The University of the State of New York

The State Education Department
State Review Officer
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No. 24-083

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Sherburne-Earlville Central School District

Appearances:
Ferrara Fiorenza PC, attorneys for respondent, by Susan T. Johns, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO II) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2023-24 school year was appropriate and denied their request for district funding for QEEG brain mapping to be conducted by an out-of-state provider of the parents' choosing. The appeal must be sustained in part.

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 has been the subject of a prior administrative appeal related to this proceeding, which was dismissed as premature (see Application of a Student with a Disability, Appeal No. 23-194).[1] A CSE convened on March 7, 2022 to conduct a program review for the 2021-22 school

[1] The district has included six proposed exhibits with its answer, arguing the exhibits are pertinent to the allegations in the appeal, but were either not related to or not available during the impartial hearing. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student

year and to recommend a program for the 2022-23 school year (Dist. Exs. 9 at pp. 1, 2; 10 at p. 1). According to a prior written notice, the March 2022 CSE recommended that a speech-language therapy consult and psychological counseling be removed from the student's IEP effective March 7, 2022 (Dist. Ex. 10 at p. 1). The March 2022 CSE recommended that for the 2022-23 school year the student receive one 40-minute period per day of consultant teacher services in English language arts (ELA), one 40-minute period per day of consultant teacher services in science, one 40-minute period per day in a 15:1 special class in math, one 40-minute period per day in a 15:1 special class in social studies, and one 40-minute period every other day of resource room (Dist. Ex. 9 at p. 9). By prior written notice dated June 22, 2022, the district notified the parent of the CSE's recommended changes for the 2021-22 school year and of the recommended special education and related services for the 2022-23 school year (Dist. Ex. 10).

A CSE convened on May 17, 2023 to develop an IEP for the student for the 2023-24 school year to be implemented on September 7, 2023 (Dist. Ex. 17 at pp. 1, 7-8). The May 2023 CSE recommended ten-month services with placement in a home public school consisting of one 40-minute period per day of direct consultant teacher services in ELA, one 40-minute period per day of direct consultant teacher services in science, one 40-minute period per day in a 15:1 special class in math, one 40-minute period per day in a 15:1 special class in social studies, and one 40-minute period every other day of resource room in a small group (5:1) (id. at pp. 1, 7-8, 10). By prior written notice, dated June 13, 2023, the district summarized the recommendations of the May 2023 CSE (Dist. Ex. 18 at pp. 1-2).

By letter dated June 21, 2023, the student's mother wrote to the district stating that the student had not attended school since May 31, 2023, "due to an incident of mass bullying that occurred on that date and ongoing bullying for eight months prior to that time" (2022-23 school year) (Dist. Ex. 20). The parent further stated that the student was "suffering from [post-traumatic stress disorder (PTSD)] and emotional trauma" due to the bullying and that the student's IEP was "inadequate to address her current needs" (id.). The parent also stated that the student's "current

with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The district's proposed exhibit 1 contains emails between IHO I and the parties dated August 17, 2023, September 7, 2023, September 8, 2023, September 10, 2023 and September 11, 2023; proposed exhibit 2 consists of emails documenting IHO I's appointment acceptance on July 12, 2023 and IHO I's recusal on September 11, 2023; proposed exhibit 3 is an email from the district's attorney to IHO I notifying her of the parties' partial resolution; proposed exhibit 4 is a copy of the partial resolution agreement executed on August 4, 2023; proposed exhibit 5 is a copy of the parents' March 7, 2024 initial request for review, which was rejected by the Office of State Review; and proposed exhibit 6 is an email to the parties from IHO II with a copy of her final decision. The August 4, 2023 partial resolution agreement is already in evidence as District Exhibit 3, and the parents' March 7, 2024 rejected request for review was filed with the Office of State Review and is a part of the hearing record. Therefore, neither proposed exhibit 4 nor proposed exhibit 5 will be accepted as additional evidence. Next the emails sought to be introduced as additional evidence were not required to be submitted as part of the hearing record (see 8 NYCRR 200.5[j][5][vi]). Nevertheless, I agree with the district that these emails are necessary to render a decision in this matter due to the nature of the parents' claims about the timeliness and conduct of the impartial hearing. For those reasons, I will exercise my discretion and accept the district's proposed exhibits 1, 2, 3, and 6 as additional evidence (see Answer Exs. 1-3; 6).

evaluation and IEP"[2] did not address her PTSD and she "want[ed] an independent neuropsychological evaluation and a QEEG Brain Mapping" conducted by a licensed psychologist located in another state and she "expect[ed] the school district to pay for all expences [sic] to get this evaluation" (id.).

In an undated response to the June 21, 2023 parent's letter, the district's director of special programs (director) wrote to the student's mother stating that "[t]he CSE recently completed your child's reevaluation and developed her IEP for the 2023-2024 school year. It was my understanding that all members of the CSE, including you, were in agreement with that IEP" (Dist. Ex. 21).[3] The director further stated that "[i]t was not brought to the attention of the CSE or the [d]istrict as of that time that [the student] [wa]s diagnosed with PTSD, that she suffered any emotional trauma, or that she was subject to 'an incident of mass bullying'" (id.). The director offered to schedule a CSE meeting "to determine whether your daughter needs special education services to address any trauma or bullying that she was subject to" and requested that the parent provide the CSE "with whatever information you have regarding the bullying incident and the trauma that she sustained" (id.). She further advised the parent that she had "inquired whether there was known bullying of [the student] over the past eight months" and was not aware of what "you are referring to" (id.). She also notified the parent that she could file a complaint with the district's Dignity for All Students Act Coordinator (id.). Next, the director indicated that the CSE would consider whatever information the parent provided in reviewing the student's IEP to determine if additional or different special education services were needed, and further indicated that whether or not changes were made to the student's IEP, the student had access to the district's counselor (id.). In conclusion, the director wrote that "[t]he CSE did not determine that there [wa]s a need for additional information to develop [the student]'s IEP to provide her with an appropriate education" and, therefore, the district would "not fund a neuropsychological evaluation" (id.). The director also advised that "any evaluation obtained by the [d]istrict would be from a licensed or certified evaluator within our geographic region" and that "the CSE w[ould] consider the results of any evaluation [the parent] br[ought] to the table" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 7, 2023, the parents asserted that they "agree[d] on an IEP plan for 2023-2024. However, it d[id] not recognize [the student] [wa]s suffering from PTSD due to the months of bull[y]ing with no end in sight" (Parent Ex. A at pp. 2, 4, 7).[4] The parents further alleged that the student was "being denied a [f]ree [a]ppropriate [p]ublic [e]ducation (FAPE) in a safe environment" (id. at pp. 5-6). The parents contended that, although they agreed

[2] The student's mother did not specify which IEP "d[id] not address [the student's] PTSD" (Dist. Ex. 20). At the time of the parent's letter, the "current evaluation and IEP" appeared to be the March 2022 IEP, as the May 2023 IEP had not yet been implemented, and the incident the parent complained of occurred during the 2022-23 school year (id.).

[3] This individual was also referred to as the district's director of special education, CSE and CPSE chairperson, 504 plan coordinator and director of special programs (Tr. p. 42; Dist. Exs. 5 at p. 2; 17 at p. 1; 18 at p. 2; 21).

[4] The due process complaint does not indicate what school year the parents are challenging. The conduct complained of occurred during the 2022-23 school year, while the parents assert that they agreed with the 2023-24 IEP (Parent Ex. A at pp. 2-9, 14).

with the recommendations in the student's IEP for the 2023-24 school year, the district failed to evaluate the student for and identify that the student was "suffering from [post-traumatic stress disorder] due to months of bull[y]ing" and needed counseling services and that the district failed to provide the student with "a safe environment in school" (id. at pp. 2-9, 14). As relief, the parents requested reimbursement for tutoring services they unilaterally obtained for the student beginning May 31, 2023 (id. at pp. 9-10). The parents further requested district funding of "an independent neuropsychological evaluation and a QEEG Brain Mapping" of the student to be completed by a specified psychologist (id. at p. 10). The parents also requested "an auditory processing evaluation done to address sequential memory, inferences and literal thinking" and "an evaluation for auditory integration training" (id.). If deemed necessary, based on such evaluations, the parents requested for the student to receive speech-language therapy and "the two-week auditory integration training therapy" (id.).

B. Events Post-Dating the Due Process Complaint Notice

By email dated July 12, 2023, the district clerk confirmed the appointment of an IHO (IHO I) to conduct an impartial hearing to resolve the parents' due process complaint notice (Answer Ex. 2). In a response to the parents' due process complaint notice, dated July 17, 2023, the district stated that the parents agreed with the IEP developed for the student for the 2023-24 school year, however the parents were now alleging "that the CSE should have considered whether the IEP should have addressed what [wa]s alleged as months of bullying of your child, including an evaluation of your child to determine the psychological effect of that alleged bullying" (Dist. Ex. 2 at p. 1). The district further stated that the parents sought an independent neuropsychological evaluation with QEEG Brain Mapping by a specified evaluator; an auditory processing evaluation to evaluate sequential memory, inferential and literal thinking; an auditory integration training evaluation to assess the student's hearing ability; and reimbursement of $500 for privately obtained tutoring (id.). The district indicated that "[i]n this context, we take no position relative to the merit of your claims that your child was bullied, but look only at the allegations touching upon claims that are cognizable under the IDEA" (id.). The district asserted that those claims related to alleged bullying and how it was handled by the district were "not within the jurisdiction of the Impartial Hearing Officer and are denied. Similarly, the proposed resolution fails to address the alleged claims" (id.).

In email correspondence dated July 17, 2023, the district's interim middle school principal wrote to the parents' private tutor who stated that she had worked with the student on two occasions and did not receive any payment (Dist. Ex. 23 at pp. 1-2).

The parties convened for a resolution meeting on July 17, 2023 (Dist. Ex. 3 at p. 1). Based on discussions during the resolution meeting, the student's IEP was amended on July 17, 2023, by agreement and without a CSE meeting, to add one 30-minute session per week of individual counseling services (Dist. Ex. 4 at pp. 1, 8). On August 4, 2023, the parties entered into a partial resolution agreement (Dist. Ex. 3 at pp. 1-2). The parties agreed to certain evaluations and reimbursement for tutoring provided the tutor was a certified teacher and the parents could provide proof of payment (id. at p. 1). With regard to the neuropsychological evaluation, the parties agreed to a neuropsychological evaluation of the student in accordance with the criteria the district used when it arranged for an evaluation, that the evaluation must take place within New York State, within 150 miles of the district and be conducted by an evaluator licensed in New York State (id.).

According to the terms of the August 4, 2023 partial resolution agreement "[t]he [p]arent agree[d] that the [d]ue [p]rocess [c]omplaint [notice] [wa]s resolved as to the above terms. The remaining issue for the impartial hearing [wa]s whether the [s]tudent [wa]s in need of an evaluation by [a specified] neuropsychologist," whether the student "need[ed] QEEG Brain Mapping to receive a free appropriate public education, and whether such evaluation and brain mapping [wa]s to take place [out-of-state] at district expense" (id.). The August 4, 2023 partial resolution agreement also stated that the district would notify IHO I that the matter was not fully resolved and would "continue to impartial hearing" and that the terms of the agreement were "legally binding and enforceable in court" (id. at p. 2).

By email dated August 9, 2023, the director wrote to the student's mother stating that she was "working on submitting the Auditory Processing evaluation request to the agency [the district] contract[s] with, and they require a parent signature" and further asked the parent if she preferred that it be mailed, emailed or if she would "stop in" (Dist. Ex. 6 at p. 1).

On August 17, 2023 at 11:55 a.m., the district's attorney sent an email to IHO I, with courtesy copies sent to the parent and to the director (Answer Ex. 3). The district's attorney advised IHO I that the parties had reached partial resolution and attached a copy of the agreement to the email (id.). At 12:07 p.m. on August 17, 2023, IHO I replied to all individuals included in the original email (replied to all) that she was available for a prehearing conference "within the next two weeks, prior to the compliance date, if needed" (Answer Ex. 1 at p. 1). The district's attorney replied to IHO I with her availability at 12:09 p.m., and at 1:09 p.m., IHO I replied to all that she "w[ould] await [the p]arent's reply" (id.). At 2:35 p.m., the parent sent an email to the director which appeared to only contain a subject line "Please call me" (Dist. Ex. 7 at pp. 1-3). At 3:54 p.m., the director replied to the parent advising that she was out of the office until Monday and would call the parent then, unless the parent preferred a different time or date (id. at p. 2). At 6:44 p.m., the parent replied to the director stating, "I'm getting all these emails and I don't even know anyone but you that's cc'd. So I'm just confused" (id.). By email sent at 10:07 a.m. on August 21, 2023, the director replied to the parent stating, "I am pretty sure those emails were from the Impartial Hearing Officer …do you still want to speak with me?" (id.). The parent replied to the director at 10:40 a.m. stating that she found "the brain mapping and all that in [O]neonta so I will be seeking that to be paid for per the agreement" (id.).

On August 28, 2023, the director wrote to the student's mother stating that she was "reaching out to see if you still want us to proceed with the Audiological Processing evaluation as we discussed [at] our meeting in July" and if so, the parent needed to sign a consent form for the outside agency that would conduct the evaluation (Dist. Ex. 6 at p. 2). The director again asked the parent if she should mail the form (id.). The parent replied that she kept forgetting and would "stop in… tomorrow" (id.).

By email sent at 3:06 p.m. on September 7, 2023, the parents' advocate wrote to IHO I, identifying herself as the individual "doing the due process hearing" and stating that she did not "understand why [the hearing] ha[d] not been scheduled" (Answer Ex. 1 at pp. 5-6). The parents' advocate asserted that it had been "63 days from fil[]ing," that she would "move on [] to the State Review Officer," and further stated that she did not "have the school attorney name and/or email" (id. at p. 6). At 5:54 p.m., IHO I replied to both the parents' advocate and the district's attorney to confirm that a "partial settlement" was reached in the matter and advised that "pursuant to an

August 17, 2023 email [IHO I] was awaiting [he]r client's reply to schedule a pre-hearing conference" (id. at p. 5). IHO I further wrote "[n]ow that [she] was aware of [the] representation, kindly provide your availability to proceed on either September 13, 2023 or September 14, 2023 with the pre-hearing conference" (id.).[5] The parties continued to correspond with IHO I over the scheduling of the prehearing conference via emails dated September 8, 2023, September 10, 2023, and September 11, 2023, with the prehearing conference ultimately scheduled for September 13, 2023 at 2:30 p.m. (id. at pp. 1-2). However, in an email sent at 2:46 p.m. on September 11, 2023, IHO I advised the district clerk that "due to an unforeseen medical issue and circumstance," she "must recuse" her appointment, and further advised that she had scheduled a September 13, 2023 prehearing conference (Answer Ex. 2).

By letter dated September 14, 2023, IHO II advised the parents and the district's attorney that she had been appointed by the district to conduct an impartial hearing on this matter on September 12, 2023 (IHO II Appointment Letter).[6] IHO II offered September 21, 2023 as an available date for the prehearing conference and requested the parties confirm their availability. According to the procedural history set forth in IHO II's decision, the parents' advocate responded on September 14, 2023, asserting that an IHO had not been timely appointed and that she would not "be meeting on the 75th day and that the [d]istrict would be served with an appeal to the State Review Officer for denying the p[a]rent due process" (IHO II Decision at p. 5). IHO II explained that she was assigned to the matter and would proceed with the prehearing conference on September 21, 2023, unless the due process complaint notice was withdrawn (id.; see Sept. 21, 2023 Tr. p. 6).[7]

C. Prehearing Conference and State Review Officer Decision

On September 21, 2023, IHO II, the district's attorney, and the parents' advocate convened for a prehearing conference (Sept. 21, 2023 Tr. pp. 1-41).[8] During the prehearing conference, the parents' advocate asserted that the allowable time to conduct an impartial hearing had expired and

[5] The district's copy of the July 7, 2023 due process complaint notice included duplicate pages of page 5 incorrectly marked as pages 5 and 6, which IHO II characterized as a "scanning error" (Dist. Ex. 1 at pp. 5-6; IHO II Decision at p. 5). The copy received by the district entirely omitted page 6, which included the name and contact information of the parents' advocate (compare Parent Ex. A at p. 6, with Dist. Ex. 1 at p. 6; see Sept. 21, 2023 Tr. pp. 30-31; Tr. p 29). The district's attorney stated that the July 7, 2023 due process complaint notice was filed by the parents with those errors (Tr. p. 29). The hearing record indicates that IHO I and IHO II were provided with the district's copy of the due process complaint notice as neither IHO was aware that the parents were represented by an advocate until the advocate contacted them directly (Answer Ex. 1 at p. 5; IHO II Decision at p. 5). Both IHOs contacted the student's mother directly (Dist. Ex. 7 at p. 2; IHO II Decision at p. 5). The student's mother was aware, no later than August 21, 2023, that IHO I was attempting to contact her; however, she never responded (id.).

[6] IHO II's appointment letter was included as part of the certified hearing record submitted by the district and will be cited in this decision as "IHO II Appointment Letter."

[7] At that time, no extensions to the regulatory timeline for issuing a decision had been requested or granted (8 NYCRR 200.5[j][5][i]. The initial compliance date was September 20, 2023 (8 NYCRR 200.5[j][5]).

[8] The hearing transcripts were not paginated consecutively with the prehearing conference transcript. The prehearing conference transcript will be cited by date and page number in this decision.

the parents had appealed to the Office of State Review alleging a denial of their right to a due process hearing (Sept. 21, 2023 Tr. pp. 3, 6-8, 10-11, 13-14, 16-21, 22-24). IHO II responded that the prehearing conference was for the parents' July 7, 2023 due process complaint notice, she recounted her understanding of the circumstances of her appointment and summarized "a lengthy" email she had received from the parents' advocate on September 14, 2023 (Sept. 21, 2023 Tr. pp. 4-6). While the parents' advocate continued to argue that the time for the impartial hearing had expired, IHO II continued to explain that she had been appointed to conduct the impartial hearing and needed to schedule dates unless the parents were going to withdraw the July 7, 2023 due process complaint notice (Sept. 21, 2023 Tr. pp. 13, 15, 17, 19-21, 22-24, 33-35, 38-39). The parents' advocate restated that the parents had been denied a hearing, they were not withdrawing the July 7, 2023 due process complaint notice and did not agree to extensions to the compliance date for issuing a decision (Sept. 21, 2023 Tr. pp. 19-21, 33-36). IHO II granted the district attorney's request to extend the timeline over the parents' objection (Sept. 21, 2023 Tr. pp. 21-22). The first hearing date was scheduled for October 4, 2023 (Sept. 21, 2023 Tr. p. 24).

On September 25, 2023, the parents filed an amended request for review with the Office of State Review, alleging that IHO II had improperly convened a prehearing conference and improperly granted the district's request for an extension of the timeline for issuing a decision after the expiration of the initial compliance date and against the wishes of the parents (Application of a Student with a Disability, Appeal No. 23-194).

By decision dated October 6, 2023, an SRO determined that no decision subject to an appeal had yet been rendered in the underlying proceeding; and that after the impartial hearing was conducted and a decision issued, any aggrieved party could appeal to the SRO and could include issues arising out of the timeliness of the impartial hearing (Application of a Student with a Disability, Appeal No. 23-194).

D. Impartial Hearing and Impartial Officer Decision

The impartial hearing began on October 4, 2023 and concluded on October 26, 2023 after three days of proceedings (Tr. pp. 1-425). By decision dated February 2, 2024, IHO II found that the student's May 17, 2023 IEP "as written at the time of the meeting, appear[ed] to have offered the [s]tudent [] a FAPE" (IHO II Decision at pp. 18, 21). IHO II further found that once the district was made aware of the alleged bullying and how it affected the student, the district "offered and added counseling and a social/emotional goal to address social conflicts" (id. at pp. 18-19). With regard to the parents' request for a neuropsychological evaluation with QEEG brain mapping, IHO II found that the parents' request "did not indicate any disagreement with any of the [d]istrict's evaluations" and that the district was not aware of any diagnosis of post-traumatic stress disorder, depression or anxiety (id. at p. 19). IHO II determined that the district "was justified in offering a CSE meeting to gather more information" given that the parent had not disagreed with any district evaluations and had not provided the district with documentation of a new diagnosis (id.). IHO II then noted that "[i]nstead of agreeing to a CSE meeting, the [p]arent filed this [due process complaint notice] and requested relief in the form" of additional evaluations (id. at pp. 19-20). Next, IHO II recounted that in response to the due process complaint notice, the district held a resolution meeting and agreed to most of the parents' requested relief (id. at p. 20). The district specifically agreed to conduct an auditory processing evaluation, auditory integration training therapy, convene the CSE to review the completed evaluations, reimburse the parents for private

tutoring upon proof of payment for tutoring provided by a certified teacher, and to fund a neuropsychological evaluation to be conducted by an evaluator licensed in New York State and located within 150 miles of the district (id.). IHO II further stated that the only item the district did not agree to fund was the QEEG brain mapping (id.). IHO II also found that the student's mother signed the resolution agreement and did not withdraw it (id.). For those reasons, IHO II "uph[eld] the agreement entered into by the parties, with the exception of the payment for tutoring" (id.).[9] IHO II found that there was insufficient information in the hearing record to award the parents with QEEG brain mapping, that it was not unreasonable for the district to restrict the location of the evaluator to within 150 miles of the district or to require the evaluator to be licensed in New York State (id. at pp. 20, 21). IHO II further found that it "[wa]s unreasonable to expect any school district in New York to send a student to [another State] for an evaluation it is unfamiliar with and pay for all expenses to have that evaluation completed" (id. at p. 20). In addition, IHO II determined that "there was no testimony from anyone as to what [Q]EEG brain mapping is, what information is gathered, why it is necessary, or when [it is] necessary" (id.). IHO II also determined that "[e]xcept for assessing for brain damage, a neuropsychological evaluation should be sufficient to gather information regarding the [p]arent[s'] concerns and the evaluator could recommend additional testing if necessary" (id. at p. 21). With regard to tutoring, IHO II found that the evidence showed that the parents "did not have a licensed/certified teacher tutor the [s]tudent and that the [p]arent[s] did not even pay for the tutoring provided by the teaching assistant" (id.).

Turning to the parents' claims about the timeliness of the impartial hearing, IHO II noted that there was "an email in evidence that indicate[d] that the [p]arent and the previous IHO had communicated in August 2023" and that she was appointed on September 12, 2023, corresponded with the parties on September 14, 2023, and scheduled a prehearing conference for September 21, 2023 (IHO II Decision at p. 21). IHO II then recounted the impartial hearing dates, extensions to the timeline for issuing a decision, the parties' "briefing schedule," and an injury to IHO II's hand that delayed her final decision (id. at pp. 21-22). IHO II found that any delays, since the due process complaint notice was filed on July 7, 2023, "have not harmed the [s]tudent who began attending school in September 2023" (id. at p. 22). In conclusion, IHO II ordered the district to arrange and fund a full and comprehensive auditory processing evaluation, and if recommended by the licensed/certified evaluator, speech language therapy services; to arrange and fund an auditory integration training evaluation, contingent on the results of the auditory processing evaluation and recommendations of the evaluator; to arrange and fund a neuropsychological evaluation to be conducted by an evaluator licensed/certified in New York State, within 150 miles of the district; all within 30 calendar days (id. at p. 22). Lastly, IHO II directed the CSE to convene and review the evaluation reports within 20 school days of receipt.

IV. Appeal for State-Level Review

In an amended request for review, the parents challenge the timeliness and conduct of the impartial hearing and allege IHO II erred in finding the district offered the student a FAPE for the 2023-24 school year. The parents disagree with IHO II's factual and legal findings and argue that the impartial hearing was not for the purpose of addressing the parents' claims raised in the July 7,

[9] As noted above, the district had agreed to reimburse the parents for up to $500 in tutoring expenses provided certain conditions were met (Dist. Ex. 3 at p. 1).

2023 due process complaint notice. Rather the parents assert the impartial hearing was for the district "on the issue [IHO II] created with [the district's attorney]" (Am. Req. for Rev. ¶9). The parents further argue that the settlement agreement was never implemented, and also that they disagree with the settlement agreement. The parents also raise claims arising from events post-dating the due process complaint notice and request that the student be assigned to attend a different high school. As relief, the parents request an independent neuropsychological evaluation and QEEG brain mapping to be conducted by a psychologist located in another state and for the district to pay for all expenses associated with obtaining the out-of-state evaluation. The parents also request an auditory processing evaluation that includes "sequential memory, inferences and literal thinking" to be done in an agency that does these evaluations; an evaluation for auditory integration training and if the student "fails the evaluation" the parents request a two-week "auditory integration training program;" the parents "want [the student] registered for Bookshare.org because her reading level is years below her 9th grade needed reading level;" the parents "want [the student] taught sensory diet in about [three] months of occupational therapy;" and the parents "want an investigation into the bull[y]ing of [the student] for the past now [two] and a half years with no investigation and addressing of the bull[y]ing that now [the student] is home on hospital/homebound and suicidal because of the refusal of school staff to address this issue of bull[y]ing" (Am. Req. for Rev. ¶¶24-28).

In an answer with exhibits, the district responds to the parents' allegations with admissions and denials and asserts that the parents' appeal must be dismissed. As affirmative defenses, the district argues that the parents' initial request for review was untimely, that the district was not served with a notice of intention to seek review, that the notice of intention to seek review includes claims not asserted in the request for review and are therefore abandoned, that the parents are improperly challenging relief obtained pursuant to a resolution agreement, an issue outside the due process complaint notice and outside the scope of the appeal, and that the SRO lacks jurisdiction to enforce the resolution agreement.[10]

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.

[10] The parent submits a reply to the district's answer. State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]).

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]).[11]

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

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district requests that the parents' amended request for review be dismissed for failure to comply with the regulations governing practice before the Office of State Review. The district alleges that although the parents' initial request for review was rejected by the Office of State Review and the parents were given the opportunity to file an amended request for review, the parents' initial request for review, which was dated March 7, 2024, was untimely. The district further argues that the parents did not and do not allege that they did not receive IHO II's decision when it was emailed on February 2, 2024. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following

[11] 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).

business day (8 NYCRR 279.11[b]). In this matter, the parents served their initial request for review on March 7, 2024, which was 34 days after the date of IHO II's decision, well within the 40-day timeline. The parents were given leave to serve and file an amended request for review by March 27, 2024. The parents have provided an affidavit of service demonstrating that the amended request for review was served on the district on March 26, 2024. Based on the foregoing, both the initial request for review and the amended request for review were timely.

Next, the district alleges that the parents did not serve a notice of intention to seek review prior to serving the initial request for review. State regulation requires that any party "who intends to seek review by a State Review Officer of the decision of an impartial hearing officer shall personally serve upon the opposing party,… a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the opposing party no later than 25 days after the date of the decision of the impartial hearing officer sought to be reviewed (see 8 NYCRR 279.2[b]). Among other things, [t]he service of a notice of intention to seek review upon a school district serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (see Application of a Student with a Disability, Appeal No. 21-054; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014). Among the many reasons the parents' initial request for review was rejected by the Office of State Review was the failure to file a notice of intention to seek review. The parents appear to have served an undated notice of intention to seek review and case information statement simultaneously with the amended request for review on the district on March 26, 2024. Nevertheless, the district was able to file the certified hearing record with the Office of State Review and to timely serve and file an answer to the parents' amended request for review. As the district has not demonstrated any prejudice, I will exercise my discretion and accept the parents' amended request for review (8 NCYRR 279.2[f]).

The district also argues that the parents included a claim in the notice of intention to seek review that was not reasserted in the amended request for review. Specifically, the district alleges that the claim that the district did not file a due process complaint notice to defend its evaluations was not included in the amended request for review and has been abandoned by the parents.

State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

The district is correct that the amended request for review does not include an allegation that the district did not initiate due process to defend its evaluations, nevertheless, the parents challenge nearly every aspect of IHO II's decision and the district's obligations when a parent requests a reevaluation are relevant to the discussion below.

2. Resolution Process, Timeliness, and Conduct of the Impartial Hearing

The parents allege that the impartial hearing was not commenced within 75 days from the filing of the parents' July 7, 2023 due process complaint notice and that they were denied a due process hearing on that basis. The parents further assert that IHO II was improperly appointed, that IHO II improperly granted extensions to the timeline for issuing a decision, and that IHO II "refus[ed] to hold the due process hearing on the issues in [the parents'] July 7, 2023, complaint" (Am. Req. for Rev. ¶¶3, II, 4-7).[12]

When a parent files a due process complaint notice, the district must immediately initiate, but not later than two business days after receipt, the appointment of an IHO utilizing the rotational selection process (8 NYCRR 200.5[j][3][i][a]). State and federal regulations also provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]). Except where the parties agreed to waive the resolution process or use mediation, a parent's failure to participate in a resolution meeting "will delay the timeline for the resolution process," as well as the timeline for the impartial hearing, until the meeting is held (34 CFR 300.510[b][3]; 8 NYCRR 200.5[j][2][vi]).

The district received the parents' due process complaint notice on July 7, 2023 (Dist. Ex. 1 at p. 1). The district was required to initiate the rotational selection process to appoint an IHO no later than July 11, 2023, the district was required to hold a resolution meeting by July 22, 2023, and the resolution period ended August 6, 2023. The hearing record reflects that IHO I accepted the appointment on July 12, 2023 (Answer Ex. 2). The resolution meeting was held on July 17, 2023, and a partial resolution agreement was fully executed on August 4, 2023 (Dist. Ex. 3 at pp. 1-2).

State regulation further provides that the impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period; unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). The IHO is required to render a decision no later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). An IHO may grant extensions beyond these timeframes; however, such extensions may only be granted

[12] The amended request for review is not paginated and contains paragraphs numbered 1-28. In addition, between paragraphs 3 and 4, there is a paragraph with a heading of "II", and between paragraphs 13 and 14, there is a paragraph with a heading of "IV".

consistent with regulatory constraints and an IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). According to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

Fourteen days after the expiration of the resolution period was August 20, 2023. On August 17, 2023, the district's attorney notified IHO I that the parties had reached a partial resolution and IHO I contacted the parties to schedule the prehearing conference (Answer Exs. 1 at p. 1; 3). The hearing record reflects that the version of the July 7, 2023 due process complaint notice filed with the district contained duplicate pages and was missing the page that included the name and contact information for the parents' advocate (compare Parent Ex. A at p. 6, with Dist. Ex. 1 at p. 6; see Sept. 21, 2023 Tr. pp. 30-31; Tr. p. 29). The district's incomplete copy was the due process complaint notice that was provided to both IHOs in this matter. The hearing record also reflects that the student's mother received the emails related to scheduling the prehearing conference no later than August 21, 2023, but declined to respond because she did not know who was sending them (Dist. Ex. 7 at p. 2). The parents' advocate, the district's attorney and IHO I corresponded between September 7, 2023 and September 11, 2023 regarding the scheduling of the prehearing conference, which was eventually scheduled for September 13, 2023 (Answer Ex. 1 at pp. 1-2, 5-6).

On September 11, 2023, IHO I recused herself for medical reasons (Answer Ex. 2). On September 12, 2023, the district appointed IHO II and on September 14, 2023, she wrote to the parents and the district's attorney notifying them of her appointment to conduct an impartial hearing on the parents' July 7, 2023 due process complaint notice (IHO II Appointment Letter). Forty-five days after the expiration of the resolution period was September 20, 2023. The parties convened for a prehearing conference on September 21, 2023 (Sept. 21, 2023 Tr. p. 1).

During the prehearing conference and throughout the impartial hearing, the parents' advocate asserted that the time for the parents' due process hearing had expired and that the parents had been denied a due process hearing (Sept. 21, 2023 Tr. pp. 3, 6-8, 10-11, 13-14, 16-21, 22-24; Tr. pp. 20-21). In their appeal, the parents maintain that IHO II erred by holding the impartial hearing more than 45 days after the expiration of the resolution period and that extensions of the timeframe to issue a decision require agreement of both parties.

Review of the hearing record demonstrates that the parents were not denied a due process hearing or denied due process of law. After the parents' due process complaint notice was filed on July 7, 2023, all of the regulatory procedural timelines were met until the scheduling of the prehearing conference on September 21, 2023.

According to the hearing record, IHO I began attempting to schedule the prehearing conference on August 17, 2023 and did not receive any type of response from the parents or their advocate until September 7, 2023 (Answer Ex. 1 at p. 1). The hearing record also indicates that the student's mother knew, no later than August 21, 2023, that IHO I was attempting to contact her (Dist. Ex. 7 at p. 2). When the parents' advocate contacted IHO I herself, on September 7, 2023, she appeared to have no knowledge of IHO I's correspondence with the student's mother (Answer Ex. 1 at pp. 5-6; Parent Post-H'g Br. at p. 5). After IHO I's recusal, the cycle began anew with IHO II corresponding directly with the parents, apparently unbeknownst to the advocate (IHO II Appointment Letter; see IHO Decision at p. 5). Based on a thorough review of the hearing record, the one-day delay in scheduling the prehearing conference did not deny the parents due process. Furthermore, the delay was primarily attributable to the parents due to their filing of an incomplete due process complaint notice with the district, which was further complicated by failing to respond to the IHOs or to inform the advocate of the need for a response.

With regard to IHO II's extensions of the timeline to issue a decision, IHO II did not err. Agreement between the parties is not required for an extension of the timeline to be granted. Extensions may be granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Contrary to the parents' argument, mutual agreement is not a basis for granting an extension (8 NYCRR 200.5[j][5][iii]) (Sept. 21, 2023 Tr. pp. 20-24, 31-32; Tr. pp. 16, 18; Parent Post-H'g Br. at p. 60).

Based on the foregoing, the district complied with the regulatory requirements for the resolution process and for the initiation of an impartial due process hearing. Further, IHO I timely scheduled a prehearing conference before recusal. With regard to the one-day delay in scheduling the prehearing conference, I find that IHO II did not violate the parents' right to due process.

3. Resolution Agreement and Scope of Impartial Hearing and Review

The hearing record reflects that a resolution meeting was held on July 17, 2023 (Tr. p. 50; Dist. Ex. 3 at p. 1). During the resolution meeting, the parties agreed to amend the student's May 2023 IEP, which had an implementation date of September 7, 2023, without a CSE meeting to add one 30-minute session per week of individual counseling services (Tr. p. 46; Dist. Exs. 4 at pp. 1, 8; 17 at p. 1). The director testified that the parents' advocate attended the resolution meeting and that the parents had a copy of the proposed resolution agreement to review from July 24, 2023 through August 4, 2023 (Tr. pp. 50, 52). The director further testified that the student's mother signed the resolution agreement and personally delivered it to her on August 4, 2023 (Tr. p. 52).

State regulations provide that "if, during the resolution process, the parent and school district reach an agreement to resolve the complaint, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the school district," and further that "such agreement shall be enforceable in any State court of competent jurisdiction or in a district court of the United States" (8 NYCRR 200.5[j][2][iv]). Moreover, State regulations provide that resolution agreements are "legally binding" and may be enforced in a State or federal district court (20 USC § 1415[f][[1][B][iii]; Educ. Law § 4404[b]; 34 CFR 300.510[d][2]; 8 NYCRR 200.5[j][2][iv]).

The terms of the August 4, 2023 resolution agreement provide that the district will: (1) arrange for an auditory processing evaluation of the student and, if recommended by the evaluator,

provide the student with speech-language therapy; (2) arrange for an auditory integration training evaluation of the student, contingent on the results of the auditory processing evaluation and recommendations by the evaluator; (3) agree to a neuropsychological evaluation of the student in accordance with the criteria the district uses when it arranges for an evaluation, i.e., the evaluator must be licensed or certified in New York State to perform such evaluations and the evaluation must take place within New York State, within 150 miles of the district; (4) to convene the CSE to review the reports from the above evaluations and identify the student's physical and emotional disabilities as identified in the evaluations; and (5) to reimburse the parents for tutoring in an amount not to exceed $500, as calculated according to the prevailing tutoring rate, for tutoring provided to the student between May 31, 2023 and June 13, 2023, provided that the private tutor is a State certified teacher and the parents submit to the district a detailed invoice indicating date and duration of tutoring, cost of tutoring, and proof of payment (Dist. Ex. 3 at pp. 1-2). The August 4, 2023 partial resolution agreement further provided that "[t]he [p]arent agree[d] that the [d]ue [p]rocess [c]omplaint [notice] [wa]s resolved as to the above terms. The remaining issue for the impartial hearing [wa]s whether the [s]tudent [wa]s in need of an evaluation by [a specified] neuropsychologist," whether the student "need[ed] QEEG Brain Mapping to receive a free appropriate public education, and whether such evaluation and brain mapping [wa]s to take place [out-of-state] at district expense" (id. at p. 1). The August 4, 2023 partial resolution agreement also stated that the district would notify IHO I that the matter was not fully resolved and would "continue to impartial hearing" and that the terms of the agreement were "legally binding and enforceable in court" (id. at p. 2).

As indicated above, the resolution agreement included the regulatory language which allowed either party to void the agreement within three business days of execution (8 NYCRR 200.5[j][2][iv]). The director testified that the parents did not seek to void the agreement (Tr. p. 52). The parent also testified on cross-examination that she signed the resolution agreement and did not attempt to void it (Tr. p. 356). There is no evidence in the hearing record to support that the parents' attempted to void the agreement or that the parents alleged they were coerced or under duress in any way when entering into the agreement (Tr. pp. 35, 51-52; Parent Post-H'g Br. at p. 5). Rather, the hearing record indicates that it was the parents' advocate who objected to the parents entering into the agreement and continued to assert that the parents were entitled to a due process hearing on all of the issues in the July 7, 2023 due process complaint notice (Sept. 21, 2023 Tr. pp. 10-11, 13-24, 31-32, 33, 34-36, 38-39; Tr. pp. 25-26, 32-33, 34-35, 37, 260-61, 329-31; Parent Post-H'g Br. at pp. 3, 4, 5, 13, 59).

The plain language of the resolution agreement, which the student's mother signed, expressly stated that the only issue remaining for the impartial hearing was whether the district was required to fund the cost of QEEG brain mapping conducted by an out-of-state provider of the parents' choosing (Dist. Ex. 3 at p. 1). During the impartial hearing, IHO II attempted to limit the scope of the impartial hearing to the issue not settled by the resolution agreement (Tr. pp. 33-35). However, in her decision, IHO II conducted a FAPE analysis and determined that the May 2023 IEP (2023-24 school year) offered the student a FAPE, analyzed the parents' June 21, 2023 letter as a request for an independent educational evaluation (IEE), and found that the district "was justified in offering a CSE meeting" (IHO Decision at pp. 18-19, 21). IHO II then "uph[e]ld[] the agreement entered into by the parties, with the exception of the payment for tutoring" (id. at p. 19). IHO II analyzed the reasonableness of an agreed-upon term of the resolution agreement finding that it was "not unreasonable for the [d]istrict to limit the IEE to be conducted within 150 miles of

the school district and mandate that it be completed by a provider licensed/certified in New York State" (id. at p. 20). In her ordering clause, IHO II modified the resolution agreement by restating the agreed-upon terms, introducing a new obligation for the district to arrange for the neuropsychological evaluation, and by removing the district's obligation to reimburse the parents for tutoring in an amount not to exceed $500, as calculated according to the prevailing tutoring rate, for tutoring provided to the student between May 31, 2023 and June 13, 2023, provided that the private tutor is a State certified teacher and the parents submit to the district a detailed invoice indicating date and duration of tutoring, cost of tutoring, and proof of payment (IHO Decision at p. 22; see Dist. Ex. 3 at p. 1).

Generally, IHOs and SROs are vested with the authority to make findings of noncompliance in matters within their jurisdiction but are not granted "enforcement" or contempt powers beyond those implied powers to dictate the orderly conduct of the proceedings over which they preside. They do not, for instance, impose punitive sanctions for failure to comply with orders flowing out of other proceedings and other legal obligations such as violating stipulations of settlement. However, they are often called upon to determine whether an agreement has been reached by parties with respect to pendency and, to that extent only, are called upon to "enforce" or interpret documents with legal significance. Another example is that an IHO or SRO would be required to give effect to a resolution agreement reached between the parties in accordance with the IDEA and would not allow a due process hearing to proceed on a matter that was purportedly resolved in the resolution agreement, but, on the other hand, the same administrative hearing officer would not be permitted to impose sanctions upon a party because the party failed to adhere to the terms of a resolution agreement since the statute requires that kind of enforcement action to be conducted before a court of competent jurisdiction (Application of the New York City Dep't of Educ., Appeal No. 16-017).

While it was commendable for IHO II to repeatedly indulge the parents' advocate in order for the parent and the student to have an opportunity to be heard, expanding the scope of the impartial hearing and addressing issues settled by the resolution agreement in her decision was error.[13] Further, IHO II has no authority to modify the resolution agreement, which is a legally

[13] Pursuant to the resolution agreement, the district agreed to arrange for an auditory processing evaluation of the student by an agency with which the district contracts (Dist. Ex 3 at p. 1). The hearing record reflects that the parents have withheld consent for the evaluation because of the belief that the agency only offers hearing tests (Tr. pp. 53-54, 304-05, 319, 366; Dist. Ex. 6 at pp. 1-2; Parent Post-H'g Br. at pp. 8-9). The parent testified that the student had been to the same agency before, that they only do hearing tests and that the advocate told her the auditory processing evaluation was "not the full thing that we asked for" (Tr. pp. 304-05, 319, 366; see Tr. 261). The parent also testified that she did not contact the agency to confirm this information, she based her belief on her past experience (Tr. p. 366). As discussed above, the parents are bound to the terms of the resolution agreement, which does not specify testing sequential memory, inferences, and literal thinking (Dist. Ex. 3 at p. 1). Nevertheless, the hearing record does not support the parent's testimony that the student has only been administered hearing tests. The hearing record includes a May 18, 2017 audiology and auditory processing evaluation and an August 4, 2021 audiological report, which included an auditory processing evaluation (Dist. Exs. 12; 13). Both evaluations were conducted by the agency the district has now offered the parents to conduct a third auditory processing evaluation (Tr. p. 53). Both auditory processing evaluations included in the hearing record were conducted by two different doctoral-level audiologists (Dist. Ex. 12 at p. 1; Dist. Ex. 13 at p. 1). The hearing record demonstrates that the parents' belief that the agency offered by the district is not capable of conducting a comprehensive auditory processing evaluation is unfounded. To the extent the parents believe that an auditory processing evaluation with subtests in the areas of "sequential memory, inferences and literal

binding document as written. If the parents now wish to challenge the agreed-upon terms of the resolution agreement, they must do so in a court of competent jurisdiction. For those reasons, IHO II's ordering clause is vacated, because the terms of the August 4, 2023 resolution agreement settled those aspects of the parents' July 7, 2023 due process complaint notice. IHO II's findings related to FAPE and to the reasonableness of terms set forth in the resolution agreement are reversed. IHO II's analysis and findings related to the parents' request for QEEG brain mapping will be addressed below.

B. QEEG Brain Mapping

The sole contested issue in this matter that is properly before me for consideration is whether the parents are entitled to funding for QEEG brain mapping to be conducted by an out-of-state provider. As noted above, the parties have already agreed to district funding of a neuropsychological evaluation which conforms to the district's criteria for evaluations, to be conducted by a provider of the parents' choosing who is licensed by New York State and located within 150 miles of the school district (Dist. Ex. 3 at p. 1).

IHO II determined that the parents were not entitled to an IEE in QEEG brain mapping (IHO II Decision at p. 19). IHO II found that the parents did not express any disagreement with a district evaluation and failed to provide the district with any information or diagnoses that would indicate that the student's needs had changed since the May 2023 CSE meeting (id.). IHO II found that there was insufficient information to award the parents QEEG brain mapping as the hearing record did not include any evidence of what QEEG brain mapping was, what information is gathered, or when or why brain mapping is necessary (id. at p. 20). IHO II also noted that the student's mother was unable to explain why QEEG brain mapping was necessary for the student, she testified that she wanted it for diagnostic purposes (id. at p. 21). For those reasons, IHO II denied the parents' request.

The hearing record indicates that a CSE convened on May 17, 2023 for the student's annual review (Tr. p. 43; Dist. Ex. 17 at p. 1). The hearing record also reflects that the parents did not disagree with any aspect of the May 2023 IEP during the meeting or advise the CSE of their concerns about bullying (Tr. pp. 43-45; Dist. Ex. 17 at p. 1; see Parent Ex. A at p. 2).

In the letter sent by the student's mother on June 21, 2023, she stated that the student had not attended school since May 31, 2023, "due to an incident of mass bullying that occurred on that date and ongoing bullying for eight months prior to that time" (2022-23 school year) (Dist. Ex. 20). The parent further stated that the student was "suffering from PTSD and emotional trauma" due to the bullying and that the student's IEP was "inadequate to address her current needs" (id.). The parent also stated that the student's "current evaluation and IEP" did not address her PTSD and she "want[ed] an independent neuropsychological evaluation and QEEG Brain Mapping" conducted by a licensed psychologist located in another state and she "expect[ed] the school district to pay for all expences [sic] to get this evaluation" (id.).

thinking" exists, there is no basis in the hearing record for finding that a doctoral-level audiologist would be unable to acquire and administer them.

The district responded to the parents' June 21, 2023 letter as a request for reevaluation, not a request for an IEE. The director wrote to the student's mother stating that "[t]he CSE recently completed your child's reevaluation and developed her IEP for the 2023-2024 school year. It was my understanding that all members of the CSE, including you, were in agreement with that IEP" (Dist. Ex. 21). The director of special programs further stated that "[i]t was not brought to the attention of the CSE or the [d]istrict as of that time that [the student] is diagnosed with PTSD, that she suffered any emotional trauma, or that she was subject to 'an incident of mass bullying'" (id.). The director offered to schedule a CSE meeting "to determine whether your daughter needs special education services to address any trauma or bullying that she was subject to" and requested that the parent provide the CSE "with whatever information you have regarding the bullying incident and the trauma that she sustained" (id.). She further advised the parent that she had "inquired whether there was known bullying of [the student] over the past eight months" and was not aware of what "you are referring to" (id.). She also notified the parent that she could file a complaint with the district's Dignity for All Students Act Coordinator (id.). Next, the director indicated that the CSE would consider whatever information the parent provided in reviewing the student's IEP to determine if additional or different special education services were needed, and further indicated that whether or not changes were made to the student's IEP, the student had access to the district's counselor (id.). In conclusion, the director wrote that "[t]he CSE did not determine that there [wa]s a need for additional information to develop [the student]'s IEP to provide her with an appropriate education" and, therefore, the district would "not fund a neuropsychological evaluation" (id.). The director also advised that "any evaluation obtained by the [d]istrict would be from a licensed or certified evaluator within our geographic region" and that "the CSE w[ould] consider the results of any evaluation [the parent] br[ought] to the table" (id.).

The parents' June 21, 2023 letter does not meet the statutory framework under which a parent has a right to obtain an IEE at public expense as the parents did not express disagreement with a district evaluation. 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]).

In response to a question from IHO II, the parents' advocate conceded that the parents did not disagree with any district evaluation in the due process complaint notice (Tr. p. 22). The parents' June 21, 2023 letter also did not request further evaluation from the district (Dist. Ex. 20). As the hearing record demonstrates that the parents did not express disagreement with any evaluation conducted by the district, the parents were not entitled to an IEE at public expense. To the extent that the parents allege that the student's current evaluation and IEP did not address PTSD, such an allegation "does not necessarily imply the evaluation was not appropriate at the

time it was conducted" (D.S. v. Trumbull Bd. of Educ., 2020 WL 5552035, at *13 [2d Cir. Sept. 17, 2020]).

With regard to the district's response to the parents' June 21, 2023 letter, under the IDEA, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Notably, in its letter in response to the parents, the district offered to convene the CSE for a program review, wherein it would consider whatever information the parents provided in reviewing the student's IEP to determine if additional or different special education services were needed, and that whether or not changes were made to the student's IEP, the student had access to the district's counselor (Dist. Ex. 21). Consistent with the regulations governing reevaluation, the director wrote that "[t]he CSE did not determine that there [wa]s a need for additional information to develop [the student]'s IEP to provide her with an appropriate education" and therefore, the district would "not fund a neuropsychological evaluation" (id.). The director also advised that "any evaluation obtained by the [d]istrict would be from a licensed or certified evaluator within our geographic region" and that "the CSE w[ould] consider the results of any evaluation [the parent] br[ought] to the table" (id.). The parents never responded to the district.

In analyzing the request for QEEG brain mapping, IHO II described that the student's mother was unable to "testify as to what it entailed or why it was necessary" and that "she wanted the [Q]EEG to diagnose the [s]tudent with whatever she may have, including Asperger's; and wanted to see if the [s]tudent had brain damage or a psychological diagnosis" (IHO II Decision at p. 21; see Tr. p. 351). IHO II further stated that "[e]xcept for assessing for brain damage, a neuropsychological evaluation should be sufficient to gather information regarding the [p]arent's concerns and the evaluator could recommend additional testing if necessary" (IHO II Decision at p. 21). As highlighted by IHO II in her decision, there was no evidence in the hearing record which indicated that QEEG brain mapping was required as an assessment tool to gather relevant

functional, developmental, and academic information about the student that would assist in developing the content of the student's IEP or was related to enabling the student to participate and progress in the general education curriculum (see 8 NYCRR 200.4[b][1]).

Accordingly, IHO II correctly denied the parents' request. Neither the June 21, 2023 letter, nor the July 7, 2023 due process complaint notice constitute a proper request for an IEE. The district responded appropriately to the parents' letter and demonstrated that the student did not require a reevaluation. Permitting the parents to obtain an evaluation of the student, under these circumstances, would bypass the evaluation process, which is something that the Second Circuit has cautioned against (D.S., 2020 WL 5552035, at *11 [rather than seeking an IEE based on an objection to a particular assessment, a functional behavioral assessment, that was not part of the student's last reevaluation, the parents could have requested that the district conduct another reevaluation of the student]).

VII. Conclusion

In summary, IHO II erred in expanding the scope of the impartial hearing to include issues settled by the August 4, 2023 resolution agreement, and in modifying the terms of the August 4, 2023 resolution agreement. Having further found that IHO II correctly denied the parents' request for district funding of QEEG brain mapping to be conducted by an out-of-state provider, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that IHO II's decision dated February 2, 2024, which found that the district offered the student a FAPE for the 2023-24 school year is reversed, as that claim was settled by the August 4, 2023 resolution agreement; and

IT IS FURTHER ORDERED that those portions of IHO II's decision dated February 2, 2024, which added, modified or removed any and all terms set forth in the August 4, 2023 resolution agreement are vacated; and

IT IS FURTHER ORDERED that IHO II's decision dated February 2, 2024, which denied the parents' request for public funding for QEEG brain mapping to be conducted by an out-of-state provider of the parents' choosing is affirmed.

Dated: **Albany, New York**
May 9, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER