragraphs" of the parent's request for review fail to include "page-specific citations to the record" on appeal (see Answer at ¶¶ 8-10). Specifically, the district alleges that the parent failed to use citations to the record in "21 of the 24 paragraphs" that set forth the "pertinent facts" and that "[a]t least 12 of the 29 paragraphs" which set forth the issues on appeal "suffer from the same defect," arguing that to the extent these are procedural errors, they are "substantial" not "mere technicalities" and further that "it is not possible for either the [district] or the SRO to determine with any certainty the sources of information" or "the extent to which this information has been portrayed accurately" in the parent's request for review.

Initially, the hearing record in this matter was undeveloped and consisted primarily of the parent's January 2021 due process complaint notice, nine pages of transcript from the December 10, 2021 impartial hearing, the district's January 2022 motion to dismiss, two State-level administrative appeal decisions involving different students, and the IHO's decision from which the parent appeals in this matter. Upon review, the parent's request for review included five citations to the transcript and three citations to the IHO's decision, as well as uncited references to the parent's two due process complaint notices and the two SRO decisions. While there may have been at least one numbered paragraph that was missing its citation to the record, other paragraphs appeared to be either argument or law, so that, on balance, given the limited record, and the

district's ability to prepare and file an answer, I find not merit to the district's contention that the request for review should be dismissed on this basis.

2. Scope of the Impartial Hearing

I turn next to the parent's argument that the IHO erred in failing to consider the parent's "corrected/amended" November 2021 due process complaint notice as the "operative" due process complaint notice, despite the IHO having said at the December 10, 2021 hearing date that he would review it. The district argues that the IHO correctly declined to "cite, place any reliance on, or even mention" the corrected/amended due process complaint notice in his decision, for reasons including that the district did not consent to the amendment.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, the parent sent her November 2, 2021 "corrected" due process complaint notice to the impartial hearing office prior to the IHO being assigned on November 19, 2021 and prior to the start of the impartial hearing on December 10, 2021 (IHO Decision at p. 3; Nov. 2021 Due Process Compl. Not.).[8] At the impartial hearing, the parent stated that the "updated corrected" due process complaint notice "didn't add any claims, it only eliminated some of the pendency claims involving the reopening of schools" so that what the parent was "seeking now" were the IEEs listed in the November 2021 corrected due process complaint notice (Tr. p. 3). The IHO indicated that he had not been provided with a copy of a corrected due process complaint notice from the impartial hearing office when he received the original due process complaint notice but indicated that the parties were "free to send" him a copy and that scheduling a status hearing in January 2022 would give him "a chance to review the corrected" due process complaint notice (Tr. p. 5). As the parent notes, the district also referenced the corrected due process complaint notice at the hearing in discussing its position on the parent's claim for IEEs and a potential motion related to the IEE claim (Tr. pp. 4-5). A copy of the November 2021 due process complaint notice was included

[8] As previously noted, a comparison of the parent's original and "Corrected" due process complaint notices shows additional language stating that the student had experienced "substantial regression," that the parent "disagree[d] with the [s]tudent's prior evaluations, both at the time of the evaluation as well as currently," and a request for the district to fund "comprehensive" IEEs including independent psychoeducational, OT, PT, and speech-language therapy evaluations (Nov. 2, 2021 Due Process Compl. Not. at pp. 2-3).

with the hearing record on appeal but was not entered into evidence as an exhibit at the impartial hearing (see Nov. 2021 Due Process Compl. Notice). The district did not voice disagreement with the corrected due process complaint notice at the December 2021 prehearing conference but stated in its motion to dismiss that the district "object[ed] to any amendment or 'correction'" to the due process complaint notice and "object[ed] to any allegations orally raised at hearing as outside the four corners" of the parent's due process complaint notice (IHO Ex. II at pp. 2, 7).[9]

There is nothing in the hearing record to indicate that the district consented to amend the due process complaint notice. However, I also find that the IHO made no clear ruling as to whether the corrected/amended due process complaint notice was accepted and did not address it in his decision, despite the district's objection in its motion to dismiss to its acceptance by the IHO, which followed discussion of the issue at the December 2021 hearing date and the IHO's statement on the record that the parties could send him a copy and that he would review it.[10] Absent a clear ruling as to whether the IHO granted permission for the parent to amend her due process complaint notice not only caused confusion for the parties, particularly as the corrected/amended due process complaint notice was filed prior to the IHO's assignment to the case, but it also resulted in a lack of clarity regarding the key issues on appeal. This matter must be remanded for further administrative proceedings as explained further below. Upon remand, the IHO should initially rule on whether he has accepted the corrected/amended due process complaint notice.

B. District's Motion to Dismiss

The parent argues that the IHO erred by failing to give the parent an opportunity to respond to the district's motion to dismiss, despite stating at the prehearing conference that he would not rule on the motion until he received either a response from the parent or confirmation that there would be no response. The parent asserts that by issuing a decision dismissing the parent's due process complaint with prejudice without giving the parent an opportunity to respond denied the parent her fundamental due process rights under the IDEA.

As a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA (see, e.g., Application of a Student with a Disability, Appeal No. 19-102; Application of the Dep't of Educ., Appeal No. 11-004), but generally regulations do not address the particulars of motion

[9] The district also argues that "there is no such term in existing law for a 'correction'" to a due process complaint notice. According to the district, a due process complaint notice can only be amended and any amendment must be approved "by the district or IHO" pursuant to 8 NYCRR 200.5(i)(7). Regardless of the terminology employed, a "corrected" due process complaint notice would still be subject to the requirements of 8 NYCRR 200.5(i)(7), mandating either consent by the district or IHO permission in order to amend a due process complaint notice.

[10] While there is State guidance that implies that a parent may not file an amendment to a due process complaint notice prior to obtaining the district's consent or the IHO's permission ("Guidance on Procedures Relating to Special Education Impartial Hearings," Office of Special Educ. Mem. [June 2016], available at https://www.p12.nysed.gov/specialed/publications/2016-memos/procedures-relating-to-impartial-hearings.html), it is unclear how in this instance the parent would have obtained permission from an IHO where none had been assigned until approximately ten months after the parent filed her original due process complaint notice.

practice.[11] Instead, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in such matters so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]).

Here, the IHO stated at the impartial hearing that his "permission to submit a motion" was not required and that "[i]f any motions [were] submitted he w[ould] rule on them accordingly" and "the other party [would] ha[ve] the opportunity to respond to the motion" stating that he "would not rule on the motion until the other party [submitted] either a response or confirmation that there w[ould] be no response" (Tr. pp. 5, 6). The district submitted a motion to dismiss dated January 3, 2022 (IHO Ex. II), and the IHO ruled on the motion in a final decision dated January 14, 2022, less than two weeks later and just five days prior to the next scheduled hearing date (IHO Decision; see Tr. p. 7).[12] There is no indication in the hearing record that the IHO communicated with the parties about the motion after it was submitted or whether the parent informed the IHO that she did not intend to respond to the motion. While permissible, summary disposition procedures should be used with caution and are only appropriate in instances in which "parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]).[13] Here, the parent was not given a meaningful opportunity to identify genuine issues of material fact or otherwise exercise her rights during the impartial hearing and, accordingly, the IHO's ruling on the motion to dismiss was premature.

Based on the foregoing, the IHO erred in ruling on the district's motion to dismiss without first giving the parent an opportunity to respond. While I considered evaluating the merits of the dismissal in light of the opportunity the parent has now had on appeal to articulate her position, the threshold inquiry into the operative due process complaint notice must first be addressed by the IHO as it may be determinative to some of the issues and, in particular, to the viability of the parent's request for publicly funded IEEs, as discussed below. However, I will offer some discussion of the three main grounds cited by the IHO for dismissing the matter as at least one ground relied upon by the IHO (sufficiency of the due process complaint notice) was clear error. The remaining grounds may be revisited by the IHO on remand.

1. Sufficiency of the Due Process Complaint Notice and Compliance with Statutory Requirements

The parent alleges that the IHO erred in finding that the due process complaint notice failed to satisfy the statutory requirements for a due process complaint notice by failing to set forth the

[11] The exception is a sufficiency challenge, which is discussed further below.

[12] According to the order of extension included in the hearing record, on January 4, 2022, the IHO granted a joint request from the parties, which had been made on December 10, 2021 (see Tr. p. 6; Order of Extension). The order of extension identified March 5, 2022 as the new due date for the IHO's decision (Order of Extension). Accordingly, the IHO was not constrained by the timelines to issue his decision in mid-January.

[13] As the matter must be remanded for further administrative proceedings as explained below, the IHO would also be able to consider any response the parent submitted to the district's motion at that time.

name of the school the student was attending and a sufficient factual description of the nature of the student's problem.

State regulations provide that a parent or district may file a due process complaint notice "with respect to any matter relating to the identification, evaluation or educational placement of a student with 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][7][A][ii]; 34 CFR 300.508[b]). A due process complaint notice must contain, at a minimum, (i) the name of the student; (ii) the address of the residence of the student; (iii) the name of the school the student is attending; (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and (v) a proposed resolution of the problem to the extent known and available to the party at the time (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). The other party may challenge the sufficiency of the due process complaint notice it if does not meet these requirement (8 NYCRR 200.5[i][3]).

In most instances when a challenge to the sufficiency of a due process complaint notice is timely made, an impartial hearing may not proceed unless the due process complaint notice satisfies the sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 CFR 300.508[c]-[d]; 8 NYCRR 200.5[i][2]-[3]). If there has been an allegation that a due process complaint notice is insufficient, the IDEA and federal and State regulations provide that the party receiving the due process complaint notice must notify the hearing officer and the other party in writing of their challenge to the sufficiency of the complaint within 15 days of receipt thereof (20 U.S.C. § 1415[c][2][A], [C]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]; [i][6][i]). An IHO must render a determination within five days of receiving the notice of insufficiency (see 34 CFR 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]). If a receiving party fails to timely challenge the sufficiency of a due process complaint notice, the due process complaint must be deemed sufficient (20 U.S.C. § 1415[c][2]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]).

Initially, a review of both the January 2021 and November 2021 due process complaint notices shows that the parent's due process complaint notice identified the name of the school the student was attending, and the district in its answer acknowledges that the student's school was properly identified (IHO Ex. I at p. 1; Nov. 2, 2021 Due Process Compl. Not. at p. 1). Accordingly, the IHO erred in determining that the parent's due process complaint notice failed to satisfy the statutory requirements for a due process complaint notice by failing to set forth the name of the school the student was attending (IHO Decision at p. 6).

As for the sufficiency of the factual description of the nature of the student's problem, the IHO did not clearly indicate which due process complaint notice he was examining for sufficiency, making it unclear which allegations were at issue. Moreover, there is no indication that the district interposed a sufficiency challenge within 15 days of receipt of the either the January 2021 or November 2021 due process complaint notices and the IHO did not render a determination within five days of receipt of any notice of insufficiency; thus, to the extent the IHO relied upon the sufficiency of the due process complaint notice(s) as a basis for dismissing the same, this was error.

2. Independent Educational Evaluations at Public Expense

Turning to the request for publicly funded IEEs, the parent contends that the IHO erred in concluding that the parent's due process complaint notice failed to properly request IEEs, as the November 2021 due process complaint notice "explicitly" stated that the parent "disagreed with [the student's] prior evaluations" and "unmistakably" requested the district conduct extensive IEEs, also noting that a parent's request need not contain "magic words" or be sent by any formalized notice and that the IHO had authority to order the IEEs at public expense. The district alleges that the IHO correctly found that the due process complaint notice failed to properly request IEEs for the reasons stated in its motion to dismiss, that the request for review improperly supports its IEE claim by relying on the "corrected/amended" November 2021 due process complaint notice which is not a "valid" due process complaint notice, and that the parent improperly raises for the first time on review that the student experienced regression, which was not raised in the January 2021 due process complaint notice or at the impartial hearing and should not be addressed on appeal.

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]).[14]

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

[14] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

Here, as noted above, the IHO made no clear ruling as to whether the corrected/amended due process complaint notice was accepted, making it impossible to definitively identify the issues on appeal. Moreover, as the IHO issued a final decision on the district's motion without giving the parent an opportunity to identify factual issues to be decided, it is not clear whether the IHO was aware of the parent's position that the November 2021 due process complaint notice articulated the parent's disagreement with district evaluations. The corrected/amended due process complaint includes a claim stating that "[t]he [p]arent disagrees with the [s]tudent's prior evaluations, both at the time of the evaluation as well as currently," which if the complaint notice was accepted, tends to support a finding that the parent expressed disagreement with an evaluation conducted by the district and requested that an IEE be conducted at public expense.[15, 16]

Upon remand, if the IHO accepts the November 2021 due process complaint notice, he should consider the merits of the parent's request for IEEs at public expense.[17] In the event that the IHO declines to accept the November 2021 due process complaint notice, the IHO may ultimately reaffirm his finding that the parent did not allege disagreement with a district evaluation (see IHO Ex. I). At the very least, the parent should have the opportunity to argue the point.

3. Remaining Allegations

As for the remainder of the parent's allegations, the IHO's dismissal may have been appropriate given the similarity of the allegations to recent matters. That is, the parent's allegations in the due process complaint notice were very similar to those alleged in matters involving different

[15] While not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]), in past decisions, SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094).

[16] To the extent the language in the November 2021 due process complaint notice referenced the parent's disagreement with district evaluations "currently" because they failed to "reflect the impact of the COVID-19 school closures and unilateral modification of IEP program and services have had on the Student . . . and the magnitude of regression that has resulted" (Nov. 2021 Due Process Compl. Not. at p. 3), this alleged disagreement would not support an award of publicly funded IEEs because, as the Second Circuit has made clear, a parent must disagree with a district evaluation as of the time it is conducted and 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"]). However, the November 2021 due process complaint notice also alleged that the parent disagreed with the district evaluations at the time of the evaluations because they did not accurately reflect the student's needs (Nov. 2021 Due Process Compl. Not. at p. 3).

[17] While the record is undeveloped, it contains a report from a district psychological evaluation conducted in October 2019, as well as an email exchange between the parent and school psychologist in which the parent requests an evaluation of the student for dyslexia and the district's response that a neuropsychological evaluation could be conducted, however the parent did provide consent and the case was closed (see IHO Ex. II at pp. 11-13, 26-30). In the event the parent's request for IEEs at public expense goes forward, the effect of the parent's lack of consent will be an issue for the IHO to consider.

students, which were discussed in recent decisions by State review officers (see Application of a Student with a Disability, Appeal No. 21-110; Application of the Dep't of Educ., Appeal No. 21-188; Application of the Dep't of Educ., Appeal No. 21-187). In all of these matters, the parents' allegations surrounded 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, and found the actions taken by the district to deliver services to students with disabilities during the closure through remote delivery to be consistent with federal and State guidance (id. at 181-84).

Here, to the extent that the parent took issue with the executive decision to close 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 district policies affecting all students. Even if I possessed such authority, courts have held that certain summary administrative actions that have the effect of limiting the availability of protections otherwise afforded by law under ordinary circumstances may be justified as part of the government's response to emergency situations (see, e.g., Hernandez v. Grisham, 508 F. Supp. 3d 893, 979 [D.N.M. 2020]), so it is far from clear that the parent would prevail with that argument in the appropriate forum anyway.[18]

Notwithstanding that certain of the parent's allegations may be properly dismissed on jurisdictional grounds or for failure to state a cognizable claim, I will give the IHO the opportunity to revisit the allegations upon remand. In particular, upon remand, the IHO should give the parent

[18] Further, in her original January 2021 due process complaint notice, the parent referenced concepts such as "status quo" and pendency rights (IHO Ex. I at pp. 1-2). In the November 2021 corrected/amended due process complaint notice, the parent has omitted some of these allegations, and therefore appears to have tacitly acknowledged that closure would not trigger pendency rights. In any event, if the parent attempted to pursue allegations that there was a violation of the student's pendency placement, such allegations would be premature insofar as the student was not entitled to a pendency placement prior to the parent's filing of the due process complaint notice in January 2021 (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]). That is, the Governor's March 2020 executive order closing schools in the State is not the event that would trigger the student's right to a pendency placement under the IDEA, and it was only the parent's filing of a due process complaint notice that gave rise to the student's rights under stay-put. The parent also initially 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 and continued in the "corrected" due process complaint notice to request that she be allowed to "self-cure the unilateral change in the Student's status quo" (IHO Ex. I at pp. 1-3; Nov. 2021 Due Process Compl. Not. at p. 3). However, an IHO would not have sufficient authority to countermand Governor Cuomo's executive orders addressing the COVID-19 pandemic response or to direct the district to open an entire 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).

an opportunity to argue why this matter is distinguishable from recent cases involving allegations that the district has not delivered sufficient or appropriate special education to students with disabilities during building closures related to the COVID-19 pandemic. To the extent the November 2021 due process complaint notice is accepted, it includes an allegation that the student suffered regression during remote instruction (Nov. 2021 Due Process Compl. Notice). It is, however, unclear from the allegations whether a CSE has taken up the question of the student's alleged regression.

While, as noted by the District Court in J.T., the United States Department of Education (USDOE) stated unequivocally in its guidance that compliance with IDEA did not preclude any school from offering educational programs through distance instruction (J.T., 500 F. Supp. 3d at 187; see "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]), such guidance merely serves to clarify a district's obligation in the context of an unprecedented public health emergency and does not speak to the actual impact of remote learning on individual students with disabilities. Accordingly, while the pivot to remote learning during the school closure period cannot be the sole basis for finding a denial of FAPE, federal and State guidance suggests that going forward, a CSE should, in the first instance, address questions of educational benefit, loss of academic skills and potential regression during remote learning when recommending educational programming for subsequent IEPs.

For instance, both the USDOE and the State Education Department's (NYSED's) Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

Accordingly, to address these delays and other delivery-related issues that occurred as a result of the pandemic, OSEP and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76

IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1; see also Z.Q. v New York City Dep't of Educ., 2022 WL 903003, at *5 [S.D.N.Y. Mar. 28, 2022] [noting that "[t]he 2020 COVID-19 guidance . . . provides that CSEs may coordinate with parents to make [an] individualized determination" about whether a student is entitled to compensatory services]).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

> Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(l), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

In sum, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. The parent is of the opinion that the student has regressed, however it is unclear from the undeveloped hearing record if the parties have conducted a review of the student's present levels of academic achievement and functional performance as envisioned by federal and State education authorities and convened a CSE to engage in educational planning for the student, including a consideration of whether any compensatory services may be warranted to make-up for a loss of skill during school closures and the delivery of instruction and services to the student remotely.

The parent stated in her November 2021 corrected/amended due process complaint notice that "as a result of the modifications of the [s]tudent's mandated IEP program and services, the [s]tudent experienced substantial regression in [his] educational skills, abilities, and performance" and that the student's prior evaluations did not accurately reflect the impact of the COVID-19 school closures and unilateral modification of the IEP program and services on the student and "the magnitude of regression that has resulted" (Nov. 2, 2021 Due Process Compl. Not. at pp. 2-3). The parent further requested that after completion of IEEs in the student's areas of need (psychoeducational, OT, PT, and speech-language therapy), that the district "promptly conduct a new" CSE meeting to review the updated evaluations and make any appropriate changes to the student's IEP (id. at p. 3).

To the extent that the parent's November 2021 due process complaint notice does not contain an allegation that a CSE has inappropriately addressed or refused to consider the student's alleged regression, the parent will not get far with her FAPE claims based solely on the district's failures related to school closure.

Upon remand, the IHO is free to consider whether the parent has any actionable claims with respect to the student's alleged regression due to the COVID-19 school closures, taking into account that a school closure during the relevant time period would not, in and of itself, constitute a denial of a FAPE. To the extent the IHO ultimately deems the amended due process complaint notice to be the operative one and considers the parent's regression claims contained therein, it may be a prudent use of limited due process resources for the parent to seek a further amendment of the due process complaint notice (or to withdraw and refile her claims) to include any FAPE claims related to the CSE's consideration of the student's current educational performance and possible regression, including any recommended compensatory services. To the extent a CSE has not yet had the first opportunity to consider these issues, the IHO's ability to determine whether FAPE has been denied to the student on the basis of the district's alleged failure to remediate the student's regression may be seriously curtailed and, therefore, it may be appropriate for the IHO to reaffirm his dismissal of these claims as premature at this juncture. The parent's amended due process complaint notice is close to being on the right track with respect to pursuing claims related to the student's alleged regression resulting from the COVID-19 school closures, but the parent is urged, if she has not already done so, to present these outstanding issues to the CSE in the first instance

VII. Conclusion

In sum, the IHO's dismissal of the parent's due process complaint notice is problematic given that there is no indication in the hearing record that the parent had a meaningful opportunity to respond to the motion. Further, the IHO erred in dismissing the parent's due process complaint notice on sufficiency grounds. As to the remaining grounds for the IHO's dismissal, absent a ruling from the IHO as to whether he accepted the November 2021 corrected/amended due process complaint notice, further review of his decision is not possible and/or is not preferable without further opportunity accorded to the parent to respond to the district's motion. This is particularly so for the parent's request for publicly funded IEEs given the allegation in the November 2021 corrected/amended due process complaint notice that the parent disagreed with district evaluations of the student.

Having determined that the IHO erred in dismissing the parent's due process complaint notice without ruling on the parent's request to amend the due process complaint notice or giving the parent an opportunity to respond to the district's motion to dismiss, the IHO's decision must be vacated and remanded for further administrative proceedings consistent with this decision.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 14, 2022, is vacated;

IT IS FURTHER ORDERED that the matter is hereby remanded to the same IHO who issued the January 14, 2022 decision to rule on the parent's request to amend the due process complaint notice, to reconsider the district's motion to dismiss taking into account the parent's response thereto, and, if necessary, to consider the parent's request for publicly funded IEEs and compensatory education services.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER