The University of the State of New York

The State Education Department
State Review Officer
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No. 23-079

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

Appearances:
The Harel Law Firm, PC, attorneys for petitioner, by Galiah Harel, 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 denied his request to be reimbursed for his son's tuition costs at the Big N Little: Ziv Hatorah Program (Ziv Hatorah) for the 2021-22 and 2022-23 school years. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it offered to provide an appropriate educational program to the student for those school years. The appeal must be sustained in part. The cross-appeal must be sustained. The matter must be 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

The student was the subject of an impartial hearing concerning the 2020-21 school year, in which the parent alleged that the district failed to sufficiently evaluate the student (see 2021-22 Tr. pp. 10-11; IHO Ex. I).[1]

[1] As discussed further below, this matter involves two proceedings that were consolidated after hearing dates had taken place in both proceedings. Transcripts arising from the separate proceedings that took place before the

A. 2021-22 School Year

1. Educational Planning

In March and April 2021, the district conducted occupational therapy (OT), speech-language therapy, and psychoeducational evaluations of the student (2021-22 Dist. Exs. 5; 7-8).

On May 19, 2021, a CSE convened and, finding the student eligible for special education as a student with an emotional disability, developed an IEP for the 2021-22 school year (fifth grade) (2021-22 Parent Ex. B).[2, 3] The May 2021 CSE recommended that the student attend a 12:1+1 special class for mathematics, English language arts (ELA), social studies, and sciences in a non-specialized school and receive the following related services on a weekly basis: two 30-minute sessions of counseling, one individual and one in a group; two 30-minute sessions of individual OT; and two 30-minute sessions of speech-language therapy in a group (id. at pp. 13-14, 18). To address the student's management needs, the May 2021 IEP indicated that the student would "benefit from a small classroom setting" and related services (id. at p. 5).

The parent executed a contract on June 17, 2021 for the student's enrollment at Ziv Hatorah for the 2021-22 school year (2021-22 Parent Ex. C at pp. 1-3).[4] In a letter dated July 1, 2021, the parent notified the district of his view that the student experienced "significant regression when . . . not in school" and, therefore, required 12-month services (2021-22 Parent Ex. H at p. 2). The parent informed the district that, if "this issue" was not resolved, the parent intended to place the student at Ziv Hatorah for the 2021-22 school year and seek district funding for the costs of the student's tuition (id.).

In a prior written notice to the parent, dated August 6, 2021, the district summarized the recommendations of the May 2021 CSE (2021-22 Dist. Ex. 4). In a school location letter bearing

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matters were consolidated have overlapping pagination. Similarly, exhibits were received into evidence separately in both proceedings with overlapping exhibit designations. Therefore, for purposes of this decision, transcript and exhibit references will be preceded by the reference to the school year at issue in the proceeding in which they were admitted (i.e., 2021-22 Ex. A). The exception is the March 31, 2023 hearing date, which continued the pagination from the hearing dates related to the 2021-22 school year proceeding but occurred after consolidation and, therefore, involved both matters, and Parent Exhibit M, which was admitted during the March 31, 2023 impartial hearing date (see Tr. p. 135). The transcript of that hearing date does not include pagination duplicative of any other transcripts in the hearing records and there is no other Parent Exhibit M in evidence; therefore, these will be cited without a preceding reference to a school year.

[2] The hearing record contains three copies of the May 2021 IEP (compare 2021-22 Parent Ex. B, with 2022-23 Parent Ex. B, and 2021-22 Dist. Ex. 1). For purposes of this decision, the copy that was entered as part of the parent's exhibits pertaining to the 2021-22 school year is cited.

[3] The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]). The IEPs at issue in this proceeding use the term "emotional disturbance"; however, as the State changed the term "emotional disturbance" to "emotional disability" as of July 27, 2022, the term "emotional disability" is used in this decision (see 8 NYCRR 200.1[zz][4]).

[4] Ziv Hatorah has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

the same date, the district notified the parent of the particular public school site to which it assigned the student to attend for the 2021-22 school year (2021-22 Dist. Ex. 3).[5]

The parent sent the district a follow-up letter, dated August 16, 2021, informing it of his view that the district had not offered "a proper or adequate placement" for the student and stating his intent to unilaterally place the student at Ziv Hatorah for the 2021-22 school year at district expense (2021-22 Parent Ex. I).

2. May 2022 Due Process Complaint Notice (2021-22 School Year)

In a due process complaint notice dated May 2, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (2021-22 Parent Ex. A). The parent alleged that the student required a "full-time extended twelve-month special education classroom" with individualized support, social skills instruction, a behavior plan, and related services (id. at pp. 3-4). The parent contended that the district failed to offer the student an appropriate program or placement (id. at p. 4). For relief, the parent sought district funding for the costs of the student's tuition at Ziv Hatorah for the 12-month 2021-22 school year (id. at pp. 4-5).

B. 2022-23 School Year

1. Educational Planning

A CSE convened on May 18, 2022 and finding the student continued to be eligible for special education as a student with an emotional disability developed an IEP for the student for the 2022-23 (sixth grade) school year (2022-23 Parent Ex. C at p. 23).[6] The May 2022 IEP contained similar recommendations as those set forth in the May 2021 IEP except that: the special class was recommended for science five times per week, up from three times per week; the related services were recommended to be delivered in 40-minute sessions, up from 30-minute sessions; and the speech-language therapy was recommended as an individual service, instead of as a group service (compare 2022-23 Parent Ex. C at pp. 16-17, 21-22, with 2021-22 Parent Ex. B at pp. 13-14, 18). In addition, the May 2022 IEP included several additional supports for the student's management needs including the use of visuals, educational videos, engaging classroom materials, coping mechanisms, structured and sensory breaks, modified tasks, reinforcement, prompting, a visual schedule, behavior momentum, verbal praise, functional communication training, small group instruction, a token system, social skill training, modeling prompts, breaks, fidget toys, response blocks, social stories, kinesthetic learning activities, sensory learning activities, if/then instructions

[5] The hearing record includes duplicate copies of the August 2021 prior written notice and school location letter among the exhibits entered by the district in the proceeding pertaining to the 2021-22 and the 2022-23 school years (compare 2021-22 Dist. Exs. 3-4, with 2022-23 Dist. Exs. 6-7). It is unclear if this was inadvertent and if the district had intended to offer a different prior written notice and school location letter for the 2022-23 school year. For purposes of this decision, the copies entered as part of the exhibits pertaining to the 2021-22 school year will be cited.

[6] The hearing record contains duplicate copies of the May 2022 IEP (compare 2022-23 Parent Ex. C, with 2022-23 Dist. Ex. 1). For purposes of this decision, only the parent exhibit is cited.

and strategies including maintaining the demand, planned ignoring, and sensory advanced warning (2022-23 Parent Ex. C at p. 5).

In a letter dated June 22, 2022, the parent notified the district that, because it failed to provide the student with a "proper or adequate educational and school placement" for the 2022-23 school year, he would be unilaterally placing the student at Ziv Hatorah and seeking district funding for the costs of the student's tuition (2022-23 Parent Ex. I at p. 2). On June 23, 2022, the parent entered a contract for the student's attendance at Ziv Hatorah for the 2022-23 school year (2022-23 Parent Ex. D at pp. 1-3).

2. July 2022 Due Process Complaint Notice (2022-23 School Year)

In a due process complaint notice dated July 14, 2022, the parent alleged that the district failed to offer the student a FAPE for the 2022-23 school year (2022-23 Parent Ex. A). The parent asserted that the student "remain[ed] in need of his placement" at Ziv Hatorah, including a full-time special class with individualized support and related services on a 12-month school year basis (2022-23 Parent Ex. A at pp. 1-2). According to the parent, the district failed to provide the student an appropriate program and placement (id. at p. 2). For relief, the parent requested district funding of the costs of the student's tuition at Ziv Hatorah for the 2022-23 school year (id. at pp. 2-3).

C. Impartial Hearings and Impartial Hearing Officer Decisions

Between June 28, 2022, and December 7, 2022, the parties convened for five impartial hearing dates concerning the parent's allegations relating to the 2021-22 school year (2021-22 Tr. pp. 1-118). On November 15, 2022 and January 26, 2023, the parties convened for at least two hearing dates concerning the 2022-23 school year (2022-23 Tr. pp. 1-46; IHO Ex. III).[7]

In an interim decision dated January 26, 2023, the IHO ordered that the district fund an independent educational evaluation (IEE) of the student (Jan. 26, 2023 Interim Decision on IEE).[8] The IHO conducted a review of evaluative information about the student and found the district and the parent's views of the student's needs equally "inexplicable" (id. at p. 1). The IHO found the contrast between the description of the student's needs in the April 2021 psychoeducational evaluation and the parent's request for 12-month services amounted to a request for an IEE (id. at p. 2). The IHO concluded that, regardless of whether the parent requested an IEE, one was required

[7] As part of the hearing record on appeal, the district filed the November 15, 2022 transcript of the 2022-23 proceeding prior to consolidation that consists of pages 1 through 46 (2022-23 Tr. pp. 1-46). However, it appears that additional hearing dates took place as part of that proceeding prior to consolidation. IHO Exhibit III includes the transcript of a hearing date that took place on January 26, 2023, as part of the 2022-23 proceeding (IHO Ex. III). The January 2023 transcript consists of pages 73 through 111 (id.). It would appear from the pagination that another hearing date may have taken place as part of the 2022-23 proceeding between the November 2022 and January 2023 dates. As this matter is being remanded, the district is directed to review the hearing record before it is submitted to the IHO on remand and include any missing transcript as part of the hearing record provided to the IHO.

[8] Given that the IHO issued two interim decisions on the same date, for purposes of this decision, citations will reference the subject matter of the decisions (i.e., Jan. 26, 2023 Interim Decision on Consolidation; Jan. 26, 2023 Interim Decision on IEE).

in order to provide "additional clinical insight" to facilitate the rendering of a decision (id. at p. 7). Accordingly, the IHO ordered the district to fund an independent neuropsychological assessment of the student by an evaluator of the parent's choosing with a report to be completed and available to the CSE and the IHO by no later than March 31, 2023 (id. at pp. 7-8).

In another interim decision dated January 26, 2023, the IHO ordered that the proceedings concerning the 2021-22 and 2022-23 school years be consolidated (Jan. 26, 2023 Interim Decision on Consolidation).[9] The IHO noted that he would not consolidate the proceeding involving the 2020-21 school year because he was dismissing it on that same date (Jan. 26, 2023 Interim Decision on Consolidation; see IHO Ex. I). However, the IHO opined that the ordered IEE was crucial to determining the issues raised for the 2021-22 and 2022-23 school years and that, therefore, the matters would be consolidated pending the completion of the IEE (Jan. 26, 2023 Interim Decision on Consolidation).

A final impartial hearing date addressing the consolidated matters took place on March 31, 2023 (Tr. pp. 119-39). On that date, the parent offered into evidence an independent psychoeducational evaluation of the student conducted on March 15, 2023 (Parent Ex. M).

In a final decision dated, March 31, 2023, the IHO dismissed the parent's due process complaint notices (see IHO Decision). The IHO summarized the evidence in the hearing record pertaining to the student's needs, noting that the evaluative information showed that the student was "performing at or around grade level, with approximately average ability, and modest behavioral demands" (id. at p. 6). The IHO found that, in this information, nothing supported the CSE's finding that the student was eligible for special education as a student with an emotional disability or needed a program "as restrictive" as a 12:1+1 special class, much less that he required the 12-month "or more extension services" as argued by the parent (id.).

The IHO found that, rather than obtain a neuropsychological IEE as ordered, the parent instead obtained a psychoeducational evaluation of the student that contained "results comparable to those on which the district had previously relied" and which the IHO opined did not support the level of services recommended in the student's IEPs, "much less the additional and more restrictive programs that the family" sought (IHO Decision at pp. 4, 7). Given the state of the hearing record and the parent's failure to obtain the independent neuropsychological evaluation, the IHO found that both parties had failed to meet their respective burdens of proof (id. at p. 7). Because the parent did not obtain "a clinical basis" for challenging the student's IEPs, the IHO dismissed the parent's due process complaint notices and held that the parent could no longer seek relief to remedy alleged violations pertaining to the 2021-22 and 2022-23 school years (id. at pp. 4, 5, 7).

As a final matter, because the parent obtained an independent psychoeducational evaluation, instead of an independent neuropsychological evaluation as ordered, the IHO held that it did not qualify for district funding (IHO Decision at pp. 4, 7). However, as a final order, the

[9] The IHO had previously declined to consolidate the proceedings involving the 2020-21 and 2021-22 school years (June 28, 2022 Interim Decision) and proceedings involving the 2020-21, 2021-22, and 2022-23 school years (July 26, 2022 Interim Decision).

IHO provided that, if the parent obtained an independent neuropsychological evaluation, the district would be required to fund it (id. at pp. 5, 7).

IV. Appeal for State-Level Review

The parent appeals, arguing that that the IHO erred in dismissing his due process complaint notices for the 2021-22 and 2022-23 school years without considering whether the district offered the student a FAPE, whether the parent's unilateral placement was appropriate, and whether equitable considerations weighed in favor of an award of district funding of the student's tuition. Specifically, the parent argues that the IHO, in finding that he could not decide the case without an independent neuropsychological evaluation, improperly shifted the burden to prove the inappropriateness of the IEP to the parent, and denied the parent a fair opportunity for an impartial hearing. The parent also contends that the IHO improperly referred to his decision in the prior matter involving the 2020-21 school year. The parent seeks an order reversing the IHO's decision and requests findings that the district denied the student a FAPE for the 2021-22 and 2022-23 school years, that Ziv Hatorah was an appropriate unilateral placement for the student, and that equitable considerations support the parent's request for relief. The parent requests that the district be required to fund the student's tuition for both school years.

In an answer with cross-appeal, the district responds to the parent's allegations and argues that the IHO correctly found that the parent did not meet his burden to prove that Ziv Hatorah was an appropriate unilateral placement. The district notes, however, that if it is determined that the IHO erred in finding that the parent did not meet his burden to prove the appropriateness of Ziv Hatorah, the matter should be remanded since the district was not given an opportunity to cross-examine the parent's witnesses. The district agrees with the parent that the IHO erred in finding he could not reach a decision in the case without an IEE and in referencing the prior matter involving the 2020-21 school year.[10] As for its cross-appeal, the district alleges that the IHO erred in finding that the district did not meet its burden to prove that it offered the student a FAPE. The district argues that, contrary to the IHO's determination, the evidence in the hearing record supports the CSEs' recommendations. In addition, the district asserts that the IHO erred in including in his final decision an order requiring the district to fund an independent neuropsychological evaluation. The district argues that the IHO's rationale for ordering the independent neuropsychological evaluation in the interim decision—to inform the hearing record—no longer applied once the proceeding came to an end.[11]

[10] As to the latter point, the district argues that the IHO's referencing to the prior proceeding was a flaw in reasoning but not sufficient enough to warrant a reversal of the IHO's order dismissing the due process complaint notices related to the 2021-22 and 2022-23 school years.

[11] In a reply and answer to the district's cross-appeal, the parent responds to the district's material allegations with admissions and denials and then goes on to reiterate allegations that the district denied the student a FAPE for the 2021-22 and 2022-23 school years, that Ziv Hatorah was an appropriate unilateral placement, and that equitable considerations support the parent's request for relief. The parent does not directly address the district's cross-appeal that the IHO erred in ordering an independent neuropsychological evaluation in his final decision.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[12]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

[12] 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., 580 U.S. at 402).

VI. Discussion

Having reviewed the parties' pleadings, the parent's appeal and the district's cross-appeal must be sustained to the extent indicated herein because the impartial hearing was improperly conducted, and this matter must be remanded to the IHO for further proceedings.

A. Preliminary Matters

1. Independent Educational Evaluation and Scope of the Impartial Hearing

Initially, both the parties agree that the IHO abused his discretion in finding that he could not decide the matters before him without an independent neuropsychological evaluation of the student. The parent argues that the IHO's desire to consider an IEE in order to assess whether the recommended placements were too restrictive was inappropriate given that the parent did not have to prove that the unilateral placement was the least restrictive environment (LRE) for the student. The district also contends that the IHO erred in ordering the district to fund an independent neuropsychological evaluation after the parent failed to obtain one while the impartial hearing was pending.

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]).[13]

Here, the parent did not disagree with a district evaluation or request an IEE. Further, a full review of the parent's May 2, 2022 and July 14, 2022 due process complaint notices shows that the parent did not include any allegations related to an evaluation conducted by the district (see 2021-22 Parent Ex. A; 2022-23 Parent Ex. A). The IHO reasoned that the parent's disagreement with a district evaluation was implicit in his request for a program so at odds with the description of the student's needs in the district psychoeducational evaluation of the student (see Jan. 26, 2023 Interim Decision on IEE at p. 2). While State and federal regulations do not speak to how a parent must manifest disagreement to the district and only require that "the parent disagrees with an evaluation obtained by the public agency" (34 CFR 300.502[b][1];8 NYCRR

[13] 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]).

200.5[g]; see Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 317 [D. Conn. 2016] [a parent does not have to express disagreement "in a formalistic manner . . . to be found to have disagreed in substance with [an] assessment"]), there must be some communication by the parent to the district. The district cannot be expected to presume that the parent disagrees with a district evaluation in circumstances such as those presented in this matter. 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 on this ground (see D.S. v. Trumbull Bd. of Educ., 975 F.3d at 163 [2d Cir. 2020] ["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]).

Ultimately, however, the main rationale for the IHO's award of an IEE at public expense was that it was required to inform the hearing record (Jan. 26, 2023 Interim Decision on IEE at pp. 7-8). It is generally 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. Roberts, 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, Luo v. Owen J. Roberts Sch. Dist., 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]).

Here, however, the IHO's reasoning for ordering the IEE was that he required the information to determine specific issues; however, the issues identified by the IHO were not raised by the parties for his review.

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). The IDEA provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the 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 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]). An IHO's sua sponte ruling on issues outside the scope of a parent's due process complaint notice may warrant reversal of those determinations (see, e.g., C.W.L. & E.L. v. Pelham Union Free Sch. Dist., 149 F. Supp. 3d 451, 463 [S.D.N.Y. 2015] [finding the IHO erred in reaching "novel issues" without the district's consent]; K.C. v. New York City Dep't of Educ., 2015 WL 1808602, at *13 [S.D.N.Y. Apr. 9, 2015] [finding an IHO's "additional findings were based on allegations not properly presented" in the parent's due process complaint notice]).

During the impartial hearing, the IHO explained his view that he could not decide the parents' claims raised in the due process complaint notice without "clinical material in hand" (IHO Ex. III at p. 20). Particularly, the IHO indicated that the parent disagreed with the district's evaluation (id. at p. 23).[14] The IHO opined that the ordered IEE would be the parent's "best shot" at demonstrating that the May 2021 CSE should have known when it developed the student's IEP for the 2021-22 school year, that the student "had significant needs that it was unaware of" and that the district should have evaluated the student further (id. at p. 30; see 2021-22 Tr. pp. 78-79). The IHO also opined that the district's evaluation did not explain the CSEs' determinations that the student was eligible for special education as a student with an emotional disability or their "more restrictive" program recommendations for placement in 12:1+1 special classes rather than a general education classroom with the support of integrated co-teaching (ICT) services (see 2021-22 Tr. pp. 66-71, 78; Tr. p. 137; IHO Ex. III at pp. 23-24; IHO Decision at p. 3).[15] Further, during the impartial hearing, the IHO went so far as to question whether the student needed special education (see 2021-22 Tr. pp. 67-71, 106), despite both the May 2021 and May 2022 CSEs finding the student eligible for special education as a student with an emotional disability (see 2021-22 Parent Ex. B; 2022-23 Parent Ex. C).

The IHO also indicated that an IEE was warranted since the only "clinical material" in the hearing record—the district's April 2021 psychoeducational evaluation—also did not support the appropriateness of the unilateral placement (IHO Ex. III at p. 15). The IHO characterized the unilateral placement as the parent "ratify[ing]" the IEP but "carry[ing] it further for an additional four periods a week of very limited student/teacher ratio for a 12:1:1 setting" as well as "into the summer" (2021-22 Tr. pp. 71-72).

However, review of the May 2022 and July 2022 due process complaint notices reveals that the parent did not challenge the district's evaluation of the student, the student's eligibility category, or the "restrictiveness" of the recommended 12:1+1 special classes (2021-22 Parent Ex. A; 2022-23 Parent Ex. A). To the contrary, the parent agreed with the district that the student needed a 12:1+1 special class placement with related services in OT, speech-language therapy, and counseling services (2021-22 Tr. p. 86; compare 2021-22 Parent Ex. A at pp. 1-2, with 2021-22 Parent Ex. B at p. 13-14; compare 2022-23 Parent Ex. A at pp. 1-2, with 2022-23 Parent Ex. C at p. 16-17). Indeed, the parent's attorney unambiguously stated that there was "no disagreement that the student needed a special education classroom" (2021-22 Tr. p. 95). Instead, the due process complaint notices focused on the lack of recommendations in the student's IEPs for a "full time" special class with individualized support and 12-month services and allegations that the district failed to provide the student with an appropriate program and placement (2021-22 Parent Ex. A at pp. 3-4; 2022-23 Parent Ex. A at pp. 1-2). As to the latter claim, at the impartial hearings the parent's attorney described the issue as relating to the district's obligation to provide the student a public school to attend and its failure to provide one, which resulted in a denial of FAPE (2021-22 Tr. pp. 97, 99-100, 111). Further, during the impartial hearing regarding the 2022-23 school

[14] As noted above, there is no indication that the parent disagreed with the district's evaluation of the student.

[15] On the other hand, the IHO stated that the district had "met its burden in effect, or on its face . . . by putting in clinical material" (IHO Ex. III at pp. 22-23; see Tr. p. 137).

year, the district represented that the issues to be addressed pertained to the school location letter and whether the student required a 12-month program (IHO Ex. III at pp. 6-7).

If the IHO did not find the parent's claims to have merit, the IHO was still bound to address the issues before him after giving both parties the opportunity to complete their presentation of evidence and testimony in accordance with due process. While the IHO may have preferred to consider other issues that were not raised by the parent, that is not the process contemplated by the statute. It is not the IHO's role to find the areas of dispute that he believes have more merit than those raised by the parent.

Taking into account the issues actually raised by the parent, it is unclear what benefit would come from the IEE. The IEE would do little to illuminate the CSEs' recommendations, insofar as the testing and recommendations contained in such an evaluation were unavailable to the May 2021 and May 2022 CSEs (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y. 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]). Further, with respect to his burden of production and persuasion, the parent was content to rely on documentary evidence already presented which consisted of documents developed by Ziv Hatorah, including various progress reports, an FBA, a BIP and an assessment of the student's then-current functioning (2021-22 Parent Ex. G).[16] This information developed by Ziv Hatorah offered the parent's and the private school's view of the student's needs (2021-22 Parent Ex. G at pp. 2-8, 11-15, 27-29, 33, 35-36, 41). To the extent the IHO took issue with these sources of information because they were not independent from the unilateral placement (2021-22 Tr. p. 64), the IHO was free to accord them appropriate weight on that ground. However, the IHO was not free to refuse to consider the evidence presented by the parties in favor of an IEE that was not relevant to the issues before him and neither party requested.

Even if the IHO felt that an IEE would have completed the hearing record, when the parents did not obtain the neuropsychological IEE by the deadline assigned, he was not empowered to dismiss the matter without completing the hearing and deciding the issues actually raised before him. The IHO's high-jacking of the process to the extent of dismissing the parties' identification of issues and presentation of evidence and insistence on the need for an IEE has resulted in a legally erroneous and impermissible outcome. Accordingly, as discussed further below, the IHO's findings must be vacated, and the matter remanded to address the parent's claims as set forth in the May 2, 2022 and July 14, 2022 due process complaint notices. In addition, given the parties' agreement that the IHO erred in ordering the IEE to complete the hearing record and absent another

[16] The hearing record contains duplicate copies of the student's assessments, plans, and reports as created by Ziv Hatorah (compare 2021-22 Parent Ex. G, with 2022-23 Parent Ex. H). For purposes of this decision, the copy that was entered as part of the parent's exhibits pertaining to the 2021-22 school year is cited.

ground for ordering district funding of an IEE, the district's cross-appeal challenging the IHO's order requiring district funding of an IEE is sustained.

2. Conduct of the Impartial Hearing

Both parties raise concern with the manner in which the impartial hearing was conducted. In particular, both parties allege that the IHO erred in not allowing the district to cross-examine the parent's witnesses. In addition, the parent alleges he was not given a fair opportunity to exercise his right to an impartial hearing in this matter.

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, 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. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]).

Upon my independent review of the impartial hearing record, there is sufficient evidence to support both parties contentions that the IHO prevented the development of the of the hearing record to the extent that a remand of this matter is necessary.

During the December 7, 2022 impartial hearing, the district's counsel represented that she wished to cross-examine the parent and the director of education of Ziv Hatorah, who both submitted testimony by affidavit, and that the district did not want to forgo its opportunity to argue that the parent's unilateral placement for the student was inappropriate (2021-22 Tr. pp. 84-85). The district's attorney stated that she was prepared to cross-examine the parent's witnesses; however, the IHO steered the district away from cross-examining the witnesses stating "[t]he opportunity you're foregoing in foregoing cross, if you forego it, is an opportunity to explore whether you think the clinical assessment I'm about to order is needed," indicating that without the ordered IEE, no determination regarding the district's proposed program or the parent's unilateral placement could be reached and thus there was no need to cross-examine the witnesses unless the district was about to argue that the student did not need to be fully evaluated (2021-22 Tr. p. 85). Though the IHO made it seem like the district had an option to cross-examine the parent's witnesses, the IHO kept pontificating that there was no need given that the IHO was not going to decide if the parent's unilateral placement was appropriate without first reviewing the IEE he ordered (2021-22 Tr. p. 90). Prior to receiving the ordered IEE, the IHO indicated that he was making two findings: that the district failed to meet its burden to support either the IEPs developed for the student for the school years at issue or the district's recommended public school placement; and the student needed to be fully evaluated (2021-22 Tr. pp. 86-87).

Accordingly, my review of the hearing record demonstrates that the district did not have the opportunity to cross-examine any witnesses and that the IHO did not conduct the impartial hearing in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]).

B. Remand

As discussed above, the IHO did not reach the parent's procedural and substantive allegations underlying his claim that the district denied the student a FAPE for the 2021-22 and 2022-23 school years. Thus, it remains to be determined whether there is merit to the allegations raised by the parent in his due process complaint notices. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

Here, the IHO's decision to dismiss the parent's May 2, 2022 and July 14, 2022 due process complaint notices must be vacated, and the matter remanded for an IHO to address the parent's claims as set forth in those due process complaint notices, to render determinations regarding whether the district offered the student a FAPE for the 2021-22 and 2022-23 school years; whether Ziv Hatorah was an appropriate unilateral placement for the student; and what relief, if any, is warranted. It is left to the sound discretion of the IHO on remand to ensure that an adequate record is developed upon which to base the necessary findings of fact and of law relative to the parent's claims listed in the due process complaint notice and the requested relief. Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved at the hearing so that the IHO addresses the claims raised by the parties (see 8 NYCRR 200.5[j][3][xi][a]).

VII. Conclusion

Having determined that the IHO erred by dismissing the parent's May 2, 2022 and July 14, 2022 due process complaint notices without prejudice, this matter must be remanded for further administrative proceedings.

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.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision, dated March 31, 2023 is vacated;

IT IS FURTHER ORDERED that the matter is hereby remanded to an IHO to determine whether the district offered the student a FAPE for the 2021-22 and 2022-23 school years based

on the issues raised in the parent's May 2, 2022 and July 14, 2022 due process complaint notices and, if necessary, whether Ziv Hatorah was an appropriate unilateral placement and whether equitable considerations weigh in favor granting funding for the cost of tuition.

Dated: **Albany, New York**
June 9, 2023

STEVEN KROLAK
STATE REVIEW OFFICER