The University of the State of New York

The State Education Department
State Review Officer
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23-074

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

Appearances:
The Harel Law Firm, P.C., attorneys for petitioner, by Galiah Harel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel Luken, 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 her request for reimbursement for the student's tuition costs at the Big N Little: Ziv Hatorah Program (Big N Little) for July and August of 2021. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 turned three-years old during the 2020-21 school year and attended a nonpublic general education preschool program on a full-time basis, in a class with eleven children and two teachers (Dist. Ex. 2 at pp. 21, 25, 32, 44-45). The teacher reported that the student "did not know what was going on," did not play with other children, and did not follow or respond to any classroom routines (id. at pp. 44, 45). The teacher noted that the student loved singing and would sometimes participate in that activity, "but mostly wandered around the classroom" (id. at p. 45). Additionally, the teacher reported that the student was usually quiet and would "randomly say the names of colors and letters" but could not communicate her needs to the teachers (id. at pp. 44, 45).

On June 8, 2021, the parent signed consent with OMNI Childhood Center (OMNI) for an initial Committee on Preschool Special Education (CPSE) multidisciplinary evaluation of the student and consented to have the student evaluated remotely due to the Covid-19 pandemic; as part of the initial evaluation the student's social history was completed (Dist. Exs. 2 at pp. 2-3, pp. 21-23; 3 at p. 11). The social history stated that the parent referred the student for evaluation due to communication delays; the parent reported wanting the evaluation completed as soon as possible in order to determine the student's eligibility and need for services provided by the district (Dist. Ex. 2 at pp. 21, 22). Over multiple dates in June 2021, the student's initial evaluation was completed, and in addition to the social history, evaluations included education, psychological, occupational (OT), physical therapy (PT), and speech-language components (id. at pp. 7, 21-23, 25-30, 32-51).

In a letter dated June 17, 2021, the parent indicated that the student's needs could not be met in a general education classroom and requested that the district develop an IEP for the student and place the student in a full-time special education classroom for the upcoming extended 12-month 2021-22 school year; the parent advised that if the issue was not resolved she intended to "commence proceedings to seek tuition funding and/or reimbursement from the [d]istrict" (Parent Ex. H at p. 2).

On June 21, 2021, as part of the multidisciplinary initial evaluation, both a psychological tele-assessment and an educational evaluation were completed as well as a physical/medical examination (Dist. Ex. 2 at pp. 5, 25-30; 44-50). During the psychological assessment, the evaluator reported that the student was self-directed, impulsive, had a poor attention span, was easily distracted during structured activities and easily frustrated, and had tantrums often (id. at pp. 26, 28). According to the evaluator, the student exhibited "[b]orderline delays" in nonverbal and verbal areas of development, and moderately low levels of adaptive functioning (id. at p. 29).

The educational evaluator observed the student at home with her parent via FaceTime and noted that the student primarily demonstrated self-engagement with toys, did not demonstrate age-appropriate play or follow directions, exhibited pervasive behaviors such as hand flapping, lining up items, and covering her ears, and mostly repeated the last word said to her (Dist. Ex. 2 at p. 51). The student identified primary colors, matched five or more objects, stacked blocks, looked at a picture book with an adult and pretended to drink from a cup (id. at p. 46). The student did not identify shapes, sequence play, identify concepts, answer "wh" questions or use two-word utterances (id. at p. 47). Regarding motor skills, the student walked up and down stairs with support and caught a ball, although her overall gross motor skills were judged to be below average (id. at p. 48). The student was able to hold a writing utensil, scribble, and turn pages in a book, and the evaluator concluded that the student's fine motor skills were in the poor range (id.). During the evaluation the student presented with global delays in the cognitive, receptive and expressive language, social-emotional, adaptive, gross motor and fine motor areas of development (see id. at pp. 45-50). The physician included the diagnosis of "A[sperger's] S[yndrome]" on the student's health examination form (id. at p. 5).

The parent signed a contract on June 21, 2021 with Big N Little agreeing to pay $12,000 monthly tuition for July 2021 through August 2021 for a total tuition payment of $24,000 (Parent Ex. C).

On June 23, 2021, OT and PT initial evaluations of the student were completed and the evaluators reported that the student exhibited delays in fine motor, visual perceptual and grasping skills, sensory integrative skills, and activities of daily living as well as deficits in muscle strength, balance, and coordination including delays in gross motor activities such as stair negotiation and ball play skills (Dist. Ex. 2 at pp. 7, 39, 43).

On June 29, 2021, a speech-language "tele-evaluation" was completed via FaceTime as part of the initial multidisciplinary evaluation (Dist. Ex. 2 at pp. 32-35). At the time of the evaluation the student was attending summer camp (id. at p. 32). The parent reported that she obtained ABA services through her insurance and that an ABA provider went to camp with the student all day, every day (Dist. Ex. 7 at p. 1). The speech-language pathologist observed the student at the camp with her teacher and reported that the student had difficulty understanding and responding to questions, did not greet the evaluator, and demonstrated below age-expectancy eye contact (Dist. Ex. 2 at pp. 32-33). The student followed one directive but had difficulty following others, identified one body part, labeled familiar items including "cat, cookie and ball," and repeated utterances given modeling but did not respond to simple "wh" questions (id. at pp. 33-34). According to the evaluator the student presented with severe delays in receptive, expressive, and pragmatic language skills (id. at pp. 7, 34-35).

On July 1, 2021, the student started attending the Big N Little (Parent Exs. E; F at p. 1).[1] Additionally, on the same date, OMNI sent the CPSE, the municipality representative, and the parents a copy of the completed preschool student evaluation summary report which provided a summary of tests, assessments, and results from the initial multidisciplinary evaluation (Dist. Ex. 2 at p. 7).

The CPSE convened on July 27, 2021, to review the initial evaluation reports and develop an IEP for the student for the 2021-22 school year (Parent Ex. B at pp. 1, 14; Dist. Ex. 1 at pp. 2, 15).[2] Attendees at the meeting, included the CPSE administrator, the special education service coordinator, and the parent, as well as a special education and regular education teacher who worked for OMNI (Dist. Ex. 1 at p. 1; see Tr. pp. 36-37). The CPSE found the student eligible for special education as a preschool student with a disability and recommended a 12-month program consisting of an 8:1+2 special class placement in an approved special education program with related services that included three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual PT, and two 30-minute sessions per week of individual OT (Dist. Ex. 1 at pp. 2, 15).

The parent signed the July 27, 2021 final notice of recommendation provided by the CPSE administrator, indicating her consent for the recommended 12-month special education

[1] The Commissioner of Education has not approved Big N Little as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The hearing record contains the student's July 2021 IEP, which was entered as both a parent and a district exhibit (compare Parent Ex. B at pp. 1-17 with Dist. Ex. 1 at pp. 1-18). As the district's July 2021 IEP includes an attendance page, that exhibit will be cited to in this decision (see District Ex. 1 at p. 1).

programming and the school location site at the Hebrew Academy for Special Children (HASC) (Dist. Ex. 4 at p. 1).

In an email dated July 30, 2021, a HASC representative reported to the CPSE administrator that she had contacted the parent to tour the school; however, the parent declined stating that she was looking into other schools and would call if interested (Tr. pp. 58-59; Dist. Ex. 5 at p. 1).

In a letter dated August 16, 2021, the parent notified the district that she "ha[d] not received a proper or adequate placement for [the student] for the 2021-2022 school year" and she intended to unilaterally place the student at Big N Little and seek tuition funding and/or reimbursement if the issue was not resolved (Parent Ex. I at p. 2).

In an email dated August 18, 2021, the CPSE administrator informed the parent of available openings for the student at both HASC and another program (Dist. Ex. 6 at p. 1). The parent replied to the CPSE administrator, stated her interest in the HASC school, and reported leaving messages for the HASC representative and that she planned to call the school again the following day (id.).

The student attended Big N Little from July 1, 2021 through August 11, 2021 (Parent Ex. F at p. 1).

On August 20, 2021 HASC notified the CPSE administrator by email that HASC accepted the student into an eight student special class at HASC, after speaking with the parent and observing the student via a video phone call, as the parent was unavailable to tour the school (Dist. Ex. 7 at p. 1).

The student attended Big N Little in July 2021 and a portion of August 2021 (Parent Ex. F; see Parent Ex. D).

A. Due Process Complaint Notice

By due process complaint notice dated May 23, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) "for the full-time 12-month 2021-2022 school year" (Parent Ex. A at p. 3). After reviewing the recommendations included in the July 2021 IEP, the parent indicated that "[t]he student remains in need of her placement in the Big N Little: Ziv Hatorah Program in the full time special education classroom to meet all of her academic, social, and behavioral needs" (id.). After briefly reviewing the student's needs, the parent asserted that the student required "a full time 12-month [s]pecial [e]ducation [p]rogram of up to 8 students, one teacher, and two assistants and the development and implementation of a behavioral plan" (id. at pp. 3-4).

The parent asserted that, on June 17, 2021, she requested that the district develop an IEP for the student, including placement in a full-time special education classroom for the upcoming 12-month school year (Parent Ex. A at p. 4). The parent further stated that, on August 16, 2021, she sent another letter to the district, notifying the district that it failed to provide the student with an adequate placement for the 2021-22 school year (id.). The parent then notified the district that she placed the student at the Big N Little for the extended 12-month 2021-22 school year (id.). As

relief, the parent requested that the district pay or reimburse the parent for the cost of the student's tuition at Big N Little for the full-time extended 12-month 2021-22 school year (id.).

B. Impartial Hearing Officer Decision

Following two prehearing conferences held on August 2, 2022 and September 29, 2022, the parties convened for the evidentiary phase of the impartial hearing on November 7, 2022 (Tr. pp. 1-142).

At the November 7, 2022 hearing date, the parent limited her claims in this proceeding to the July and August portion of the 2021-22 school year (Tr. pp. 16-21). After the district presented its evidence, during cross-examination of the parent's first witness—a supervisor at Big N Little, the witness indicated that one of the parent's exhibits was not complete (Tr. pp. 94-95; see Parent Ex. G). At the conclusion of the witness's testimony, counsel for the parent indicated that she contacted the parent and the parent "wanted to request additional time to amend the disclosure, because there actually was some notices sent previously, before the last notice we have" (Tr. p. 130). The district objected to the parent's request to disclose additional evidence after the district completed the presentation of its case and the IHO determined that the additional evidence would not be allowed; however, the IHO permitted the parties to brief the issue of the incomplete document included in the parent's initial disclosure (Tr. pp. 130-36). Counsel for the parent then requested that the case be withdrawn without prejudice and the district objected to the parent's request for a withdrawal without prejudice, asserting that it would be unfair to the district as the district had already presented all of its evidence, including the testimony of its witness (Tr. pp. 136-37). The IHO permitted the parties an opportunity to brief this issue, as well (Tr. p. 139).[3]

The hearing then proceeded on December 8, 2022 and counsel for the parties further discussed the parent's request to withdraw the matter without prejudice, the parent's request for additional disclosure of evidence, and the parent's additional request that if withdrawal without prejudice was not permitted, that the treatment plan be allowed as evidence and that the missing parts of the exhibit be permitted into evidence (Tr. pp. 143-73). At the conclusion of the December 8, 2022 hearing date, the IHO directed the parent to make a written motion to address the request for inclusion of the additional evidence (Tr. pp. 165-71).

The parent submitted a December 21, 2022 brief requesting permission to enter a May 2021 email, indicating that the district was aware the parent was seeking services for the student earlier than June 2021, into the hearing record (Parent December 21, 2022 Br.). The district submitted opposition to the parent's brief, dated December 29, 2022 (Dist. December 29, 2022 Br.).

[3] The district submitted a December 2, 2022 brief opposing the parent's withdrawal without prejudice, objecting to the parent's request to disclose additional evidence, and requesting that one of the parent's exhibits, the Big N Little treatment plan, be stricken from the hearing record because it was incomplete (Dist. December 2, 2022 Br.). It appears from the transcript of the hearing that the parent also filed a brief related to the request for withdrawal and the admission of the treatment plan into evidence (Tr. pp. 144, 146, 155-56, 164); however, the parent's brief was not included as a part of the hearing record.

The hearing continued on January 10, 2023 and the parties argued their positions with respect to the parent's request for admission of the additional evidence (Tr. pp. 174-94). Counsel for the parent asserted that the document showed the district knew the student needed an evaluation and a special education program prior to the summer of the 2021-22 school year (Tr. p. 181). In discussing the relevance of the May 2021 email to the parent's case, counsel for the district asserted that the district's timeline for evaluating the student began when the parent signed consent for the evaluation in June 2021, meaning that whether the district knew the student need to be evaluated earlier was not relevant (Tr. pp. 182-83). In discussing whether the timeliness of the district's evaluation was at issue in this proceeding, the parent conceded that it was not mentioned in the due process complaint notice, but argued that the due process complaint notice asserted that the district failed to provide a FAPE and that the failure to create a timely program could be included as part of the alleged failure to provide a FAPE (Tr. p. 189). At that point, the parent again raised her request to withdraw the due process complaint notice without prejudice (Tr. pp. 189-90). The IHO then determined that the matter would proceed, that the due process complaint notice did not include an allegation related to the timing of the student's evaluation, and that the May 2021 email would be excluded as evidence as it was not relevant (Tr. pp. 190-91).

The hearing continued on February 16, 2022 and concluded on March 17, 2023 (Tr. pp. 198-278).[4]

In a final decision dated March 17, 2023, the IHO noted that, at the November 7, 2022 hearing, the parent limited this matter to the issue of whether the district provided the student with a FAPE for July and August of the 2021-22 school year (IHO Decision at pp. 4, 6). The IHO summarized the testimony of the district's witness, the CPSE administrator, who testified that the student required an evaluation before the CSE could convene and that the parent authorized the district to perform the necessary evaluation (id. at pp. 6-7). The IHO noted that the July 2021 IEP had an implementation date of September 1, 2021 and described the CPSE administrator's testimony that the district "had 60 school days from the authorization by the parent to implement the services which would have required the [district] to implement the services in September 2021, after the summer of 2021, the period of which is the subject of this claim" (id. at p. 7). The IHO noted that the CPSE administrator testified that the district secured a placement for the student at HASC and that the parent accepted placement of the student at HASC (id.). The IHO noted that the parent testified that an email was sent from her family accepting the placement at HASC for the student; however, the student did not attend HASC for the 2021-22 school year (id.).

The IHO found that hearing record supported a finding that the district provided the student with an IEP that "was reasonably calculated to enable the [s]tudent to make appropriate progress for the 2021-2022 extended school year, intended to begin on September 1, 2021" (IHO Decision at p. 9). Following the above finding, the IHO concluded that "the "[p]arent failed to establish that the [d]istrict did not provide a FAPE for the 2021-2022 school year" (id.). The IHO then turned to the appropriateness of the parent's placement of the student at Big N Little and found that the record contained no evidence regarding how Big N Little differentiated the student's instruction or that the student made progress and further found that there was "no credible evidence" that Big N

[4] Counsel for the parties appeared for a hearing on February 14, 2022; however, the matter was adjourned (Tr. pp. 195-97).

Little addressed the student's specific needs (id. at 10). For these reasons, the IHO concluded that the parent failed to demonstrate that Big N Little was an appropriate placement for the student (id. at p. 11). The IHO then turned to equitable considerations and determined that the parent did not establish that the student's placement at Big N Little was justified and the parent's 10-day notice did not describe how the recommendations made in the IEP were inappropriate (id.). As such, the IHO determined that the equitable considerations did not favor the parent and denied the parent's requested relief (id. at pp. 11-12).

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision. As an initial matter, the parent asserts that the IHO erred in refusing to permit the parent to withdraw her due process complaint notice without prejudice or allow her to introduce the additional evidence into the hearing record. According to the parent, the additional evidence was important because it showed the district was aware the parent requested an evaluation in February 2021. The parent contends that the IHO should have accepted the document into evidence as the IHO could have waived the evidentiary disclosure requirement without any prejudice to the district as there was another hearing date scheduled. The parent further appeals from the IHO's determination that the parent failed to establish that the student was denied a FAPE. According to the parent, the district failed to show that it provided the student a FAPE and the IHO shifted the burden of proof to the parent by finding that the parent failed to establish that the student was denied a FAPE. The parent further asserts that she contacted the district in February 2021 and signed consent for an evaluation in February 2021; that the district CPSE administrator testified she received the parent's consent in April 2021; and that the parent was waiting for a district placement but no one got back to her until August 2021. The parent contends that the district did not explain "why it had not timely evaluated or created a timely IEP for the Student." The parent also appeals from the IHO's determination that the parent failed to meet her burden of proving that the student's placement at Big N Little was appropriate. Finally, the parent argues that the IHO erred in determining that equitable considerations did not favor the parent.

The parent requests that the IHO's decision that the district was not required to provide the student with a placement for July and August 2021 be reversed and requests an order declaring that the district failed to provide the student with a FAPE, that the unilateral placement was appropriate for the student, that equitable considerations favor the parent, and that the district directly fund the student's July and August 2021 tuition for Big N Little.

The district answers and asserts that the IHO's decision should be affirmed, arguing that the IHO correctly applied the evidentiary disclosure rule by denying the parent's motion to admit additional evidence after the hearing had already begun and the district had rested its case. In addition, the district argues that the IHO properly denied the parent's request to withdraw her due process complaint notice without prejudice after the district rested its case. The district further asserts that even if the IHO mistakenly shifted the burden of proof from the district to the parent, the ultimate conclusion reached by the IHO, namely that the district provided the student with a FAPE within 60 school days from the date of its receipt of the parent's signed consent to evaluate the student, was correct. The district specifically notes that although the parent is now making arguments covering the period from February 2021 through the June 2021 consent to evaluate that was included in the hearing record, the parent did not raise any of these allegations in the due

process complaint notice, which instead started with the parent's June 2021 letter to the district in which she requested that the student be provided with an IEP and placed in a full-time special education classroom for the upcoming 12-month 2021-22 school year. The district further argues that the hearing record did not establish that Big N Little was an appropriate placement for the student because there was no evidence that the student's individual needs were specifically addressed. The district further alleges that equitable considerations do not favor the parent because the language of the parent's June and August 2021 letters failed to put the district on notice of the alleged deficiencies of the July 2021 IEP and were sent to the district after the student had already begun attending the unilateral placement.

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]).[5]

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

[5] 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).

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).

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing and Additional Evidence

As an initial matter, the parent alleges that on June 17, 2021 she notified the district that the student needed to be placed in a full-time special education classroom for an extended 12-month school year for the upcoming 2021-22 school year (Parent Exs. A at p. 4; H at p. 2). During the November 7, 2022 hearing, the parent limited the relief sought from funding for the entire 2021-22 extended school year to only the summer months of July and August 2021 (Tr. pp. 16, 19-21). Also, as discussed above, after the district rested its case, the parent revealed that she had discovered "some notices sent previously, before the last notice that we have," and requested permission to either amend her disclosures or to withdraw her due process complaint notice without prejudice (Tr. p. 130, 136). The district objected to both as it had already rested its case and argued that admitting new evidence so far into the hearing would violate the evidentiary disclosure rules set forth in State regulation and, since the district had already rested its case, it would be unduly prejudiced if the parent were to relitigate the matter (Tr. pp. 130-33, 136). Ultimately, the IHO did not grant the parent leave either to withdraw the due process complaint notice without prejudice or to submit the additional undisclosed evidence into the hearing record (id.).

The parent asserts that the IHO erred by not allowing her to introduce evidence into the hearing record (Req. for Rev. ¶¶ 15, 16). According to the parent, the additional evidence was important because it showed the district was aware the parent requested an evaluation in February 2021. The district requests that the SRO uphold the IHO's decision that the additional evidence was properly excluded (Answer ¶¶ 16, 17).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [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]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution

period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, a review of the parent's due process complaint notice demonstrates that in presenting the problem prompting the parent's request, the first action the parent alleged was her June 17, 2021 letter to the district notifying the district of the student's need for a special education program (Parent Exs. A at p. 4; H at p. 2). In the June 2021 letter, the parent requested that the district provide the student with an IEP and place the student "in a full-time special education classroom for the upcoming extended 12 month[] 2021-2022 school year" (Parent Ex. H). A review of the due process complaint notice demonstrates that the parent did not raise any allegations that there was a prior notice to the district, predating the June 2021 letter, or that the district did not respond in a timely manner to a parental referral of the student for an evaluation (see Parent Ex. A). In fact, as conceded by counsel for the parent during the hearing, the parent's due process complaint notice "could be better written" (Tr. pp. 189-90); while the due process complaint notice summarized the June 2021 and August 2021 letters sent to the district, the program recommended in the July 2021 IEP, and the program provided to the student by Big N Little, the only actual allegation of a denial of FAPE was fairly generic, asserting that the "request was being made because [the district] failed to provide the Student with a Free Appropriate Public Education" and the district "failed to provide a placement and appropriate program for the Student" (Parent Ex. A at pp. 3-4). Pertinently, the due process complaint notice does not mention any communications between the district and the parent predating June 2021 (see Parent Ex. A).

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

Review of the district's questioning of its only witness, the CPSE administrator, shows that the district's line of questioning related to the CSE process leading up to the development of July 2021 IEP, including the July 2021 CSE's review of the evaluative information regarding the student, the student's present levels of performance, and the parent's concerns, as well as the annual goals developed for the student and the July 2021 CSE's program recommendations (Tr. pp. 29-63). During cross-examination, the line of questioning similarly focused on the July 2021 CSE meeting and the IEP development process, including the evaluative information considered by the CSE, the student's present levels of performance, and the recommended special class (Tr. pp. 63-75). Relevant to this appeal, during direct, the CPSE administrator testified that the student was recommended for 12-month services but the IEP was not scheduled to be implemented until September 1, 2021 and that the reason for the September 1, 2021 implementation date was that the parent's consent for an evaluation was signed on June 8, 2021 and the district had 60 school days from the parent's consent to arrange for the student's services (Tr. pp. 56-57). However, counsel

for the parent did not cross-examine the district's witness regarding the implementation date for the July 2021 IEP (Tr. pp. 63-75).

Based on the above, the district's presentation of its case focused on the development of the July IEP for the student and the district did not open the door to communications regarding the process by which the student's evaluations were conducted or the timing of the evaluations or the CSE meeting. Accordingly, the IHO was correct in deciding not to allow the additional evidence into the hearing record after the district had rested its case and there is no reason to overturn the IHO's decision in this regard.

2. Withdrawal

As set forth above, the parent also argues that the IHO should have permitted the parent to withdraw her due process complaint notice without prejudice (Req. for Rev. ¶¶ 15, 19). The district asserts that the IHO was correct in deciding not to allow the parent to withdraw her due process complaint without prejudice as at the time the parent made the request the district had completed the presentation of its case (Answer ¶ 18).

Pursuant to State regulation, a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). Except in cases where a party withdraws the due process complaint notice prior to the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and the other party, and the IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]). In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (8 NYCRR 200.5[j][6][ii]).[6]

In this instance, the parent requested to withdraw her due process complaint without prejudice after the district presented its case-in-chief and after the IHO declined to allow the addition of new evidence into the hearing record (Tr. pp. 130-36). The district objected to the parent's request to withdraw and argued that the district would be "unduly prejudiced" if it had to relitigate the case after it had presented witness testimony and documentary evidence (Tr. pp. 136-37). The IHO gave the parties the opportunity to brief the issue (Tr. p. 139; Dist. December 2, 2022 Br. at pp. 2-3, 9-13). At the December 8, 2022 hearing, the parties were given the opportunity to further address the parent's request to withdraw her case without prejudice (Tr. pp. 143-173). During the December 8, 2022 hearing, the district asserted that "if [p]arent's counsel [is] seeking to withdraw this matter, it should be withdrawn with prejudice as the [district] has expended significant resources in litigating this case" (Tr. p. 148). After reviewing the hearing transcript and the briefs submitted by the parties, the IHO decided that she would "not allow the case to be

[6] If a party "subsequently files a due process complaint notice within one year of the withdrawal of the complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint notice that was previously withdrawn by the party," the district shall appoint the same IHO who was appointed to the "prior complaint unless that [IHO] is no longer available to head the re-filed due process complaint" (8 NYCRR 200.5[j][6][iv]).

withdrawn without prejudice" (Tr. p. 150). Based on the timing of the parent's request to withdraw her due process complaint notice without prejudice, the district's opposition to a withdrawal without prejudice, and the parties' arguments made during the hearing, the IHO's decision not to permit a withdrawal without prejudice was reasonable and will not be disturbed on appeal.

B. FAPE

The parent argues that the IHO improperly shifted the burden of proof to the parent to show that the student was denied a FAPE (Req. for Rev. ¶¶ 22-23). According to the parent, the district did not show that it provided the student with a FAPE during the hearing.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

Review of the IHO decision shows that although the IHO's analysis was brief, the IHO made several findings regarding the district's provision of a FAPE to the student for the 2021-22 school year (IHO Decision at pp. 8-9). The IHO noted that the district "provided documentary evidence and witness testimony" that it had provided the student with a FAPE for the 2021-22 school year (id. at p. 9).[7] The IHO held that in response to the parent's request for evaluations and an IEP, the district completed the evaluations and held an IEP meeting that was "attended by appropriate persons" and that the parent did not object to the composition of the CSE or the IEP recommendations (id.). The IHO stated that "[t]he evidence is clear that the [district] provided an IEP reasonably calculated to enable the [s]tudent to make appropriate progress for the 2021-2022 extended school year, intended to begin on September 1, 2021, and that the [district] complied with all procedural matters" (id.). However, the IHO concluded her analysis by finding that "the [p]arent failed to establish that the [d]istrict did not provide a FAPE for the 2021-2022 school year" (id.), giving the appearance that the IHO shifted the burden of proof to the parent in her final conclusion.

Based on the above, although the IHO's choice of language at the end of her analysis could have been better presented, review of the actual analysis of the relevant evidence by the IHO does not represent a shift of the burden of persuasion to the parent to demonstrate that the district failed to provide the student with a FAPE (see E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *11 n.13 [S.D.N.Y. Sept. 26, 2018]; Application of a Student with a Disability, Appeal No. 18-058; see also C.F., 746 F.3d at 76 [noting that "the Department bears the burden of establishing the validity of the IEP"]). Further, the decision when read in its entirety reveals that the IHO made her decision based on an assessment of the relative strengths and weaknesses of the evidence presented by both the district and the parents rather than by solely allocating the burden of

[7] In this sentence the IHO mistakenly referenced the 2020-21 school year.

persuasion to one party or the other (see generally IHO Decision). Thus, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3).

Finally, other than the parent's general assertion that the IHO shifted the burden of proof, the parent's arguments regarding the provision of a FAPE to the student relate to the timeliness of the initial evaluation of the student and the timing for the development of the July 2021 IEP. However, as noted above, the parent's argument that the district did not explain "why it had not timely evaluated or created a timely IEP for the [s]tudent" is outside the scope of this proceeding. Nevertheless, given the IHO's use of language that the parent read as having erroneously shifted the burden of proof, I will undertake a review of the parent's assertion that the district did not timely develop an IEP for the student for the 2021-22 school year.

As discussed above, the July 2021 IEP indicated that services were to be implemented beginning September 1, 2021 (Parent Ex. B at pp. 1, 2, 14). A handwritten notation on the IEP summary shows that the recommendations for July and August were intended to begin in July and August 2022 (id. at p. 1). In explaining the September 1, 2021 implementation date, the district CPSE administrator testified that the district had "60 school days" from June 8, 2021, when the parent signed consent "to authorize services," to arrange for the student's program and that the 60 school days would not have been before September 2021 (Tr. p. 57). Consistent with the district's contention, State regulations mandate that, "the board of education shall arrange for the preschool student with a disability to receive such programs and services commencing with the July, September or January starting date for the approved program, unless such services are recommended by the committee less than 30 school days prior to, or after, such appropriate starting date selected for such preschool student, in which case, such services shall be provided as soon as possible following development of the IEP, but no later than 30 school days from the recommendation of the committee and within 60 school days from receipt of consent to evaluate" (8 NYCRR 200.16[f][1]).

During the impartial hearing, it was established that the only signed parent consent for an evaluation contained in the hearing record was dated June 8, 2021 (Tr. p. 57; Dist. Ex. 2 at p. 2).

The parent testified that she contacted the district in February, April, June, and August 2021 (Tr. pp. 203, 238-39). She also testified that she signed consent for the student to be evaluated in February 2021 (Tr. pp. 203, 207). According to the parent, she contacted the CPSE administrator in April 2021 and the administrator acknowledged that she received the parent's consent for an evaluation (Tr. p. 204). However, during cross-examination, the parent clarified that in February 2021 she contacted an agency that conducts evaluations and she signed a consent for them to conduct the evaluation as an approved agency (Tr. pp. 240-43).

The CPSE administrator's testimony describing the CPSE evaluation process indicated that after a referral for an evaluation was received, the CPSE sent a packet out to parents which included a consent form and a booklet of agencies to contact to conduct the evaluation, the parents then contacted the agency they wanted to conduct the evaluation and signed the consent form (Tr. pp. 31-32). With respect to the June 8, 2021 consent form, the form was sent to the CPSE by OMNI

on July 1, 2021 along with the packet containing the student's initial evaluation conducted by OMNI (Dist. Ex. 2 at pp. 1, 2; see Tr. pp. 33-34).

Considering the above testimony, as well as the documentary evidence included in the hearing record, it appears that the parent may have signed a consent form in February 2021 with an agency that she selected to conduct the evaluation; however, it does not appear from the hearing record that the consent form the parent signed in February 2021 was ever delivered to the CPSE or district staff. Accordingly, using the June 8, 2021 parental consent, the district's decision to begin implementing the student's educational program in September 2021 complied with State regulation for implementation of a preschool student's recommended programming (8 NYCRR 200.16[f][1]). As a result, the hearing record supports finding that the IEP's September 1, 2021 start date was timely.

VII. Conclusion

Based on the hearing record, there is insufficient information or reason presented to depart from the IHO's findings that the district offered the student a FAPE for the 12-month portion of the 2021-22 school year.

I have considered the parent's remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 2, 2023

STEVEN KROLAK
STATE REVIEW OFFICER