The University of the State of New York

The State Education Department

State Review Officer

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No. 24-189

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

Appearances:
Ferrara Fiorenza PC, attorneys for respondent, by Jennifer E. Mathews, 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 aspects of a decision of an impartial hearing officer (IHO) related to an order for respondent (the district) to fund the costs of an independent educational evaluation (IEE). 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 attended a State-approved nonpublic school, Upstate Caring Partner's Tradewinds Education Center (Tradewinds), since December 2019, pursuant to a referral by the district's CSE (Dist. Exs. 4 at p. 1; 7 at p. 7). According to the parents, they filed a due process complaint notice in March 2022 and, in June 2022, the parents and the district agreed that the matter would be resolved without an impartial hearing and the district would apply to different non-district programs on the student's behalf, provide the student a reading tutor in the interim, and would obtain a psychological evaluation of the student, and that if the parents did not agree with the evaluation, they could seek an IEE at district expense (Parent Ex. B-a at pp. 3-6).

The district referred the student for a psychological evaluation, which was conducted in August 2022 (Dist. Ex. 4). In January 2023, the parent consented to Tradewinds conducting a

functional behavioral assessment (FBA) of the student, which was completed in April 2023 (Dist. Exs. 5; 6).

CSEs convened on April 28, 2023 and June 9, 2023, for which the parents prepared a presentation that was included in the hearing record (Parent Exs. B-a; B-b). According to the presentation, the parents disagreed with the August 2022 psychological evaluation because it did "not address an instructional component" (Parent Ex. B-b at p. 21). In a June 18, 2023 email from the parents to the district, the parents indicated the district had acknowledged the parents request for an IEE and indicated it would look into the parents request for a particular evaluator (Parent Ex. C-b at p. 1). On September 18, 2023 and October 2, 2023, the parents emailed the district and indicated that they had made three requests for an IEE at district expense and detailed some components that they hoped could be included in an IEE by their preferred evaluator (Parent Ex. C-b at pp. 7-10).

On October 13, 2023, a CSE convened to conduct a "[p]rogram [r]eview" and, finding the student continued to be eligible for special education as a student with autism, recommended that the student attend a 12-month school year program in a 6:1+3.5 special class placement in a State-approved nonpublic day school with adapted physical education twice weekly and receive support of a behavioral intervention plan (BIP); related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy; and several modifications and accommodations (Dist. Ex. 7 at pp. 1, 11, 18-20, 23).[1] During the CSE meeting, the parents again requested an IEE at district expense and the district provided the parents with a list of psychologists (Parent Ex. A at pp. 14-15).[2]

The parties exchanged several emails during October and November 2023, in which they discussed the district's obligations under the IDEA and pursuant to the district's IEE policy and the qualifications and costs of the parents' preferred evaluator, the parents formally requested that the district fund an independent FBA, and the parties discussed whether an IEE could include an FBA (Parent Ex. C-b at pp. 11-37).[3]

A. Due Process Complaint Notice

In an amended due process complaint notice dated January 9, 2024, the parents reiterated their request for an IEE at district expense and detailed their proposed resolution (Dist. Ex. 1).[4] In

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

[2] The hearing record shows that leading up to the October 2023 CSE meeting, the district met with the parents' preferred evaluator (Parent Ex. C-b at pp. 7, 10-11).

[3] Some of the emails between the parties are included in both the parents' and the district's exhibits (compare Parent Ex. C-b, with Dist. Ex. 8). For purposes of this decision, only the parents' exhibit is cited in instances where the emails appear in both exhibits.

[4] The parents' original due process complaint notice was dated November 27, 2023 (Nov. 2023 Due Process Compl. Not). In a response dated December 6, 2023 addressed to the first IHO assigned to hear the matter and in in a second response dated December 29, 2023 addressed to the second IHO assigned (hereinafter "the IHO"),

particular, the parents requested a comprehensive IEE to address alleged deficiencies in the "2022 triennial reevaluation that the school district was responsible for completing" including a psychoeducational evaluation, a behavior assessment, an inclusion and educational environment assessment, a literacy assessment, and an OT assessment (id. at pp. 11-13).

B. Impartial Hearing and Impartial Hearing Officer's Order

An IHO was appointed before whom the parties appeared on three separate dates (see Feb. 8, 2024 Tr. pp. 1-21; Mar. 12, 2024 Tr. pp. 1-13; Mar. 22, 2024 Tr. pp. 1-34). During a February 8, 2024 prehearing conference, the parents agreed that the request for the OT assessment was premature as the parents intended to privately obtain a comprehensive eye examination and wanted an independent OT assessment only if it was determined that the student's "vision issues interfere[d] with his ability to perform academically in school" (Feb. 8, 2024 Tr. pp. 14-15; Dist. Ex. 1 at p. 13). During the March 22, 2024 impartial hearing date, the parties agreed to resolve the claims raised in the parents' amended due process complaint notice by the district funding an independent psychoeducational evaluation with a specific reading evaluation included at a cost of no more than $3,500, an FBA by an independent Board Certified Behavior Analyst (BCBA) or Licensed Behavior Analyst (LBA) with a degree in education, and an inclusion and educational environment assessment at a cost of no more than $3,500 (Mar. 22, 2024 Tr. pp. 25-26, 28-32; see Dist. Ex. 1 at pp. 11-13).

In an a so-ordered decision dated April 9, 2024, the IHO memorialized the parties' agreement (IHO Order).[5] In particular, the IHO set forth the parties' agreement that the district would fund (1) "an inclusion and educational environment assessment of the student's current placement"; (2) "a private [FBA] to be conducted by an independent [BCBA] who has a degree in education so that they can integrate the instructional components into a behavior assessment; and (3) "an independent psycho-educational evaluation which will include a specific and targeted reading evaluation by a reading specialist" (id.). The order noted the parents would select the evaluators and stated the maximum cost of $3,500 each for the inclusion and educational environment assessment and the psychoeducational evaluation and stated that the district would be required to fund the FBA at market rate (id.).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in the language included in the order, which the parents contend has led to disagreements between and among the parents, the chosen evaluator, Tradewinds, and the district. The parents argue that the IHO's decision lacks "legal analysis or

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the district requested dismissal of the due process complaint notice, alleging that the complaint failed to state a proposed resolution to the problem (Dec. 29, 2023 Response to Due Process Compl. Not.; Dec. 9, 2023 Response to Due Process Compl. Not.). In an interim decision dated January 2, 2023 (which, in an apparent typographical error, was titled an "Order Denying Consolidation"), the IHO indicated that, to avoid dismissal, the parents would be required to amend the due process complaint notice within 10 business days to state a proposed resolution (Interim IHO Decision).

[5] An IHO is not precluded from so-ordering a settlement reached by the parties to a due process proceeding provided the order addresses matters within the due process complaint notice or amended due process complaint notice (8 NYCRR 200.5[4][iii]).

explanation" as to why the evaluations were ordered and "is apparently ambiguous" about whether the parents and private evaluators could "define [the] reasonable scope and goals for the ordered evaluations."

With respect to issues that arose after the IHO issued the order in the matter, the parents indicate that Tradewinds expressed concerns about the assessments taking place at Tradewinds noting that the assessments were "highly unusual" in the school setting given that "NY does not allow for parents to obtain an FBA as an IEE and an 'inclusion evaluation' is not a CSE evaluation within the special education regulations," insisted that Tradewinds was not a party to the due process proceeding and could not be ordered to provide any relief relating thereto, and requested specific parameters of the evaluations be articulated and put in writing. The parents argue that the IHO's order is ambiguous with respect to whether the district should coordinate the private evaluator's interactions and visits with Tradewinds and with the student's district-provided reading tutor. In addition, the parents indicate that the district "took emphatic exception" to empowerED's plan to observe the student in three different environments for the FBA and initially denied a request for empowerED to tour a district school and meet with a district representative as part of the inclusion and educational environment assessment.[6] The parents also indicate that the district and empowerED cannot come to an agreement as to the market rate for the FBA.

For relief, the parents request "an explanation of the basis for ordering the independent evaluations" in the IHO's order, clarification of the definition and scope of the evaluations to address the concerns raised by the district and Tradewinds, and clarification of the "lines of responsibilities" and the degree to which the district or Tradewinds can impose conditions or restrictions on the IEE. The parents also seek district funding for empowerED's time spent corresponding about the IEEs and meeting demands made by Tradewinds for the evaluators to complete training. With respect to the costs of the IEEs, the parents request that the district be required to fund the full costs of the evaluations rather than the costs as capped by the IHO. Alternatively, the parents request that "market rate" be defined. The parents request that the district be ordered to "take care of" empowerED's "logistical and coordination needs" in conducting visits, observations, or interviews at Tradewinds or district facilities, or some other "avenue of relief" if Tradewinds can refuse empowerED the ability to conduct aspects of the evaluations at Tradewinds. For example, the parents propose that, if Tradewinds is permitted to ignore the IHO's order, the district be required "to find an interim placement" elsewhere.

In an answer, the district responds to the parents' allegations with general admissions and denials and requests that the parents' appeal be dismissed. The district argues that the IHO's order granted all of the relief the parents sought in their due process complaint notice and the parents agreed to the terms memorialized in the IHO's order and further asserts that the parents seek relief that an SRO cannot grant. The district additionally argues that the parents' appeal should be dismissed because the parents failed to timely serve the notice of intention to seek review and

[6] The parents indicate that the district ultimately allowed a tour of a district school.

because the request for review fails to comply with State regulations governing appeals to the Office of State Review.[7]

The parents respond to the district's answer in a reply.

V. Applicable Standards

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).[8]

[7] Regarding the notice of intention to seek 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). The district must file the completed and certified record with the Office of State Review within 10 days after service of the notice of intention to seek review (see 8 NYCRR 279.9[b]). In the instant matter, it is undisputed that the parents untimely served the notice of intention to seek review. However, an SRO "may, in his or her discretion . . . review the determination of an impartial hearing officer notwithstanding a party's failure to timely serve a notice of intention to seek review" (8 NCYRR 279.2[f]). Although there was a noncompliance with State regulation, the parents do not have a history of noncompliance with this aspect of State regulation and the district has not identified any prejudice in responding to the parents' request for review. Accordingly, I decline to exercise my discretion to reject the parents' request for review in this instance. With regard to the request for review, State regulations require that 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]). Inspection of the request for review shows that the parents, who appear in this appeal pro se, sufficiently identified the issues presented for review and, as a matter within my discretion, I find that any deficiencies in the request for review in this instance do not warrant dismissal of the appeal based on the failure to comply with the practice regulations.

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

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

When a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]; Letter to Petska, 35 IDELR 191 [OSEP 2001]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

VI. Discussion

Here, with exception of those matters that were withdrawn by the parents, the IHO's order granted the parents the relief sought in the amended due process complaint notice and, during the impartial hearing, the parents and the district agreed to specific terms on the record that the IHO set forth in the order (compare IHO Order, with Dist. Ex. 1 at pp. 11-13; see Feb. 8, 2024 Tr. pp. 14-15; Mar. 22, 2024 Tr. pp. 25-26, 28-32). Accordingly, the parents are not aggrieved by the IHO's order (see Educ. Law § 4404[2]). Although the parents allege that the IHO failed to explain the basis for his order, no explanation was needed given that the order was based on the parties' agreement. According to the transcript in the administrative record, the parties went off the record to negotiate resolutions to the various aspects of their disagreements then returned on the record

81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

to report their agreed upon terms to the IHO (Mar. 22, 2024 Tr. pp. 28-32). The only terms of the IHO's order that arguably limited the relief sought in the amended due process complaint notice pertain to the cost caps on the amount the district would fund for the independent psychoeducational evaluation and the inclusion and educational environment assessment and the provision for the district to fund the independent FBA at market rate (see IHO Order). However, the parents specifically agreed on the record to a $3,500 cap for the psychoeducational and inclusion assessments, so the IHO did not err in ordering such a cap on the basis of the parties agreement (Mar. 22, 2024 Tr. pp. 28, 32). The parties did not discuss a specific cost for the independent FBA with the IHO, but the IHO ordered that the district fund the FBA at no more than market rate (see Mar. 22, 2024 Tr. pp. 29-30 IHO Order). At no point during the parties and the IHO's discussions did the parent seek to offer into evidence documentation regarding the costs of the independent FBA sought or request a particular rate.[9] According to the parents, the district stated it was willing to fund an FBA at a cost of no more than $2,500, but these statements are outside the record and appear to have been made after the due process proceeding before the IHO was concluded (see Req. for Rev. ¶ 5). While the parents allege that their evaluator now finds the district's proposed rate of $2,500 to be "outrageously low," the parents do not indicate what other rate the evaluator proposes (id.). Given that the IHO's order memorialized a settlement agreed to by the parties on the record, that the evidence in the hearing record does not reflect a particular rate for the independent FBA, and the parent does not suggest a rate in his appeal, I find no basis to disturb the IHO's order. That a party later experiences remorse with the terms that were negotiated as part of a settlement and reported to the IHO is not the fault of the IHO, and there is no indication that the parents were induced to enter into the settlement under factors such as fraud or duress. While the parents complain that the IHO erred in failing provide an analysis in his order adopting the parties' settlement, the IHO was not required to conduct an analysis of the parties' negotiated, agree-upon resolution of their dispute. The basis for the IHO's order was clear—it was premised upon the parties' agreement and their preference to a negotiated resolution of their dispute, and I can only note that negotiated resolutions are often the product of compromise that avoid the risks of losses that one side or the other may find unacceptable in due process litigation.

The crux of the remaining concerns raised by the parents in their appeal relate to issues the parents are encountering in effectuating the terms of the IHO's order and, thus, are related to the enforcement of the order. It is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). Likewise, the Second Circuit has held that a due process proceeding is "not the proper vehicle to enforce the settlement agreement" (H.C. v. Colton-Pierrepont Cent. Sch. Dist., 341 Fed. App'x 687, 689-90 [2d Cir. July 20, 2009]; see A.R. v. New York City Dep't of Educ., 407 F.3d 65, 78 n.13 [2d Cir. 2005]; see also Honeoye Cent. Sch. Dist. v. S.V., 2011 WL 280989, at *3-*5 [W.D.N.Y. Jan. 26, 2011]). Accordingly, I have no jurisdiction to address the

[9] The district's IEE policy provides maximum fees allowable for several evaluations but does not contemplate an FBA (see Dist. Ex. 3 at p. 3).

parents' allegations that the district and/or Tradewinds are not cooperating with the evaluation process or are setting additional parameters on the scope of the evaluations (Vincenzo v. Wallkill Cent. Sch. Dist., 2022 WL 913094 [N.D.N.Y. Mar. 29, 2022] [addressing the scope of a settlement agreement and the extent to which it covered a third party]).

In addition, several of the parents' requests for relief are raised for the first time on appeal. 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]). With respect to relief, State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

On appeal, the parents request elucidation of the parameters of the evaluations and the parties' respective obligations, district funding for the private evaluator's time above and beyond the costs of the evaluation, and they propose alternative relief of an interim placement (see generally Feb. 8, 2024 Tr. pp. 1-21; Mar. 12, 2024 Tr. pp. 1-13; Mar. 22, 2024 Tr. pp. 1-34; Dist. Ex. 1). As the parents did not request relief in these forms in their amended due process complaint notice or during the impartial hearing, they cannot be addressed for the first time on appeal.

While I find that the parent is not entitled to any relief on appeal, for the parties' consideration, I note that some of the disagreements between the parties appear to be based on the role of Tradewinds. For both parties benefit, I note that Tradewinds is a State-approved nonpublic school and, therefore, must "conform[] with the requirements of Federal and State laws and regulations governing the education of students with disabilities" (8 NYCRR 200.1[d]; see 8 NYCRR 200.7), and, among those requirements, is the parents right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]). OSEP has stated that "if parents invoke their right to an independent educational evaluation of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement" (Letter to Mamas, 42 IDELR 10; see also Letter to Savit, 64 IDELR 250 [OSEP 2014]; Letter to Wessels, 16 IDELR 735 [OSEP 1990]).

While I do not have the authority to enforce the IHO's order that is premised upon the parties' settlement in this matter, the parents are not without recourse. If the parents feel that the district is impeding the evaluations or refusing to fund the evaluations as ordered, the parents may file a State complaint against the district through the State complaint process if they have concerns with the implementation of the IHO's order, or by seeking enforcement of the IHO's order through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R., 407 F.3d at 78 n.13).

VII. Conclusion

As there is no error in the IHO's description of the parties' settlement agreement, the parents are not aggrieved by the IHO's order that memorialized the terms thereof and seek only enforcement of the order, the settlement agreement, or additional relief that is outside the scope of the impartial hearing, the necessary inquiry is at an end.

In light of these determinations, I need not address the parents' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 15, 2024

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JUSTYN P. BATES
STATE REVIEW OFFICER