The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 25-032

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 Law Offices of Lloyd Donders, attorneys for petitioner, by Lloyd Donders, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Toni L. Mincieli, 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) appeal from a decision of an impartial hearing officer (IHO) which partially denied his request for funding by respondent (the district) for the costs of an independent educational evaluation (IEE) of his son and declined to award compensatory education. The district cross-appeals from that portion of the IHO's decision which, in part, awarded an IEE at public expense. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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

Reportedly, the student has received diagnoses of autism spectrum disorder and attention deficit hyperactivity disorder (Parent Ex. F at pp. 2, 5). The student attended public school until the middle of second grade (id. at p. 4). From the middle of second grade to the school year at issue, which was the student's sixth grade year, the student has been home-schooled (Parent Ex. F at pp. 4-5; Dist. Ex. 9 at p. 1).

In a prior written notice dated June 29, 2023, the district informed the parent that the student was due for a triennial reevaluation (Dist. 19 at p. 1).[1] The prior written notice reflected the district's determination that the student needed the following assessments as part of the district's triennial reevaluation: an educational evaluation report, a psychological assessment, and a social history update (id.). The June 2023 prior written notice was accompanied by a blank consent form for the assessments for the parent's signature (id. at p. 4). The student's mother signed the consent form on July 12, 2023 (id. at p. 6). On July 12, 2023, the district completed a psychoeducational evaluation and a social history assessment and administered a Vineland Adaptive Behavior Scales, Third Edition (Vineland-3), Comprehensive Parent/Caregiver Report, and a Behavioral Assessment System for Children-Third Edition (BASC-3), Parent Rating Scale-Adolescent, with the student's mother completing the forms (Dist. Exs. 5; 8; 9; 10). The district also completed a physical therapy (PT) evaluation on July 25, 2023, an occupational therapy (OT) evaluation on July 27, 2023, and a speech-language evaluation on August 9, 2023 (Dist. Exs. 3; 4; 6).

On November 8, 2023, a CSE convened to develop an IESP for the student (see Parent Ex. F). The November 2023 CSE determined that the student was eligible to receive special education as a student with autism (id. at pp. 1, 11).[2, 3] The November 2023 CSE recommended that the student receive four periods per week of individual special education teacher support services (SETSS) and two 40-minute sessions per week of individual speech-language services (id. at p. 11).[4] The CSE noted that the student's mother shared she had "recently learned [the student] could have continued receiving special education services through the [district] . . . and decided to request the services" (id. at p. 5). The CSE noted that the student was "being reevaluated as part of the triennial reevaluation process" (id. at p. 3). In a November 29, 2023 prior written notice to the parent, the district summarized the recommendations made by the November 2023 CSE and identified the following assessments and evaluations that the CSE relied upon in developing the

[1] The June 2023 prior written notice stated that "[a] reevaluation must be conducted at least once every three years to determine a student's continued eligibility for special education services. According to [the district's] records, [the student] is due for a reevaluation at this time" and that the student's "IEP team had a meeting on 03/06/2018 based on their last evaluation. Therefore, a reevaluation is currently warranted" (Dist. Ex. 19 at p. 1).

[2] The hearing record includes duplicate copies of the November 8, 2023 IESP (compare Parent Ex. F, with Dist. Ex. 1). For ease of reference, this decision will cite the parent's exhibit.

[3] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[4] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

November 2023 IESP: (1) a July 12, 2023 psychoeducational; (2) a July 12, 2023 Vineland-3; (3) a July 25, 2023 PT assessment; (4) an August 16, 2023 speech-language assessment; and (5) a September 18, 2023 OT assessment (Dist. Ex. 2 at p. 1).

According to the parent, the student's mother emailed the district on May 11, 2024, to request an IEE (Parent Ex. A at p. 2; see Parent Ex. B).[5] On May 13, 2024, the district emailed the mother and indicated that, because the student was not attending a district public school, "the [CSE] ha[d] to update the IEP and/or submit for IEE" (Parent Ex. B). The district further stated that the mother's email would be "forwarded . . . to the central office for Special Education for further assistance" (id.). In a letter dated May 18, 2024 sent to the district via facsimile, the student's mother notified the district that she disagreed with the CSE's recent evaluations "because they failed to comprehensively evaluate [the student]" and that she was requesting an IEE at district expense to include: (1) a neuropsychological evaluation; (2) a speech-language evaluation; (3) an OT evaluation; (4) a PT evaluation; (5) an applied behavior analysis (ABA) skills assessment; and (6) a functional behavioral assessment (FBA) (Parent Ex. C at p. 1). The letter identified the providers that the parents had chosen to complete the evaluations and the rates those providers charged (id. at pp. 1-2). The letter requested that the district "respond to th[e] request in writing within (10) calendar days with a letter authorizing that the [IEE] be conducted at public expense or initiate a hearing pursuant to the Regulations of the Commissioner of Education Section 200.5(g)" (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated June 13, 2024, the parent, through his attorney, alleged that, as of that date, the district "neither funded the requested IEEs nor filed for Due Process to defend [its] evaluations" (Parent Ex. A at p. 3). The parent also alleged that the November 2023 CSE failed to include parent counseling and training as a service on the student's IESP (id.). For relief, the parent requested district funding for an IEE at specific rates to include the following: (1) a neuropsychological evaluation; (2) a speech-language evaluation; (3) an OT evaluation; (4) a PT evaluation; (5) an ABA skills assessment; and (6) an FBA (id. at pp. 2-3, 4). The parent also requested the district be required to provide the student with compensatory education and to "modify the IESP to address areas of weakness identified by the [IEE]" (id. at p. 5).

In a due process response notice dated June 28, 2024, the district raised several defenses (Due Process Response).

B. Impartial Hearing Officer Decision

Two pre-hearing conferences were held on July 24, 2024 and August 2, 2024 and an impartial hearing convened on September 5, 2024 before the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-175). During the proceedings, the parent's attorney asserted that the district had failed to respond to parent's request for an IEE, which at the time of the first prehearing conference, had been "two and a half months" prior, and at the time of the impartial hearing had been "almost four months" prior (Tr. pp. 3, 58). The parent's attorney argued that this

[5] The evidence in the hearing record includes the district's May 13, 2024 response to the mother's email, but does not include the body of the mother's email to the district (see Parent Ex. B).

constituted an unnecessary delay and that, therefore, the district should be precluded from defending its evaluation of the student (Tr. pp. 4, 56-60). The parent's attorney also requested that the IEEs be ordered on an interim basis and that, after completion of the IEEs, the parties "return for a merits hearing to look at compensatory services and/or modifications of the IESP" (id.). With respect to the district's evaluation of the student, the parent's attorney indicated that it was not comprehensive enough (Tr. p. 6). The parent's attorney also noted that the parent had not received copies of OT and PT evaluations and that the district had not responded to a request for records (Tr. p. 7; see Tr. pp. 4-5). During the proceedings, the district's attorney conceded that the district had not filed a due process complaint but argued that the district "should be able to raise some defense as to why the evaluation that [the district conducted] was appropriate" or why the decision not to conduct certain assessments was appropriate (Tr. pp. 31-32, 61). In addition, the district disputed "the extent of the evaluations that [we]re requested, the costs of the evaluations requested by the Parent, and whether all of those evaluations should be ordered in IEEs" (Tr. p. 62). The district's attorney also indicated the district's position that it had not "received enough time to defend the evaluation" (Tr. pp. 32-33).

In a decision dated December 3, 2024, the IHO found that the parent was entitled to certain assessments as part of an IEE at district expense (IHO Decision at p. 10). Before turning to the merits, the IHO outlined legal standards, noting distinctions between evaluations and assessments and between initial evaluations and reevaluations, and described her view of the issues raised by the parties (see id.at pp. 5-9). The IHO indicated that the district's offer of a free appropriate public education (FAPE) was at issue and that the parent requested an IEE at public expense as a remedy for a procedural violation pertaining to the district's failure to comprehensively evaluate the student (id. at p. 5). However, the IHO noted that the parent had not identified any areas of need that the district had failed to address in the IESP that it developed for the student (id. at p. 8). The IHO also noted that a parent's right to an IEE at public expense "[wa]s not a FAPE contingent remedy" and that a district's "failure to respond to an IEE request [wa]s an independent action" (id.). In the present matter, the IHO indicated that the parent's request for an IEE arose not from a disagreement with an evaluation the district conducted but, instead, from "the lack of evaluation for a known category of disability" (id. at p. 9). Accordingly, the IHO stated that the issue presented was whether "the district kn[e]w or suspect[ed] the categories of disability for which the IEE [wa]s requested" (id.).

During the August 2, 2024 prehearing conference, the parent's attorney stated that "[t]here might be some willingness on the Parent's part to drop some of the requests for [IEEs]" and that the parent's "biggest concern, surrounds information around the student's autism diagnoses. So [they]'re less concerned about a physical therapy and an occupational therapy" assessment (Tr. pp. 21, 28). However, at the conclusion of the August 2024 prehearing conference, the parent's attorney states that the parent is seeking an "interim order… to award the evaluations requested" in the parent's due process complaint notice without withdrawing any of the requested evaluations (Tr. p. 40).

The IHO found that the parent stated disagreement with the district's evaluation of the student and appropriately requested independent assessments at district expense (IHO Decision at p. 9). The IHO rejected the district's arguments that it did not have time to complete an FBA or an ABA skills assessment (id. at p. 8). With respect to the district's evaluation, the IHO noted evidence that the district completed the BASC-3 with the student's mother as the informant but

that this was "only one data point" and that the district considers "other factors . . . when programming around behavior" (id. at p. 9). The IHO found that the district's witness offered a "rationale cogent and responsive" regarding why the district did not conduct an ABA skills assessment or an FBA (id. at p. 10). The IHO determined that "the [d]istrict lacked a reason to evaluate [the s]tudent beyond what [wa]s required by law for initial evaluations" and that nothing in the hearing record reflected that the student's behaviors interfered with instruction (id. at p. 8).

Notwithstanding the foregoing, the IHO found that the district did not timely respond to the parent's May 11, 2024 request for an IEE (IHO Decision at p. 10). The IHO opined that, had the district initiated the impartial hearing, rather than the parent, the district may have been found to have "sustained its burden" (id.). However, having determined that the district did not timely respond to the parent's request for an IEE at public expense, the IHO found that the parent was entitled to an order directing the district to fund "an independent re-evaluation" (id.). Specifically, the IHO directed the district to fund: (1) a physical examination; (2) a psychoeducational/ neuropsychological evaluation; and (3) "a social history and an observation of the student in the student's learning environment" (id. at pp. 10-11). The IHO did not order district funding of an independent FBA or ABA skills assessment or independent speech-language, PT, or OT assessments, noting with respect to the PT and OT assessments that the parent's attorney had stated they "were not of issue" (see id. at pp. 10-11 & n.16). The IHO indicated that the evaluators could "determine the scope of additional assessments required for [the s]tudent based on initial findings" (id. at p. 11). The IHO indicated that the independent evaluations would be conducted by providers of the parent's choosing consistent with district protocols and guidelines (id.). In addition, the IHO ordered the district to convene the CSE to consider the independent evaluations within 30 days of their completion (id.). The IHO denied the parent's request for compensatory education without prejudice (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the issues raised in the district's request for review and the parents' answer is presumed and, therefore, the allegations and arguments will not be recited here in detail. Briefly, the parent appeals, alleging that the IHO erred in limiting the scope of the IEE and denying the parent's request for district funding for the following independent assessments: an FBA, an ABA skills assessment, and speech-language therapy, OT, and PT assessments. The parent also argues that the IHO failed to address his request for compensatory education or his request for the student's educational records. As relief, the parent requests that the district be required to fund an IEE at the parent's requested rates and to remand the case to a new IHO to determine appropriate compensatory education services after the IEE is completed.[6] The district

[6] The parent also alleges that the IHO's decision was not issued timely; however, courts have found that, as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45-day deadline, 'relief is warranted only if. . . [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education'"] [alterations in the original], quoting J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] [same], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]). According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't

cross-appeals, arguing that the IHO erred in awarding an IEE at public expense given that, at the time of the parent's due process complaint notice, there had not been an unnecessary delay after the parent's request for an IEE at public expense.

V. Applicable Standards

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]).[7]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]. If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

---

of Educ., 2015 WL 1499389, at *14 n.12 [S.D.N.Y. Mar. 31, 2015] [noting that "[t]he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning"], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; M.L. v. New York City Dept. of Educ., 2014 WL 1301957, at *13 [S.D.N.Y. Mar. 31, 2014] ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]). Having stated no other basis for a finding that the parent or student was harmed by the delay other than the parent's disagreement with the outcome of the decision, the parent's remedy is the present appeal.

[7] 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]).

VI. Discussion

A. Independent Educational Evaluation

1. Unnecessary Delay

I will first address the IHO's determination that the district acted with unnecessary delay by not responding to the parent's request for an IEE before the parent filed the due process complaint notice in this matter.

State regulations indicate that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]; 8 NYCRR 200.5[g][1]). The process envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021] [discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at *2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]). It is clear, however, is that simply refusing or ignoring a parent's request for an IEE at public expense is not among the district's permissible options (see Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at *14 [D. Colo. July 15, 2022]; MP v. Parkland School District, 2021 WL 374184, at *18 [E.D. Pa. Aug. 25, 2021];[8] see also Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (Trumbull, 975 F.3d at 168-69).[9]

The authority on the topic of what constitutes an unnecessary delay demonstrates that the reasonableness of the passage of time is fact specific, and evidence relevant to the inquiry may include information about actions or communications occurring after the parent's request for an IEE at public expense (see J.P. v. Ripon Unified Sch. Dist., 2009 WL 1034993, at *7 [E.D. Cal. Apr. 15, 2009] [noting that, after the parents' request for an IEE "the parties continued to discuss provision of an IEE through a series of letters" and "did not come to a final impasse in that regard" until a date less than three weeks before the district filed a due process complaint]; L.S. v. Abington Sch. Dist., 2007 WL 2851268, at *10 [E.D. Pa. Sept. 28, 2007] [finding a six week delay in the

[8] The Parkland case also discussed caselaw with different factual circumstances in which the district's failure to file for due process had been excused such as incomplete district evaluations or agreements between the district and parent that the district would conduct further evaluations.

[9] The Second Circuit, in Trumbull, speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate" (Trumbull, 975 F.3d at 169).

district requesting an impartial hearing to dispute the parent's request for IEE reimbursement is consistent with procedures and intent of IDEA where the district first attempted to resolve the matter]; Letter to Anonymous, 56 IDELR 175 [OSEP 2010] [stating that the phrase "without unnecessary delay" permits school districts "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE"]). Indeed, in its cross-appeal, the district acknowledges that "[t]here is no specific definition for 'unreasonable delay'" and that "[t]he facts of the case should dictate" (citing L.S., 2007 WL 2851268, at *9).

Here, the hearing record reflects that the student's mother sent an email to the district on May 11, 2024 (see Parent Ex. B). Although the hearing record does not include the body of the May 11, 2024 email, the superintendent of "District 75" programs responded that "since the student [wa]s not a District 75 student, the [CSE] ha[d] to update the IEP and/or submit for IEE" and stated that he forwarded the parent's email "to the central office of Special Education for further assistance" (id.). The mother followed up with a request for an IEE, sent via facsimile, on May 18, 2024, to the CSE (Parent Ex. C). During the impartial hearing, the district did not deny receipt of either of the communications from the mother or dispute that both communications contained requests for an IEE. Further, the district did not present any evidence regarding its IEE policy, its standard practice for responding to a request for an IEE, or its actions in response to the parent's request.[10] On appeal, the district appears to argue that the passage of one approximately month between the parent's May 11 or May 18, 2024 requests for an IEE and the parent's June 13, 2024 due process complaint notice was, on its face, not an unnecessary delay; however, without any evidence presented by the district about the district's standard process or the district's response to the parent's request for an IEE at public expense in the present matter, there is no factual support for the district's argument.[11] Accordingly, I find insufficient basis in the hearing record to disturb the IHO's finding that the district failed to respond to the parent's request for an IEE at public expense without "unnecessary delay."

2. Scope of the IEE

Although the IHO found that the district was required to provide an IEE at public expense due to the unnecessary delay in responding to the parent's request, the IHO did not order all of the independent assessments requested by the parent and, instead, found that the parent was entitled to an "an independent re-evaluation" at public expense and limited the IEE to include they type of

[10] The parent's request does not appear in the district's events log for the student for the 2023-24 school year (see Dist. Ex. 12). Further, the district's witness at the impartial hearing did not testify regarding the district's response to the parent's request or the lack thereof (see Tr. pp. 70-165; Dist. Ex. 20).

[11] The district cites Moonsammy v. Banks, 2024 WL 4277521, at *16 (S.D.N.Y. Sept. 23, 2024) for the proposition that the district could defend its evaluation in an impartial hearing initiated by the parent; however, in Moonsammy, the parent requested an IEE at public expense for the first time in the due process complaint notice, so the district's delay in initiating due process was not at issue. The district also cites Fullmore v. District of Columbia, 2016 WL 1254208, at *2-*3 (D.D.C. Mar. 29, 2016) to argue that "[r]egardless of whether a district's response to a request for a publicly funded IEE is timely, the parent must show that the alleged delay clause substantive harm"; however, the discussion in Fullmore related, not to whether the district's delay supported an award of an IEE at public expense, but whether the delay supported a finding of a denial of a FAPE and an award of compensatory education.

assessments set forth in State regulation as minimally required for an initial evaluation of a student (i.e., a physical examination, a psychoeducational or neuropsychological evaluation, and a social history and observation of the student) (IHO Decision at pp. 10-11; see 8 NYCRR 200.4[b][1]). The IHO did not order district funding of an independent FBA or ABA skills assessment or independent speech-language, PT, or OT assessments, noting with respect to the PT and OT assessments that the parent's attorney had stated they "were not of issue" (see IHO Decision at pp. 10-11 & n.16).[12]

As an initial matter, the hearing record does not support the IHO's characterization of the parent's attorney's statements regarding the PT and OT assessments. Rather, review of the hearing record shows that the parent's attorney presented possible concessions that could be made in the event the parties could agree on a resolution (see Tr. pp. 21, 27-28). That resolution, however, did not occur, and there is no indication that the parent withdrew his request for independent PT and OT assessments at district expense. Accordingly, the IHO erred in this regard.

As for the FBA and ABA skills assessment and the speech-language assessment, the IHO's reasoning in denying the parent's request is less clear. During the prehearing conference on August 2, 2024, the IHO indicated that, because the district had not conducted an FBA, an order for an independent FBA at district expense "would not be appropriate" (Tr. pp. 22, 115, 140). After some discussion about the difference between an evaluation and an assessment the IHO stated that "the remedy for not evaluating is District evaluation, not [an IEE]" (Tr. pp. 22-28). However, in the decision, the IHO acknowledged that "[a] parent has the right to ask for an IEE at public expense in an area or category of disability or need that was not previously assessed by the school district's evaluation (IHO Decision at pp. 8-9, citing Letter to Baus, 65 IDELR 81).

Furthermore, although the IHO stated in the decision her view that, had the district timely responded to the parent's request for an IEE, she would have found that the district sustained its burden to defend its evaluations of the student, noting that she did not find that the district was required to have conducted an FBA or ABA skills assessment (see IHO Decision at pp. 9-10), the IHO's finding in this regard was dicta given the determination on the district's unnecessary delay and, therefore, does not support the limited relief awarded.

Finally, the Second Circuit's decision in D.S. v. Trumbull Board of Education, 975 F.3d 152 (2d Cir. 2020) does not support the limitations on the relief awarded. The Court discussed the idea of a comprehensive evaluation or re-evaluation of a student forming the basis of an IEE request, as opposed to a single assessment (i.e., an FBA) (see Trumbull Bd. of Educ., 975 F.3d at 162-68; see also T.P. v. Bryan County Sch. Dist., 792 F.3d 1284, 1291 n.13 [11th Cir. 2015] [discussing the awkwardness of referring to individual assessments as IEEs when "evaluation" is used in the IDEA to refer to the entire process of determining a student's needs]). However, the Court specifically rejected reasoning that would limit the scope of an IEE if based on disagreement with a comprehensive evaluation by the district, stating:

[12] The IHO's decision is internally inconsistent as the IHO elsewhere stated that the "[p]arent [wa]s entitled to IEEs at [d]istrict expense for the neuropsychological evaluation, Speech/Language, Occupational Therapy evaluation a Physical Therapy evaluation" (IHO Decision at p. 10).

> If a parent disagrees with an evaluation and requests an IEE at public expense, the regulations do not circumscribe the scope of that IEE. See 34 C.F.R. § 300.502(b)(1). Nothing in the statute or regulations suggests that a parent cannot challenge an evaluation on the ground that it was too limited. To the contrary, because the IDEA requires an evaluation to be comprehensive, one would expect that a parent is free to disagree with an evaluation based on its deficient scope. There is no basis for the district court's bifurcation of how a parent may disagree.

(Trumbull Bd. of Educ., 975 F.3d at 165; see Jones-Herrion v. Dist. of Columbia, 2019 WL 5086693, at *4 [D.D.C. Oct. 10, 2019] [noting that because assessments are only the building blocks to an evaluation, the IDEA therefore entitles the student to all the independent assessments necessary to formulate that evaluation]).

Having found no basis for the IHO's order that limited the scope of the IEE to include only a physical examination, a psychoeducational or neuropsychological evaluation, and a social history and classroom observation, the order will be modified to provide that the IEE at district expense may include an FBA, an ABA skills assessment, and speech-language therapy, OT, and PT assessments as requested by the parent.

3. Rates

Next, on appeal, the parent requests that the IEE be ordered at the rates requested by the parent. When a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

The IHO ordered the independent evaluations be "conducted by the provider[s] of the [p]arent's choosing provided [the p]arent follows all district protocols and guidelines for procuring an independent evaluator" (IHO Decision at p. 11). The IHO noted in a footnote of the decision that she "w[ould] not address a specific provider or rate in th[e] order due to shifting prices and availability for providers" (id. at p. 11 n.15). However, the parent sought the IEE from specific providers and at specific rates (see Parent Exs. A at p. 4; C at pp. 1-2). At the impartial hearing,

the district stated that it disagreed with the costs of the evaluation requested by the parent (see Tr. p. 62). However, the district failed to present any evidence of its cost containment criteria or assert that the parent sought an IEE that exceeded such criteria without justification.[13] Accordingly, to the extent the IHO limited the costs of the IEE, this was error, and the district shall be required to fund the IEE through the providers identified by the parent at rates not to exceed those set forth in the parent's IEE request and the due process complaint notice (see Parent Exs. A at p. 4; C at pp. 1-2).

B. Other Relief

The parent also alleges that the IHO erred in not addressing the parent's request for compensatory education, for modifications to the IESP, and for educational records.

During the prehearing conference, the parent's attorney requested the IEE on an interim basis (see Tr. pp. 4, 39-40). It is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. 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]). However, absent allegations of a denial of a FAPE, an IEE would not have informed the hearing in the present matter (see 8 NYCRR 200.5[g][2]; [j][3][viii] [referring the IHO's authority to request an IEE at district expense "as part of a hearing"]; see also 34 CFR 300.502[d]; Lyons, 2010 WL 8913276, at *3).

In the memorandum of law, the parent asserts that the IHO should have ordered the IEE and "allow[ed] the [p]arent to use the findings in the various reports to seek compensatory [education]" (Parent Mem. of Law at p. 10). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied

[13] A school district must not restrict the providers of IEEs to a set list and must give parents the opportunity to show that circumstances require choosing an evaluator who does not meet school district criteria (Letter to Parker, 41 IDELR 155 [OSEP 2004]; Letter to Anonymous, 103 LRP 22731 [OSEP 2002]).

in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]).

However, in the present matter, FAPE is not at issue. Indeed, in the due process complaint notice, the parent indicated that the "hearing request [wa]s limited to obtaining educational records, an [IEE], and recommended compensatory education based on same" and that the "[p]arent reserved[d] the right to re-file for any substantive FAPE deprivation claims for this and any school years" (Parent Ex. A at p. 1 [emphasis in the original]).[14] Similarly, in the memorandum of law, the parent concedes that the parent's complaint in this matter was "a request for an IEE" and there not "any FAPE issues in the IESP" (Parent Mem. of Law at p. 3). Accordingly, there being no allegation of a denial of a FAPE in the present matter, there is no basis for an award of compensatory education.

With respect to the parent's request for modifications to the IESP based on the IEE, state and federal regulations mandate that a CSE must consider IEEs whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]).[15] Accordingly, a CSE will be required to consider the IEE obtained by the parent and relief requiring specific programming for the student's IEP or IESP would be premature and would tend to circumvent the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]).

As a final matter, to the extent that the parent seeks the student's educational records pursuant to the Family Educational Rights and Privacy Act (FERPA), State law does not make provision for review of FERPA claims through the appeal process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction

[14] The parent had alleged that the November 2023 CSE failed to include parent counseling and training as a service on the student's IESP (Parent Ex. A at p. 3). However, the parent has not appealed the IHO's failure to address this issue and, therefore, it is deemed abandoned and will not be further discussed (8 NYCRR 279.8[c][2], [4]).

[15] However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

is limited to matters arising under the IDEA or its State counterpart"]).[16] Accordingly, the undersigned does not have jurisdiction over the parent's allegations arising under FERPA.

VII. Conclusion

For the reasons described above, there is no basis to disturb the IHO's determination that the district failed to respond to the parent's request for an IEE without unnecessary delay thereby entitling the parent to an IEE at district expense. However, the IHO erred in not ordering the district to fund the IEE consisting of the assessments requested by the parent in the due process complaint notice at the rates specified. The parent's requests for an award of compensatory education and an order for specific amendments to the student's IESP are denied.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated December 3, 2024, is modified by reversing those portions which limited an IEE at public expense to a physical examination, a psychoeducational/ neuropsychological evaluation; and a social history and observation; and limited the rates thereof; and

IT IS FURTHER ORDERED that the district shall fund an IEE to consist of the following: (1) a neuropsychological evaluation at a rate not to exceed $7,000; (2) an OT assessment at a rate not to exceed $2,000; (3) a PT assessment at a rate not to exceed $2,000; (4) a speech-language assessment at a rate not to exceed $2,000; (5) an ABA skills assessment at a rate not to exceed $2,500; and (6) an FBA at a rate not to exceed $2,500.

Dated: **Albany, New York**
May 20, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[16] Parents who believe their FERPA rights have been violated can file complaints with The Student Privacy Policy Office (formerly known as the Family Policy Compliance Office), which will investigate and adjudicate the claims (see Gonzaga University v. Doe, 536 U.S. 273 [2002]).