The University of the State of New York

The State Education Department
State Review Officer
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No. 23-050

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

Appearances:
The Law Office of Elisa Hyman, P.C., attorneys for the petitioner, by Elisa Hyman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which found that respondent (the district) offered her son a free appropriate public education (FAPE) for the 2019-20 school year. The district cross-appeals from the IHO's decision that awarded compensatory counseling services and compensatory education for missed pendency services. The appeal must be dismissed. The cross-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

During the 2017-18 school year, the student was eligible for special education programming as a preschool student with a disability (Dist. Ex. 5 at p. 1). For the 2018-19 school year, the student was enrolled at Yeshiva Toras Chaim of South Shore (South Shore), a nonpublic parochial school, where he repeated pre-kindergarten (Parent Ex. AA ¶ 3; Dist. Exs. 5 at p. 1; 8 at pp. 1, 2).[1] The student attended a general education class with one teacher and one teaching

[1] In early 2018 the district began the "Turning 5 process" to determine the student's eligibility for school-age special education services as it was anticipated he would "articulate[] to kindergarten in September, 2018" (Parent Ex. U at p. 1). The hearing record referred to the student's 2018-19 school year program as both pre-kindergarten and kindergarten (Parent Ex. AA ¶¶ 7, 9, 11; Dist. Ex. 4 at p. 1).

assistant and received special education itinerant teacher (SEIT) services, speech-language therapy, and occupational therapy (OT) pursuant to a pendency order from a prior impartial hearing (Parent Exs. Y at pp. 2, 14; AA ¶ 9).

As part of a reevaluation of the student, the district completed a psychoeducational evaluation of the student on May 3, 2019, which included administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV), Wechsler Individual Achievement Test-Third Edition (WIAT-III), Draw-A-Person Test, and a "[r]eview of available records, interview and informal measures" (Dist. Ex. 4 at p. 1). The results of the May 2019 psychoeducational evaluation revealed that the student's full scale IQ was in the average range for his age and his performance on the academic subtests of the WIAT-III was within average expectations for a pre-kindergarten student with the exception of the early reading skills subtest, on which he scored in the below-average range (Dist. Exs. at 4 pp. 2-3; 17 ¶¶ 9, 10).

The CSE convened on May 22, 2019 to develop the student's IEP for the 2019-20 school year (Dist. Ex. 8 at p. 14; see Dist. Ex. 11 at pp. 1, 4). Finding the student eligible for special education programming as a student with a speech or language impairment, the May 2019 CSE recommended that the student attend a district non-specialized school and receive integrated co-teaching (ICT) services for math, ELA, science, and social studies, and also recommended one 30-minute session of counseling (in a group of two) per week, two 30-minute sessions of individual OT per week, and two 30-minute sessions of individual speech-language therapy per week (Dist. Ex. 8 at pp. 1, 10-11, 13). The district issued prior written notice and school location letters on June 18, 2019, which described the recommended programming and identified the student's assigned public school site (Dist. Ex. 10).

The parent unilaterally placed the student at South Shore for the 2019-20 school year (Parent Exs. AA ¶ 20). On September 9, 2019, the parent initiated due process proceedings and the student remained at South Shore for the 2019-20 school year and received the same services he received during the 2018-19 school year pursuant to pendency (Parent Exs. A; AA ¶ 21; IHO Order on Pendency at p. 12). According to the parent, at some point during the 2019-20 school year, prior to the shift to remote instruction due to the COVID-19 pandemic, the student stopped receiving OT (Parent Ex. AA ¶ 23). In March 2020 the student began receiving remote instruction from South Shore due to school building closures resulting from the COVID-19 pandemic, but according to the parent, he did not receive speech-language therapy or SEIT services (Parent Ex. AA ¶¶ 24, 25).

The CSE convened for the student's annual review on April 29, 2020, and recommended ICT services in all academic subjects, one 30-minute session of individual counseling per week, and two 30-minute sessions of individual speech-language therapy per week (Dist. Exs. 14 at pp. 16-17). June 16, 2020 prior written notice and school location letters issued by the district noted that the student's recommended special education services would be delivered in a district non-specialized school and identified the public school the student was assigned to attend for the 2020-21 school year (Dist. Ex. 16 at pp. 1-2, 5).

The parent unilaterally placed the student at South Shore for the 2020-21 school year (Parent Ex. AA ¶ 31; see Parent Ex. X at p. 1). According to the parent, during the 2020-21 school year, the student only received speech-language therapy for the "last few months" of the school year and did not receive counseling (Parent Ex. AA at ¶¶ 34, 36).

A. Due Process Complaint Notice

In a due process complaint notice dated September 9, 2019, the parent alleged that the district's May 2019 IEP failed to provide appropriate supports for the student by: failing to place the student in the least restrictive environment (LRE), which the parent asserted was a general education class with 1:1 special education teacher support services rather than ICT services; failing to provide the student with sufficient speech-language services; failing to provide the student with appropriate counseling based on his needs; failing to create an IEP with proper goals addressing the student's areas of need; and denying the parent the opportunity to visit the proposed placement (Parent Ex. A at p. 3).[2]

As relief, the parent requested an order directing the district to provide the student with 10 hours per week of 1:1 special education teacher support services (SETSS) both inside and outside of a classroom; two 45-minute sessions per week of individual counseling; an increase to the student's speech-language services to three 30-minute sessions per week of individual speech-language therapy; and new appropriate IEP annual goals (Parent Ex. A at pp. 3-4). The parent also made a request for a pendency hearing asserting that the student's last agreed upon program was the March 2018 IEP (id. at p. 5).

B. Impartial Hearing Officer Decision and Events Post-Dating the Due Process Complaint Notice

On February 28, 2020, the parties appeared for a prehearing conference to discuss the student's placement during the pendency of the proceeding (Tr. pp. 1-46). In an interim order on pendency dated February 28, 2020, the IHO determined that the parties agreed that the student's pendency placement derived from an unappealed IHO decision in another proceeding dated April 3, 2019, which mandated: five hours per week of SEIT services; two 30-minute sessions per week of individual speech-language therapy; and two 30-minute sessions per week of individual OT (February 28, 2020 Interim IHO Decision at p. 12; see Parent Ex. Y). In the February 2020 interim decision, the IHO noted that after the issuance of the April 2019 IHO decision in the prior proceeding, the district convened a May 2019 CSE that created the challenged IEP for the student but the parent sought to incorporate some aspects of the May 2019 IEP's related services into the student's pendency placement (id.). Rejecting the parent's request, the IHO determined that parents may not add certain services from a proposed IEP to a pendency placement absent an agreement from the district; they must seek a new CSE meeting to create a new interim service plan (id.).

While the impartial hearing was pending, the CSE convened on April 29, 2020 to review the student's programming and develop an IEP for the student for the 2020-21 school year with a projected implementation date in September 2020 (Dist. Ex. 14). In the proposed IEP the CSE continued to recommend that the student receive ICT services for math, ELA, social studies, and science, along with one 30-minute session per week of individual counseling and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 16-17).

[2] According to the document and the parent's testimony, the September 2019 due process complaint notice was filed on the parent's behalf by a non-lawyer advocate (see Parent Exs. A at pp. 5-6; AA ¶¶ 21-22).

The parties next convened for a status conference before the IHO on October 15, 2020, at which time the parent's advocate indicated the parent had retained counsel for the parent's claims related to the 2019-20 and 2020-21 school years and counsel wanted to amend the parent's due process complaint notice (Tr. pp. 47-68).

When the parties next convened on January 26, 2021, parent's counsel appeared and indicated that she had filed a due process complaint notice and withdrew it at the request of the IHO with the expectation that she would be allowed to amend the parent's due process complaint notice in this proceeding (Tr. pp. 69-76).

The parent filed an amended due process complaint notice on February 17, 2021 (see Parent Ex. B). In the parent's amended due process complaint notice, the parent alleged that the district failed to provide the student with a FAPE for the 2019-20 and 2020-21 school years; failed to appropriately evaluate the student; failed to create appropriate IEPs; failed to provide the student with appropriate placements; and failed to follow procedural requirements (id. at pp. 1-2). The parent raised numerous allegations related to the May 2019 IEP and the April 2020 IEP (id. at pp. 3-5, 6-8). The parent also raised allegations related to a request for an independent educational evaluation (IEE) (id. at p. 9). The parent asserted that the district failed to educate the student pursuant to the April 2019 pendency decision and reserved the right to request an immediate pendency hearing in the event that the district refused to implement the student's pendency placement (id. at pp. 3, 5, 11).[3]

As relief, the parent requested a declaratory judgment holding that: the district failed to provide the student with a FAPE for the 2019-20 and 2020-21 school years; the district failed to appropriately evaluate the student in his areas of need; the district engaged in predetermination when creating the student's IEPs; and that the district discriminated against the student because of his disability (Parent Ex. B at p. 11). The parent further requested that the student's pendency be continued at an "enhanced market rate"; district funding for any compensatory education the student needed in order to put him in the position he would have been in if a FAPE had been provided or for any failure to implement pendency; district funding for compensatory 1:1 instruction or any other services recommended by an IEE; any services awarded should be delivered by providers of the parent's choice at "enhanced market rates"; reimbursement for any out-of-pocket expenses; and attorney's fees (id. at pp. 11-12). The parent also requested that the IHO order independent evaluations on an interim basis, including, a speech-language evaluation; an auditory processing evaluation; a neuropsychological evaluation; an OT evaluation with a focus on sensory processing; an assistive technology evaluation; and a social skills/executive functioning observation (id. at p. 12).

In March 2021, the parent filed a due process complaint notice commencing another proceeding seeking an IEE for the student, specifically requesting a neuropsychological

[3] Although the parent's February 2021 amended due process complaint notice documents the April 2019 pendency decision as being dated April 13, 2019, the April 2019 pendency decision was dated April 3, 2019 (compare Parent Ex. B ¶ 21 with Parent Ex. Y at p. 14).

evaluation, a speech-language evaluation, and a social skills and executive functioning observation (SRO Ex. A).[4]

Through a written interim decision dated April 9, 2021, the IHO consolidated the February 17, 2021 due process complaint with the March 26, 2021 due process complaint as they concerned the same student (April 9, 2021 Interim Order at p. 1, see Parent Exs. B).

The parties proceeded with an impartial hearing on November 10, 2021, which concluded on December 22, 2022 after five days of proceedings (Tr. pp. 77-739).

In a decision dated February 12, 2023, the IHO noted that the 2019-20 and 2020-21 school years were at issue and that the parent requested compensatory educational services and an order directing that the district fund an IEE for the student (IHO Decision at p. 55). The IHO determined that the district demonstrated that it offered the student a FAPE for the 2019-20 school year (id. at pp. 56-57). Specifically, the IHO decided that the hearing record established that the district used sufficient and credible information when developing the student's 2019-20 school year IEP (id.). The IHO further found that the district showed that it would have been able to deliver its recommended ICT program to the student in the LRE (id. at p. 57). The IHO noted that while the student received 1:1 instruction under his preschool IEP, it was reasonable for the CSE to determine the student did not require 1:1 instruction to receive a FAPE for the 2019-20 school year (id.). The IHO noted that he found the district's witnesses to be credible and that their testimony supported the appropriateness of the recommended program (id. at p. 58). The IHO then found that the witness who testified regarding the assigned public school was credible, and the district demonstrated that the school could have implemented the student's IEP and the parent did not allege an inability of the assigned school to implement the IEP (id. at pp. 58-59).

Regarding the 2020-21 school year, the IHO decided that the district failed to meet its burden to prove that the student was offered a FAPE (IHO Decision at p. 59). The IHO explained that he found that the district school psychologist was not credible having given testimony that the IHO found to be "quite concerning" (id.). The IHO noted that "[p]erhaps the CSE review was itself fine, but the record does not demonstrate that" (id.). However, the IHO stated that he found the parent's claims that the district would have been unable to implement the IEP for the 2020-21 IEP to be "unavailing" (id. at pp. 59-60).

Addressing remedies, the IHO declined to award the parent with tuition for the student's general education nonpublic school because the IHO determined that the parent's attorney did not raise the issue of tuition in her opening statement and the parent's attorney did not "conduct the[] case as a tuition reimbursement/direct payment case" (IHO Decision at p. 60). Additionally, finding the student "needed modest academic support to address similarly modest deficits," and finding the student received "substantial 1:1 academic support" through pendency, the IHO decided not to award the requested compensatory tutoring or reading specialist support (id. at p. 61).

[4] The March 2021 due process complaint notice indicated that the parent had filed a September 2020 due process complaint notice requesting an IEE; however, the September 2020 due process complaint notice was withdrawn and is not included in the hearing record (see Tr. p. 735; SRO Ex. A).

However, the IHO found that the district recommended counseling for the student but failed to provide the student with counseling services for two years (IHO Decision at p. 61). Accordingly, the IHO ordered the district to provide, or pay for, a bank of 40 hours of counseling services for the student (id.). The IHO additionally determined that the parent established that the district failed to prove that it had sufficient evidence when creating the 2020-21 IEP and ordered that the district pay for an independent neuropsychological evaluation, an independent speech-language evaluation, and an independent observation made by an expert in executive functioning and social skills (id. at p. 62).[5] Furthermore, the IHO ordered the district to provide the parent with an accounting of the services that the student should have received through pendency but did not receive, with any lack of data to be determined in the student's favor and to create a bank of unreceived pendency services to be used by August 31, 2026 (id.).[6]

IV. Appeal for State-Level Review

The parent appeals alleging that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year. The parent's request for review includes numerous challenges to the IHO's decision. Most of the allegations can be grouped into concerns regarding the evaluative information available to the May 2019 CSE; concerns regarding the CSE process including allegations of predetermination of the student's programming and a lack of parent participation in the decision-making process; concerns about the annual goals developed for the student; concerns over the May 2019 CSE recommendations including the student's management needs and ICT services; and concerns related to implementation of the May 2019 IEP. More specifically, the parent argues that the district's evaluator was unaware of the student's actual age, was unaware that the student had repeated pre-kindergarten and prepared her evaluation on the assumption that the student would be entering kindergarten, not first grade. According to the parent, the student should have been assessed for a learning disability because he was not learning at the appropriate rate. The parent further alleges that the district was unable to implement the 2019 IEP because it was created for a student in kindergarten, but the student would have been enrolling in first grade because of his age. The parent also argues that the IHO underestimated the extent and severity of the student's learning and social/emotional deficits. According to the parent, the annual goals included in the May 2019 IEP were not based on appropriate assessments and did not address all of the student's needs. The parent argues that the IHO erred in determining that the district's proposed ICT program would have been appropriate for the student. Finally, the parent objects to the relief awarded by the IHO, asserting that the IHO should have awarded compensatory education for both school years, additional compensatory education for the 2020-21 school year, reimbursement for the money she paid for a reading specialist for the 2019-20 school year and the 2020-21 school year, and additional IEEs.[7]

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[5] The IHO indicated that the completion of the IEE would create a new accrual date for any claims the parent brings based on information obtained in the evaluations (IHO Decision at p. 62).

[6] The order contains a typographical error, directing accumulated unrelated pendency services "to be utilized by the family no later than August 31, 20926," but this is most reasonably interpreted to read as August 31, 2026 (IHO Decision at p. 62).

[7] The parent also submits two exhibits with her request for review as additional evidence, a copy of the March 2021 due process complaint notice (SRO Ex. A) and a copy of the parent's post hearing brief (SRO Ex. B). The

In an answer and cross-appeal, the district generally denies most of the allegations contained in the parent's request for review and argues that the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2019-20 school year. The district further argues that the parents failed to prove that the unilateral placement was appropriate and that the hearing record lacks evidence that the student received special education services at the unilateral placement. The district cross-appeals from the IHO's award of compensatory counseling services. Additionally, the district cross-appeals from the IHO's award of a bank of compensatory educational services based on missed pendency services, arguing that the pendency in this proceeding only required the district to fund services so that any services missed should be considered the parent's responsibility.

In a reply and answer to the cross-appeal, the parent argues that the district waived its right to contest the pendency decision by failing to appeal it and that the district is estopped from arguing that the parent was obligated to locate providers for the student. The parent explained that the student was part of the class in a class action lawsuit against the district attempting to compel the district to implement pendency services. The parent argues that the district failed to raise arguments regarding notice or equities during the hearing and is therefore precluded from doing so on appeal.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures

March 2021 due process complaint notice should have been included as part of the hearing record and is accepted as additional evidence and the parent's post-hearing brief was already included as a part of the district's submission of the hearing record so an additional copy of that document is unnecessary.

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]).[8]

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. May 22, 2019 CSE

Turning first to the parties dispute over the IHO's conclusion that the district offered a FAPE for the 2019-20 school year, a review of the hearing record reveals that the May 2019 CSE was comprised of a district school psychologist who participated as a district representative, a district special education teacher, and the student's regular education classroom teacher, SEIT services provider, speech-language therapist, with the May 2019 CSE meeting notes reflecting their participation (Dist. Exs. 8 at p. 16; 9; 17 ¶¶ 6, 15). The evidence in the hearing record further shows that when developing the student's IEP for the 2019-20 school year, the May 2019 CSE considered the May 2019 psychoeducational evaluation and May 2019 social history update completed by the district, as well as the student's May 2019 OT progress report, May 2019 speech-language therapy progress report, and January 2019 SEIT progress report (Dist. Exs. 10 at pp. 1-2; 17 ¶ 14). In her direct testimony by affidavit, the school psychologist testified that during the May 2019 CSE meeting, the student's classroom teacher discussed the student's "functioning and abilities," including that the student enjoyed participating in class but had "some difficulty" remaining focused throughout the day, performed well in group activities, could express himself well, and asked for help when needed (Dist. Ex. 17 ¶ 16). According to the school psychologist, the student's speech-language therapist also provided input during the May 2019 CSE meeting and discussed the student's receptive and expressive language delays and articulation difficulty producing the "th" sound (id. ¶ 17). The school psychologist testified that the student's social/emotional functioning, academic strengths and needs, physical development, and

[8] 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).

management needs were discussed during the May 2019 CSE meeting and memorialized in the May 2019 IEP (id. ¶¶ 16-23). The evidence in the hearing record shows that the parent participated in the May 2019 CSE meeting and voiced her concerns regarding the student's academic and social performance (Dist. Exs. 8 at p. 2; 9 at p. 3; 17 ¶ 25). According to the school psychologist, the May 2019 CSE's recommendation that the student receive ICT services, speech-language therapy, OT, and counseling was "appropriate to meet [the student's] needs" in the LRE and "based upon all of the evaluations and reports, as well as input from [the student's] parent, teacher and services providers" (Dist. Ex. 17 ¶¶ 25, 27). She noted that the parent did not express disagreement with this recommendation during the May 2019 CSE meeting. (id. ¶ 25).

1. Sufficiency of Evaluative Information

In this matter, much of the parent's argument that the district denied the student a FAPE for the 2019-20 school year centers on the fact that the student repeated prekindergarten during the 2018-19 school year and was therefore beginning the 2019-20 (kindergarten) school year at an age when many students in the district would typically be entering first grade. Specifically, the parent argues that the student should have been assessed based on the age and grade he would have been in had he not repeated prekindergarten. However, the evidence in the hearing record does not support the parent's argument.

Federal and state regulations provide that 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]). Any 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]).

In this case, it should first be emphasized that there is a fundamental difference between the concept of a student's chronological grade—i.e., the label assigned by the school as part of an administrative function based, at least in part on the number of years the student has been in school—and the concept of a student's functional grade level—i.e., the student's level of academic

achievement or the grade level that correlates to the academic skills that the student is able to perform or the curriculum in which the student requires instruction. The chronological grade of a student is the sort of determination that falls within the broad authority granted to the district by State law "[t]o prescribe the course of study by which the pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant" (Educ. Law §§ 1709[3]; 2554[1]; 2590-h[17]). Accordingly, matters relating to a student's promotion from grade to grade are committed to the discretion of the district (see Appeal of A.R., 54 Ed. Dep't Rep., Decision No. 16,665 [2014], available at http://www.counsel.nysed.gov/Decisions/volume54/d16665; Appeal of Y.R., 51 Ed. Dep't Rep., Decision No. 16,270, available at http://www.counsel.nysed.gov/Decisions/volume51/d16270; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013]; Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955] ["After a child is admitted to a public school, the board of education has the power to provide rules and regulations for promotion from grade to grade, based not on age, but on training, knowledge and ability"]).

During the impartial hearing, the school psychologist testified that at the time of the evaluation she knew the student had repeated prekindergarten and should have been in kindergarten based on his age (Tr. p. 201). She further testified that "as [the student was] in pre[kindergarten], [she] ha[d] to administer prekindergarten subtests," and that she could not "score a kindergarten subtest for a pre[kindergarten] [student]" (Tr. p. 202). The school psychologist confirmed that the WIAT-III test specifications called for administering subtests by enrolled grade rather than by age and described that the cover page "[had] boxes of what grade certain subtests c[ould] be administered," and noted that "in prek[indergarten] [she] could only administer early reading skills, math problem solving, and . . . also writing [subtests]" (Tr. pp. 203-04). The school psychologist indicated that she "could only administer those subtests because [the student was] in pre[kindergarten]," but noted that there were also "age-based scores," which would "fluctuate slightly" (Tr. pp. 209-10). When asked if there was a difference in how she would administer the WIAT-III to a student who was repeating a grade as opposed to a student who was in the appropriate grade for their age, the school psychologist responded that "[t]here's no difference. You have to administer the subtest for that grade" but added that there were "grade base[d]" and "age base[d]" norms (Tr. pp. 209, 210; see Tr. p. 216). She further clarified that on the WIAT-III, even though she was not able to administer kindergarten subtests, "the subtests that [she] gave [were] age based" and were normed by age and grade (Tr. pp. 215-16). The parent's claim that the school psychologist improperly administered the psychoeducational assessment is without merit.

The parent also argues that the May 2019 reevaluation, consisting of a social history and a psychoeducational evaluation, failed to assess the student in all areas related to his disability. A review of the May 2019 psychoeducational evaluation report established that the evaluation included information on the student's cognitive skills, academic performance, social skills, behavior, and attention (see Dist. Ex. 4).

The district school psychologist testified that she made the determination that the May 2019 reevaluation would include a psychoeducational evaluation and social history and noted that if she felt that additional assessments were warranted based on her findings, she would "proceed" (Tr. p. 189). She noted that since the student was a "cognitively and academically capable child,"

she did not feel any additional assessments were needed and related that this process was consistent with "best practices" (Tr. pp. 189-90). The school psychologist testified that while she did not have the student's social history update before she conducted the assessment, she "like[d] to do a psychoeducational evaluation to see if there [were] any red flags," then "compare it with the social history" and then call the parent if she had any further questions (Tr. pp. 191-92). The school psychologist testified that she reviewed documents about the student from the previous school year (Tr. pp. 192-93). She further testified that she did not formally assess the student's executive functioning skills or attention and noted that she could have completed additional assessment of the student's attentional skills after the May 2019 CSE, but "did not feel it was needed" because five-year-old students "tend to be inattentive" and if the student had "significant inattention" she would have seen it, even in a one-to-one setting (Tr. pp. 225-26). She additionally noted that while there was an "attentional component" to the student's performance in the classroom, she judged that it was "not severe enough to warrant further testing" (Tr. p. 227). Nor did she feel that the student's academic delays were severe enough to warrant further assessment to determine if he had a learning disability (Tr. pp. 227-28).

Regarding the student's cognitive skills, the May 2019 psychoeducational evaluation report indicated that administration of the WPPSI-IV to the student yielded a full scale IQ of 91 (27th percentile), with no significant strengths or weaknesses noted in subtest or index scores (Dist. Ex. 4 at pp. 2-3). On the verbal comprehension index, which measured the student's knowledge acquired from his environment, verbal concept formation, and verbal reasoning, he received a standard score of 93 (32nd percentile) and "performed comparably across subtests" (id.). On the fluid reasoning index, a measure of the student's inductive reasoning skills, broad visual intelligence, conceptual thinking, and classification abilities, the student received a standard score of 97 (42nd percentile) and "exhibited diverse skills" among subtests, which suggested that he "best demonstrate[d] his fluid reasoning skills when working with verbally-based rather than visually-based concepts" (id.). According to the report, the student "displayed typical performance for his age" across the remaining WPPSI-IV subtests (id.).

Speaking to the student's academic performance, the May 2019 psychoeducational evaluation report noted that the student's standard scores on the WIAT-III math problem solving subtest and alphabet writing fluency subtest were within the average range; however, his standard score of 83 (13th percentile) on the early reading skills subtest was in the "below average" range (Dist. Ex. 4 at pp. 2-3). On this subtest, the student knew nine of eleven letters presented, identified one letter sound in isolation, identified two of three letter groups, and matched one of five sight words to pictures (id. at p. 3). The school psychologist reported that the student had not mastered matching or providing rhyming words, matching beginning or ending sounds, or blending orally presented words (id.). The May 2019 social history noted that the student's mother reported that he was doing better academically and had "progressed for kindergarten level" (Dist. Ex. 5 at p. 1). The student had improved "a little" with writing, could write his first name, exhibited "progress with more letters," could count to 20, and knew colors and most shapes (id.). The May 2019 social history noted that the parent was concerned about the student "moving to the next level academically because a lot [wa]s expected" (id. at p. 2).

Regarding her observation of the student's social/emotional skills the school psychologist testified that "[n]o concerns regarding the student's social emotional function were noted during this evaluation, nor expressed by the parent prior" (Dist. Ex. 17 ¶ 11). The May 2019 psychoeducational evaluation report indicated that the school psychologist "immediately" established rapport with the student and he easily separated from his mother (Dist. Ex. 4 at p. 2). The report reflected that the student displayed "a happy affect," prevalent eye contact, and "age appropriate" figure drawing responses (id. at p. 4). According to the school psychologist the student spoke in full sentences, was "highly cooperative and sociable throughout the assessment," and initiated conversation (id. at pp. 2, 4). According to the report, the student followed directions "with clarification and repetition requested twice respectively" (id. at p. 2). The May 2019 psychoeducational evaluation report noted that the student swiveled in his chair, but this "did not deter him from [the] task" (id.). The report also noted that the student became "restless" during the educational assessment, asking when he would be done but he was "easily reassured" (id.).

Additionally, the May 2019 social history update report indicated that the student's teachers and therapists were working on focusing and following directions and the student had made progress but it "[was] not perfect" (Dist. Ex. 5 at p. 1). The May 2019 social history also noted the parent's concerns about the student's ability to socially interact more, become more independent, not copy others or worry about what other students were doing, and improve his self-esteem (id. at p. 2).

The evidence in the hearing record shows that in addition to the May 2019 reevaluation, the May 2019 CSE considered the student's January 2019 SEIT progress report, a May 2019 OT progress report, and a May 2019 speech-language therapy report (Dist. Exs. 10 at pp. 1-2; 17 ¶ 14). The January 2019 SEIT progress report indicated that the student exhibited developmental and social delays that affected his day-to-day classroom performance (Dist. Ex. 1 at pp. 1, 3). He had low self-esteem and, therefore, had difficulty making his own decisions and constantly copied what others said and did, both inside and outside of the classroom (id.). The student had difficulty following directions and needed "constant" repetition to follow through on tasks asked of him (id.). Speaking to the student's performance in math, the January 2019 SEIT report noted that the student counted to 30 "by rote," could count with one-to-one correspondence up to 20, recognized numbers 1 through 19, and could differentiate between "more" and "less," but only when there was a significant difference between them (id.). The January 2019 SEIT math report noted that the student's performance in the classroom was impacted by his social delays, and he required one-to-one support to complete tasks in the classroom (id.). With regard to the student's reading skills, the January 2019 SEIT progress report noted that the student enjoyed looking at books and having them read to him (id. at p. 2). The student could predict what a story was about by looking at the picture on the cover of the book when he was by himself; however, if a peer was present, the student would give the same answer as his peer or change his answer to be the same as his peer (id. at pp. 1, 2). The student could answer 'wh' questions about a story read to him, but during a group read aloud, he would give the same answer as the peer who answered before him (id. at p. 2). The January 2019 SEIT report described that the student could write his full name with prompts as needed, wrote using all capital letters, and could draw "some shapes but not all" (id.).

Additionally, the report indicated that the student learned best with visual cues and prompts, and that hands-on, project-based activities helped the student recall the lesson learned (id.).

Regarding the student's social/emotional skills, the January 2019 SEIT progress report related that the student was a happy and "sweet natured" student, who showed difficulty in the social/emotional domain (Dist. Ex. 1 at p. 2). He followed school rules and routines appropriately but "tend[ed] to show a low self[-]esteem and [wa]s always looking to his peers to make decisions for him" and his social anxiety affected his social interactions and academic performance in the classroom (id.). The January 2019 SEIT report indicated that the student had difficulty "branching out" and tended to "follow one peer around" during center time and at other times during the day (id.). The student copied his peers and would only choose an activity or item a peer had chosen (id.). According to the January 2019 SEIT report, the student also had a hard time expressing himself and using problem solving strategies in social situations, and social goals were "a major focus during each session" (id.). Role playing scenarios and a behavior chart to help the student initiate "healthier" peer interactions and decision-making skills (id. at pp. 2-3). The May 2019 SEIT report noted that one-to-one special education services were integral to the student learning how to interact in social settings (id. at p. 3).

The May 2019 OT progress report reflected the results of an administration of the Peabody Developmental Motor Scales-Second Edition to the student, which, in conjunction with clinical opinion, indicated that the student "demonstrate[d] all age appropriate fine motor and visual motor integrative skills as assessed by his [o]ccupational [t]herapist" and that those skills were "within normal limits" (Dist. Ex. 6 at p. 1). The progress report indicated that the student had exhibited "significant improvements in his skill sets" since starting OT in 2017, including using a more mature tripod grasp when writing, copying shapes, cutting with scissors, using buttons, building with cubes, and developing graphomotor skills for writing (id. at pp. 1-2). The occupational therapist also reported that "delays persist[ed] in [the] areas of spatial awareness and visual perceptual skills" and that "[t]herapy should continue" to help the student gain those skills and maintain the skills recently mastered (id. at p. 2).

The May 2019 speech-language therapy progress report relayed that the student exhibited receptive and expressive language difficulties (Dist. Ex. 7 at p. 1). According to the May 2019 speech-language therapy report, the student could answer concrete 'wh' questions on short stories but had difficulty recalling the details of stories and retelling a story in sequence (id.). The May 2019 speech-language therapy report indicated that the student had difficulty following multi-step directions and benefited from repetition and pauses to help him focus and process the information given (id.). The student was also noted to have difficulty describing and retelling events using specific language and was working on describing given objects including category, function, description, and location (id.). The May 2019 speech-language therapy report additionally related that the student misarticulated "voiced/voiceless /th/ sounds" but had shown progress in his ability to use the sound correctly in sentences and spontaneous speech during speech-language therapy sessions (id.).

Here, the evidence in the hearing record shows that the CSE used a variety of assessment tools to identify the student's needs and the IHO's did not err in finding that the evaluative information available to the May 2019 CSE was sufficiently comprehensive to identify the

student's special education and related services needs in order to develop the student's IEP (see IHO Decision at pp. 56-57).[9]

2. Annual Goals

The parent next argues that the IHO should have determined that the May 2019 IEP did not offer the student a FAPE because the district did not establish that the annual goals were written with input from the parent, based on appropriate assessments, or crafted by knowledgeable professionals. Additionally, the parent asserted that the annual goals were vague, not measurable, did not contain adequate benchmarks, and were not individually tailored to meet all of the student's individual needs.[10]

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

As noted above, the May 2019 CSE included the school psychologist, a district special education teacher, the student's classroom teacher, SEIT services provider, and speech-language therapist, and the parent (Dist. Exs. 8 at p. 16; 17 ¶ 15). The school psychologist testified that the May 2019 IEP annual goals were developed through "a combination of verbal input by all

[9] The parent additionally asserts that the district should have conducted an assistive technology evaluation because the student exhibited delays in auditory comprehension, attention, organization, visual processing, and reading that could benefit from assistive technology; however, the evidence does not support a finding that the lack of an assistive technology evaluation resulted in a denial of a FAPE to the student. When asked why an assistive technology evaluation was not conducted, the school psychologist opined that "[t]here was no need for an assistive technology evaluation" (Tr. p. 264). When warranted by the student's needs, the district must assess the student's "functional capabilities" and whether they may be "increase[d], maintain[ed], or improve[d] through the use of assistive technology devices or services (34 CFR 300.5; 8 NYCRR 200.1[e]; see 34 CFR 300.6; 8 NYCRR 200.1[f]). "The evaluation should provide sufficient information to permit the [CSE] to determine whether the student requires assistive technology devices or services in order to receive FAPE" (Letter to Fisher, 23 IDELR 656 [OSEP 1995]). Even if the district should have conducted an assistive technology evaluation, it does not appear from the hearing record that such an oversight would result in a denial of FAPE. As discussed in more detail below, the May 2019 IEP included management strategies, annual goals, ICT services, and speech-language therapy that focused on improving the student's auditory comprehension, attention, organization, visual processing and reading skills (Dist. Ex. 8 at pp. 3, 4-8, 10-11).

[10] Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4 [d][2][iv]; see 20 U.S.C. §1414 [d][1][A][i][I][cc]; 34 CFR 300.320 [a][2][ii]). This student had not been identified as requiring alternate assessments, and, therefore, did not require short-term instructional objectives or benchmarks to be included in his annual goals (Dist. Ex. 8 at p. 13).

participants" of the CSE meeting, the May 2019 psychoeducational evaluation, and the progress reports received prior to the CSE meeting (Dist. Ex. 17 ¶ 24). According to the school psychologist, "[a]ll the goals were written in collaboration at the meeting," and the CSE "discuss[ed] each goal" (Tr. p. 244).

The evaluative information available to the May 2019 CSE revealed that the student's early reading skills were below average, he had difficulty with self-regulation and sustaining attention, low self-esteem, difficulties with social interaction, and delays in expressive and receptive language (see Dist. Exs. 1; 4; 5; 6; 7). The May 2019 IEP included approximately 13 annual goals to address these needs (Dist. Ex. 8 at pp. 4-10). To address the student's visual motor, fine motor, and writing skills, the May 2019 IEP included an annual goal focused on improving the student's ability to write words and sentences with correct orientation, sequence, spacing, and motor control (id. at p. 4). To improve the student's focus and self-regulation skills, the May 2019 IEP included an annual goal for maintaining an upright seated posture and positioning for a 10 to 15-minute lesson despite the presence of auditory and visual stimuli (id. at pp. 4-5). Regarding the student's auditory comprehension skills, the May 2019 CSE developed an annual goal for the student to improve his ability to follow three-step directions containing embedded temporal/spatial concepts (id. at p. 5). The May 2019 IEP also included communication annual goals for increasing vocabulary and improving expressive language by increasing the length of sentences, articulating /th/ sounds, improving lucidity of expressions, and adhering to topic (id. at pp. 5-6). To address the student's academic needs, the May 2019 IEP included annual goals for retelling details from a story in sequential order, reading 30 consonant-vowel-consonant words, increasing sight vocabulary by 30 words obtained from the Dolch list, solving addition and subtraction problems using manipulatives, identifying what he knew about a story or topic by making predictions, and improving his writing skills (id. at pp. 6-9). Finally, to address the student's social/emotional needs, the May 2019 IEP included goals focused on developing skills such as active listening, commenting, asking questions, appropriately entering and exiting conversation and play with teachers and peers, and being an active participant in classroom and leisure activities, as well as an annual goal for choosing a solution for a social scenario when given three choices and explaining his choice, and understanding cause and effect during counseling sessions (id. at p. 10).

Review of the May 2019 IEP annual goals shows that, contrary to the parent's assertions on appeal, they contained measures to determine if the goal had been achieved (i.e. 80 percent accuracy over four sessions, 4/5 trials), how progress would be measured (i.e. recorded observation, data collection, checklists), and when progress would be measured (i.e. one time per month, one time per quarter) (Dist. Ex. 8 at pp. 4-10). Additionally, as described above, the annual goals addressed the student's main areas of need. To the extent annual goals may not have addressed spatial awareness or visual perceptual skills as asserted by the parent, inadequate goals in and of themselves are often unlikely to rise to the level of a denial of FAPE. Courts have explained that an IEP need not identify annual goals as the only vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]).

Therefore, review of the May 2019 IEP shows that, consistent with the IHO's finding, the CSE, with input from the student's then-current providers, developed annual goals to sufficiently address the student's identified needs.

3. ICT Services

The parent asserts that the IHO erred in determining that the ICT services recommended by the May 2019 CSE were appropriate to meet the student's needs. Specifically, the parent contends that the May 2019 IEP did not recommend an "ICT program," but rather a "part-time ICT class" for 30 periods per week for academic instruction, and ten periods per week in a regular education classroom "without services," and, further, that the classroom where ICT services would have been delivered had 35 students and no 1:1 special education teacher, and argues that this larger class size and lack of 1:1 special education was not consistent with the evaluative information available to the May 2019 CSE (Req. for Rev. ¶ 21). The IHO determined, and the evidence in the hearing record supports finding that the recommended ICT services, in conjunction with other supports included in the May 2019 IEP, would have been an appropriate program for the student.

As discussed above, the May 2019 CSE recommended that the student receive ten periods per week of ICT services in ELA, ten periods per week of ICT services in math, five periods per week of ICT services in social studies, and five periods per week of ICT services in science (Dist. Ex. 8 at pp. 10-11). The May 2019 CSE also recommended one 30-minute session per week of counseling in a group, two 30-minute individual sessions per week of OT, and two 30-minute individual sessions per week of speech-language therapy (id. at p. 11).

State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

In the instant case, the parent refers to "ICT classes" and "the general education portion of the [student's] school day," as if the student was recommended for two separate programs (see Req. for Rev. ¶ 21). However, the hearing record does not support this characterization. The school psychologist testified that "you have a special education teacher for the entire day "in a class where ICT services are delivered (Tr. p. 161). When asked if the recommended periods of ICT covered the "entire school week" or if the other periods were "general education" the school psychologist noted that an "integrated coteaching class is considered general education" and the student would be "covered" for all academic periods but would not have special education support for nonacademic periods "like art and gym" (Tr. p. 177).

According to the parent, at the time of the May 2019 CSE, the student's general education class at South Shore was composed of 14 students, some of whom had IEPs, with one teacher and one teaching assistant, and the student received one hour of 1:1 SEIT services per day (Parent Ex. AA ¶ 9; Dist. Ex. 5 at p. 1). Regarding the size of the district's general education classes, the school psychologist testified that the student's May 2019 IEP did not specify a class size because an "ICT classroom" was "a general education classroom" and could "vary in size," but had a "maximum" of 25 students (Tr. pp. 175-76). The district special education teacher testified that

there could have been "up to 35" students with a mix of 40 percent of students with IEPs and 60 percent without (Tr. pp. 506-07; Dist. Ex. 19 ¶ 5).[11]

While it is possible that the recommended district ICT class could have had comparably more students than the student's 2018-19 class at South Shore, review of the evaluative information available to the May 2019 CSE did not suggest that the student's class size was a concern (see Dist. Exs. 1; 4; 5; 6; 7). The May 2019 IEP related that according to the student's classroom teacher, he enjoyed participating in class but had "some difficulty focusing" (Dist. Ex. 8 at p. 1). He often needed instructions repeated and could be restless during circle time (id.). The May 2019 IEP further noted that the student had friends in the classroom and shared appropriately but was a "follower" and would copy other students who "may be doing the wrong thing" (id. at p. 2). Despite these difficulties, the IEP also reflected teacher reports that the student "work[ed] meticulously" during preferred activities such as arts and crafts, and "perform[ed] well" in organized group activities, either with a teacher working with a group or one-on-one with the student (id. at p. 1). He also answered "wh" questions during circle time, expressed himself well, and asked for help when needed (id.). Additionally, the teacher reported that the student had friends in the classroom and shared appropriately (id. at p. 2).

While the student may have been successful with the smaller class size at South Shore, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson, 325 F. Supp. 2d at 145). Moreover, the evidence in the hearing record does not lead me to conclude that the student could only successfully receive instruction in a small class, especially here, as he would have received the support of a special education teacher for core academic classes when provided with ICT services together with related services consisting of two weekly 30-minute sessions of OT and speech-language therapy each on an individual basis.

The parent additionally maintains that there was nothing in the evaluative information considered by the May 2019 CSE that suggested the student no longer needed 1:1 SEIT services. Specifically, the January 2019 SEIT progress report noted that the student, who at the time was attending "a mainstream preschool," needed SEIT and related services to help him learn skills to "function in the classroom setting," make his own decisions, and follow directions (Parent Ex. W at p. 1). According to the SEIT provider, the student required 1:1 support to be able to complete tasks in the classroom, "learn how to interact in social settings," and to improve reading skills (id. at pp. 1, 2, 3). However, the IHO found, and the totality of the evidence in the hearing record supports, that the student was "of average intelligence" and needed "modest academic support to address similarly modest deficits," such that ICT services, in conjunction with the other supports and related services the May 2019 CSE recommended for the student, were appropriate to meet his special education needs (IHO Decision at pp. 56-59, 61).

[11] One of the special education teacher's statements cannot be true as the maximum class size in which 12 special education students could constitute 40% of the class would be 30 students.

The school psychologist testified that the student had "average cognitive skills, and largely average academic skills, with the exception of the early reading skills," but did need "a little academic support" (Tr. p. 153). She stated that the May 2019 CSE considered programming consisting of a general education placement with SETSS but given the information presented during the CSE meeting regarding the parent's and providers' concerns about the student's attention and need for support throughout the school day, the CSE recommended ICT services (Tr. p. 153; Dist. Exs. 8 at p. 15; 9 at p. 4; 17 ¶ 27). She testified that she also "strongly considered, based on the reports that [she] was provided and [her] psychoeducational evaluation . . . how academically capable [the student was]" (Tr. pp. 172-73). According to the school psychologist, the "ICT teacher" could work with students in a group in school throughout the day, and their focus of instruction was "more academic" (Tr. pp. 162-63).[12] The school psychologist indicated that teachers in the class where ICT services were delivered decided what areas the student needed support with and modified that throughout the day (Tr. p. 173). She further testified that the student's social/emotional needs would be addressed through counseling primarily and the special education teacher could help "with consultation" with the guidance counselor (Tr. pp. 162-63, 165, 168-70).

When asked why the CSE did not recommend the type of program the student was receiving at the time of the May 2019 CSE meeting, namely, general education with 1:1 SEIT services, the school psychologist testified that 1:1 programming was considered to be "restrictive" and that the goal for the student entering kindergarten was "not just to meet his needs, but also to challenge him" as he needed to become "more independent" (Tr. pp. 171-72). According to the school psychologist, "[i]f you have one person sitting with you, that really doesn't foster independence" (Tr. p. 172). Additionally, while the May 2019 CSE did not recommend that the student receive a specific amount of 1:1 instruction provided by a special education teacher, the May 2019 IEP management needs included one-to-one instruction and small group, and both the school psychologist and district IEP teacher testified that small group and one-on-one instruction could be provided in the ICT classroom when needed (Tr. pp. 173, 510; Dist. Ex. 8 at p. 3).

While the parent is correct that the May 2019 IEP did not include supplementary aids and services in that specific section of the IEP (Dist. Ex. 8 at p. 11), the May 2019 CSE identified the supports necessary for the student to participate in general education classes with nondisabled peers to the maximum extent appropriate in the least restrictive environment (id. at pp. 3, 13). The May 2019 IEP included management needs to address the factors identified in the student's present levels of performance including preferential seating, modeling and reminders, repetition of instructions, teacher prompts, sentence starters, math manipulatives, token reinforcement/behavior chart, and, as discussed above, one-to-one and small group instruction (id. at p. 3). The May 2019 IEP further noted that regarding the effect of the student's needs on involvement and progress in the general education curriculum, the student required "additional supports during the day to provide management needs to address his academic and social needs" (id.). When asked why the identified supports for the student were placed in the management needs section of the IEP rather than the supplementary aids and supports section, the school psychologist testified that this was an

[12] The context of the school psychologist's testimony indicates that her reference to the "ICT teacher" refers to the special education teacher in the classroom (see Tr. pp. 162-63).

"oversight" (Tr. pp. 231-32). The school psychologist further testified that the management needs were not "optional" but rather things that the student needed and that the teacher should provide, "at their discretion, as needed" (Tr. pp. 232-33). According to the district special education teacher, the teachers in the ICT class would implement the management needs on the student's IEP based on the student's needs and depending on the lesson and noted that these needs could vary depending on the content being taught (Tr. pp. 509-12).

Here, the recommended general education classroom with ICT services, which included a regular education teacher as well as a special education teacher throughout the school day, in addition to individual speech-language therapy and counseling services, provided the student with more support than the one hour per day of SEIT services the student was receiving at South Shore and was reasonably calculated to provide the student with educational benefits.

Finally, the parent returns to another version of her age and grade arguments, contending that the district would not have been able to implement the May 2019 IEP because it was written for a student in kindergarten and had the student attended the district placement, he would have been enrolled in first grade because of his age. The argument is no more convincing in this form. Initially as noted above, matters relating to a student's grade level are committed to the discretion of the district. Moreover, the student's chronological grade is akin to a categorical label of the sort that has been deemed irrelevant under the IDEA (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). That is, the IDEA provides that a student's special education programming, services, and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; Heather S. v. Wisconsin, 125 F.3d 1045, 1055 [7th Cir.1997] ["The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child"], citing Rowley, 458 U.S. at 181, and Board of Educ. of Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ.,41 F.3d 1162, 1166 [7th Cir.1994]; M.R. v S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (emphasis in original)]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis" in an IEP "will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]; see generally In re: Student with a Disability, 110 LRP 23554 [SEA VA 2010]). Accordingly, having determined that the May 2019 IEP recommended an appropriate program for the student, the specific grade the student was assigned to attend for the 2019-20 school year is not something that should result in a denial of FAPE. While it may be possible in certain cases that the assignment of a student to a particular grade level may give rise to an inference of a possible functional grouping violation (see 8 NYCRR 200.6 [h]), this argument has not been sufficiently made in this case and the evidence in the hearing record would not support such an argument. There was, as the IHO points out, considerable testimony regarding the impact of the parent's decision to delay the student's entrance into school-age programming and the question of what

grade the student would have been placed in had he been enrolled in the district. However, the district IEP teacher who assigned students in the recommended public school site testified that the student would not have been assigned to a grade until he was registered in the school and as she had never experienced such a situation, she could speculate how the decision regarding grade assignment for this student would be made (Tr. pp. 595-96, 601). The evidence does not show that the district was incapable of delivering the services listed in the IEP and, furthermore, it does not convince me that there is sufficient reason to overturn the IHO's decision to dismiss the parent's challenges with respect to the 2019-20 school year.

B. Relief Requested

1. Compensatory Relief

Turning to the parties' dispute over the IHO's findings related to the following school year, the district did not challenge the IHO's conclusion that the district denied the student a FAPE for the 2020-21 school year. Accordingly, that adverse determination has become final and binding upon the district (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Instead, the parties' dispute centers on the relief ordered by the IHO. The IHO held that considering the 1:1 support the student received under pendency, there was no basis in the hearing record to conclude that the student required compensatory tutoring or the services of a reading specialist; however, the IHO found that the student was entitled to some compensatory relief for the 2020-21 school year and awarded 40 hours of counseling services (IHO Decision at pp. 61, 63). Specifically, the IHO determined that although counseling was not included in the student's pendency program, because the district recommended that the student receive one 30-minute session per week of counseling for the 2019-20 and 2020-21 school years, the student should receive 40 hours of counseling services (id.).[13] In review of the hearing record the IHO's decision to award counseling services as a compensatory service was reasonable, and, although the district argues compensatory services were unnecessary because the student made an undefined amount of social progress by December 2022, this argument does not provide a sufficient basis for departing from the IHO's award. Additionally, in review of the IHO's decision, the 40 hours of counseling services was provided for relief for only for the school year that the IHO determined the district failed to offer the student a FAPE, namely the 2020-21 school year. As the IHO's determination that the district offered the student a FAPE for the 2019-20 school year is thorough and well-reasoned, it will be upheld and the parties' arguments for a change in the award of counseling services is denied.

Next, the parent requests a compensatory education award of reimbursement for the student's reading specialist tutoring services and private school tuition for portions of the 2019-20 school year and all of the 2020-21 school year (Req. for Rev. ¶¶ 28, 29). The parent argues that she should be allowed to submit invoices and proof of payment in order to receive reimbursement.

Initially, to the extent the parent is requesting reimbursement for the cost of tuition at the student's nonpublic school place and for privately obtained tutoring services, such a request should

[13] The IHO further awarded the parent a bank of services equal to the student's accumulated unused pendency services for the 2020-21 school year, but as the district did not appeal this portion of the IHO's decision, it has become final and binding upon the parties.

be assessed under the Burlington-Carter framework. There is no evidence in this case that the parent obtained the reading specialist's services with the consent of district officials. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] ["Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in

> determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

Regarding the parent's request for reimbursement relief, the IHO correctly determined that there was not enough evidence in the hearing record to support the parent's request for tuition reimbursement. Specifically, the IHO noted that "[w]ithout the benefit of any documentation from the nonpublic program or any witness testimony from the school concerning the relevant school years, I would be hard pressed to conclude that the family had sought to address, much less make, a demonstration of the propriety of the unilateral placement" (IHO Decision at p. 60).

Additionally, even assuming for the sake of argument, that it was permissible for me to consider the parent's request for reimbursement for the student's private services as one for compensatory education, the hearing record does not support departing from the IHO's determination.[14]

The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim

[14] With regard to the parent's argument that the IHO improperly shifted the burden of proof to the parent regarding compensatory education, in another recent case, I addressed growing concerns that blending Burlington/Carter reimbursement relief and compensatory education relief in this manner would become unworkable because both Schaffer v. Weast, 546 U.S. 49, 59-62 (2005) and Education Law § 4404(1)(c) place the burden of proof on parents to show that the private services for which they seek reimbursement were appropriate and reasonably calculated to enable the student to receive the educational benefits defined by Rowley (Application of a Student with a Disability, Appeal No. 23-096). In recent years, SROs have interpreted the State's burden-shifting legislation as placing the burden on districts with regard to parental requests for compensatory education. But in this case, it would be unfair to place the burden of production and persuasion on the district to disprove the need or appropriateness of the reading specialist's past services as compensatory education because it would force the district to acquire all of the relevant evidence from the parent and the parent would have little motivation to assist the district in its litigation defense and, more likely, would be incentivized to thwart the production of the evidence in any manner legally permissible.

to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Addressing the parent's request for reimbursement for the student's reading specialist, the IHO noted that the student was receiving "substantial 1:1 academic support… beyond that mandated in the IEPs, by virtue of pendency" (IHO Decision at p. 61). Essentially, the IHO determined that the services the student received through the provision of services under pendency had the effect of placing the student in a position equivalent to where he should have been had a FAPE been offered. The hearing record supports this determination, and, therefore, the IHO correctly held that there was no basis in the record to support the parent's argument that the student required the services of a reading specialist as compensatory education (id.). Accordingly, the parent's request for additional compensatory relief is hereby denied.

2. Additional IEEs

In the parent's February 2021 amended due process complaint notice, the parent requested that the IHO order IEEs, including a neuropsychological evaluation, a speech-language evaluation, an observation of the student by an expert in social skills and executive functioning, an OT evaluation, an auditory processing evaluation, and an assistive technology evaluation "to inform the record, or, at a minimum, at the end of the case" (Parent Ex. B at p. 12). In the parent's March 26, 2021 due process complaint notice, which was consolidated with the February 2021 amended due process complaint notice, the parent indicated that she had requested an IEE of the student in a September 22, 2020 due process complaint notice, which was subsequently withdrawn, and asserted that based on the September 2020 due process complaint notice, she wanted a neuropsychological evaluation, a speech-language evaluation, and an observation of the student by an expert in social skills and executive functioning (SRO Ex. A). As relief, the IHO ordered the district to fund a neuropsychological evaluation, a speech-language evaluation, and an observation of the student by an expert in social skills and executive functioning, and as neither party has appealed that portion of the IHO's order, once again, it has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). In her appeal, the parent requests an order directing the district to fund an IEE including an OT evaluation, an auditory processing evaluation, an assistive technology evaluation, and a vision evaluation (Req. for Rev. ¶ 24).

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]).[15]

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" (Trumbull, 975 F.3d at 170).

While there are claims that the district failed to adequately evaluate the student, and it shows that the parent initiated a claim for publicly funded IEEs in the September 9, 2020 due process complaint notice and repeated those claims in her March 26, 2021 due process complaint notice and February 17, 2021 amended due process complaint notice, there is no evidence that the parent sought IEEs at public expense prior to their September 2020 due process complaint notice, which is not included in the hearing record, or how the district responded, if at all, to the parent's request.

It must be noted that I have concerns with the parents' inclusion of the request for an IEE in the due process complaint notice in the first instance (see Parent Ex. A at p. 8). In past decisions SROs, including the undersigned, have permitted a parent to request a district-funded IEE in a due process complaint notice in the first instance (see, e.g. Application of the Dep't of Educ., Appeal No. 21-135); however, I have also expressed reservations that this is not the process contemplated by the IDEA and its implementing regulations (Application of the Dep't of Educ., Appeal No. 23-034; Application of a Student with a Disability, Appeal No. 22-150) and my observation is that the approach has caused more problems than it resolves (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). The statute clearly indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]). The process envisions that a district has

[15] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021][discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at *2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at *14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at *18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether and granting IEE at public expense];[16] Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 168-69 [2d Cir. 2020]).[17] My continued study of the judicial and administrative guidance on the topic has led me to change my previous approach of allowing parents to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement and request for an IEE with the district first).

Additionally, the stated purpose of the parent's request for IEEs in the February 2021 amended due process complaint notice, as opposed to the ones requested in the March 2021 due process complaint notice, was to inform the hearing record (Parent Ex. B at p. 12).[18] The IHO granted the IEE request as raised in the March 2021 due process complaint notice and denied the additional evaluations requested in the February 2021 amended due process complaint notice (IHO Decision at pp. 61-62). As the purpose of the request for evaluations in the February 2021 amended due process complaint notice was to inform the hearing record and the IHO rendered his final decision on February 12, 2023, the additional requested evaluations will not have any impact on informing the hearing record and are therefore moot for the purpose of this appeal.[19] The parent's request for an award additional independent evaluations at district expense is hereby

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

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

[18] To the extent that the parent is arguing that the district engaged in procedural violations justifying an award of compensatory relief, a review of the hearing record indicates that any such violations were not substantive and therefore will not be discussed, except to note that the district should follow proper procedural protocols.

[19] If an IHO believes that IEEs are appropriate and necessary, the IHO should make an effort to order IEEs at the beginning of the proceeding so that the IHO will be able to utilize the results of the IEEs. Ordering IEEs for the purpose of informing the hearing record at the conclusion of a hearing makes little sense, as the IHO will not have the benefit of reviewing the finalized IEEs before the IHO's decision is rendered.

denied. If the parent believes that the student is in need of such IEEs, the parent should notify the district in a proper manner outside of the due process hearing system that she is seeking IEEs at district expense; however, it should also be noted that the parent has been already been awarded the IEE she initially requested as a part of this proceeding and only one IEE is permissible per district evaluation with which the parent disagrees (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

3. Pendency

The district appeals from the IHO's award of a bank of unused pendency services. According to the district, the parent took it upon herself to secure the student's SEIT services under pendency and, therefore, the district was not responsible for any services that were missed.[20]

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where

[20] With respect to related services, specifically OT and speech-language therapy, the district does not dispute that it was required to provide these services but asserts that the parent should obtain the services by filing an action in court rather than obtaining them through the current proceeding. The district appears to contend that the IHO in this matter did not have authority to "enforce" his pendency decision; however, that argument is without merit, because an IHO or an SRO on appeal can permissibly make a determination as to a compensatory award for a district's failure to meet its obligations to deliver a student's education programming under pendency.

district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

The district contends it was not directly responsible for the actual delivery of services pursuant to pendency and accordingly any lapse in services cannot be attributed to it. However, this argument is contrary to the IHO's interim decision on pendency in this matter, a decision from which it has not appealed. The IHO specifically ordered that the student's placement for the pendency of this proceeding derived from an April 2019 IHO decision which mandated five hours per week of individual SEIT services, two 30-minute sessions per week of individual OT services, and two 30-minute sessions per week of individual speech-language therapy services (February 8, 2020 Interim IHO Decision at p. 12). Additionally, the IHO ordered "the district to provide the services detailed above" (id.). The district's argument appears to be entirely based on its own interpretation of the April 2019 IHO Decision from the prior proceeding; however, that decision was not as clear as the district asserts. In particular, although the April 2019 IHO decision directed the district "to fund" SEIT services at a specific rate, it also directed the district to "continue services outlined in the pendency order for the 2018-19 school year, including five hours of [SEIT] services" (Parent Ex. Y at p. 14). Of course, regardless of what the district's interpretation of the April 2019 IHO decision was, that decision was only the starting point for pendency in this proceeding, which was set by the February 8, 2020 Interim IHO Decision. If the district believed that it was not required to "provide" SEIT services as part of pendency in this proceeding, it was required to appeal from the IHO's interim decision, and it did not do so. Accordingly, the district has not presented a valid reason for overturning the IHO's award of a bank of compensatory education for missed pendency services.

VII. Conclusion

Based on the discussion above, there is no basis to overturn the IHO's finding that the student was offered a FAPE for the 2019-20 school year, that the student is entitled to a bank of compensatory education for missed pendency services and the student is entitled to compensatory counseling services for the district's denial of a FAPE to the student for the 2020-21 school year.

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 18, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER