



The University of the State of New York

The State Education Department
State Review Officer
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No. 23-077

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 petitioner, by Erin McCormack-Herbert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2020-21 school year were appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As a young child the student exhibited delays in speech and motor development and received special instruction along with speech-language therapy, occupational therapy (OT) and physical therapy (PT) through the Early Intervention Program (Parent Exs. K at p. 2; M at p. 1). The student attended a 12:1+1 special class for two years of preschool where he also received speech-language therapy, OT, and PT (Parent Exs. K at p. 2; M at p. 1). For kindergarten (2013-14 school year) the student attended the public school (Parent Ex. A at p. 3). He was found eligible for special education as a student with a speech or language impairment and received integrated

co-teaching services, speech-language therapy, OT and PT (Parent Exs. A at pp. 2-3; M at p. 1). The student received the same services during first grade (2014-15 school year); however, the frequency of his speech-language therapy and PT was reduced (Parent Ex. A at p. 3).

In April 2015 the parent obtained a developmental evaluation of the student and the developmental pediatrician who conducted the evaluation thereafter sent a letter dated April 13, 2015 to the student's primary care physician (Parent Ex. M). The developmental pediatrician noted that a CSE meeting had recently been held for the student and the services "were staying the same" (Parent Ex. M at p. 1). The pediatrician further noted that the parent wanted a new evaluation and additional services and that the district had agreed to reevaluate the student after spring vacation (id.). The developmental pediatrician administered an intelligence test to the student which yielded an IQ composite standard score of 99 which was in the average range (Parent Ex. M at p. 3). She noted that the student was impulsive and tended to answer quickly (id.). The developmental pediatrician also administered an evaluation of school-related skills, on which the student's performance was deemed "[a]cceptable" and a behavior rating scale which yielded "significant" scores with regard to inattention and hyperactivity/inattention (id.). According to the developmental pediatrician, the student presented with decreased muscle tone, but was well related and cooperative (Parent Ex. M at p. 2).¹ Based on the student's performance the developmental pediatrician offered the following diagnoses: language development disorder; motor delay, inattention, and problems with learning (id. at p. 3). She noted that the student continued to exhibit delays in language and motor skills, that inattention was affecting the student's performance, and that academics were notable for weaknesses in reading and writing skills (id.). The evaluator recommended that additional educational interventions, such as "resource room or special education teacher support services (SETSS)" be considered to address reading and writing (id.).

In July 2015 the student's classification was changed to learning disability (Parent Ex. A at p. 4). For second grade (2015-16 school year) he received ICT services, SETSS, and related services of speech-language therapy, OT and PT (Parent Ex. A at p. 4). For third grade (2016-17 school year) the student's SETSS were discontinued and replaced with AIS for ELA, and related services were decreased (Parent Exs. A at pp. 4-5; P at p. 4). The parent obtained private tutoring for the student beginning in November 2016 (Parent Ex. A at p. 5).

In April 2017 the student was referred for an educational evaluation due to concerns regarding his academic functioning (Parent Ex. L at p. 1). The evaluation resulted in a report dated May 14, 2017, which indicated that the student attained scores in the average range on measures of reading comprehension, sight word vocabulary, and oral reading fluency but "far [b]elow [a]verage" on a measure of decoding skills (Parent Ex. L at p. 2). According to the evaluation report, the student's overall writing skills including spelling, sentence composition, and essay composition fell within the average range, as did the student's overall math skills (Parent Ex. L at pp.2- 3).² A June 7, 2017 (third grade) teacher questionnaire indicated that the student was reading

¹ At the time of the April 6, 2015 medical/developmental evaluation report the student was attending first grade in an integrated Co-teaching class as a student with a speech or language impairment pursuant to an Individualized Education Program (IEP) (Parent Ex. M at p. 1). According to this report the student was receiving OT, PT, and speech-language therapy but no specific reading intervention (id.).

² Although the May 14, 2017, educational evaluation report did not identify whether it was completed by a district

on grade level but exhibited weaknesses in his ability to provide evidence to support his thinking and in determining the meaning of unknown words (Parent Ex. P at p. 1). The teachers who completed the questionnaire reported that the student's math skills were at the third grade level but that the student presented with challenges related to multistep word problems and explaining mathematical thinking (id.). The student's teachers reported that the student's writing skills were below grade level with strengths in creating paragraphs, but challenges related to editing, and writing an introduction and conclusion (id. at p. 2). Lastly, the student's teachers reported that he adjusted "very well," was happy, sweet, and had many friends (id.).

A private evaluator saw the student for a neuropsychological evaluation on June 19, 2017 (Parent Ex. K at p. 1). Administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V), yielded a full scale IQ of 85 which was in the low average range (id. at p. 8). The evaluator reported that the student's scores on the fluid reasoning and working memory indices were in the average range, verbal comprehension and processing speed indices were in the low average range, and visual spatial index was in the very low range (id.). The student's scores on the nonverbal index, general ability index, and cognitive proficiency index were all in the low average range (id. at p. 16).

The private evaluator reported that the student's academic skills were assessed using the Woodcock Johnson III Normative Update Tests of Achievement and the Woodcock-Johnson IV Tests of Achievement which indicated that the student's decoding skills, word reading, sentence reading fluency, and vocabulary skills were in the average range, while his word attack skills and reading comprehension were in the low average range (Parent Ex. K at p. 16). With respect to reading, the private evaluator further elaborated that the student's difficulties with decoding and word attack skills included problems with understanding vowel and consonant blends, attention to all vowels and consonants read, and addition, omission or transposition of syllables (Parent Ex. K at p. 10). The student's oral comprehension, spelling skills, and picture vocabulary were also reported to be in the low average range and his math skills for both calculation and problem solving were reported to be in the average range (id.). The June 2017 neuropsychological evaluation report indicated that the student presented with challenges in fine motor skills, receptive and expressive language, attention skills, and memory and noted that the student's challenges interfered with his ability to function without supports (id. at p. 16).³

The student has been the subject of prior administrative due process proceedings (Parent Exs. A at pp. 5, 11; B; D). After the parents filed a due process complaint notice, in a decision dated September 18, 2017 an IHO found that the district denied the student a FAPE for a portion of the 2014-15, 2015-16, and 2016-17 school years and ordered it to fund independent speech-language, OT, PT, assistive technology and psychiatric evaluations, and that upon completion of the evaluations the district would meet and modify the student's IEP by adding afterschool tutoring

teacher or a private provider, the absence of letter head signifying it as a district document would suggest it was generated by a private provider (Parent Ex. L at p. 1).

³ The 2017 neuropsychological evaluation report indicated that the student needed additional tutoring outside the classroom setting, not delivered as pull-out instruction at school but rather in a tutoring center, because his delays were "much more severe than they appear[ed] and a great deal of individualized instruction [was] needed for him to have the essential skills needed to best utilize his classroom setting" (Parent Ex. K at p. 17).

and related services to the IEP, unless contraindicated by the evaluations (Parent Ex. B at p. 21). In addition, the IHO ordered the CSE to consider and implement the recommendations of the assistive technology evaluator and discuss the necessity of a 12-month program (id.). The IHO also ordered the district to provide the student with compensatory services in the form of academic remediation, speech-language therapy, OT and PT (id.).

Following the IHO's September 2017 decision several independent evaluations of the student took place. The results of a PT evaluation, conducted in October 2017, indicated that the student presented with "decreased overall [] gross motor skills, low-muscle tone in his trunk and lower extremities and decreased fluidity and quality of movement" (Parent Ex. H at p. 5). The evaluation report noted that the student demonstrated decreased strength, balance, stability, and coordination (id.). In addition, the evaluation report stated that the student's deficits could impact his ability to safely and efficiently maneuver through his environment independently, keep up with his peers especially in the school setting, and impact his overall function with activities of daily living and during educational related activities (id.).

Next, the student was seen in his home for a speech-language evaluation on November 7, 2017 (Parent Ex. J).⁴ At the time of the evaluation the student was attending fourth grade in a district school in an integrated co-teaching (ICT) classroom of 29 students (id. at p. 1). According to the November 2017 speech-language evaluation report, the student presented with delays in several areas which the examiner opined were compromising his academic success and "put him at risk for delayed language functioning" (id. at p. 11). Specifically, based on the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-5) the examiner indicated that the student had delays in his overall vocabulary, word knowledge, comprehension, listening, and memory tasks (id.). The examiner also noted that the student's expressive language, both spoken and written, was fragmented or tangential at times and his reading comprehension was depressed (id. at pp. 11-12). Further, assessment on the Oral and Written Language Scales – Second Edition (OWLS-II) indicated that the student's written content was marked by syntactical and semantic errors with weaknesses in spelling and punctuation (id. at p. 12). Further assessment using the Word Identification and Spelling Test (WIST) found the student had above age level decoding abilities, but he demonstrated significant delays in spelling and sound-symbol knowledge and his overall literacy abilities were delayed (id. at p 12).

The speech-language pathologist who conducted the November 2017 speech-language evaluation also conducted an assistive technology evaluation of the student in his home on the same day (Parent Ex. I). The examiner indicated that the student had several challenges related to his ability to access the curriculum which impeded his academic success, and she recommended specific tools (an iPad and applications) to support the student in the classroom and to afford him the ability to increase his skills in the areas of writing, organization, comprehension, spelling, vocabulary expansion, and syntax (id. at p. 5). The examiner also recommended that the student receive training to ensure "confident access" to the recommended tools (id.).

⁴ Given the lack of district letter head, the speech-language evaluation appears to have been conducted by a private evaluator (Parent Ex. J at p. 1). The examiner reported that the student was referred to her "as a component of an impartial hearing" (id. at p. 11).

A CSE convened on June 25, 2018 and found the student eligible for special education services for the 2018-19 school year as a student with a learning disability (Parent Ex. C at p. 1). The June 2018 CSE recommended that the student receive ICT services for his core academic subjects and also recommended that the student receive related services of counseling, along with the after-school services of tutoring, speech-language therapy, occupational therapy, and physical therapy (id. at pp. 15, 17). The June 2018 CSE also recommended resources to address the student's management needs including: graphic organizers; checklists; question prompts; transition words and key words charted; extra time; small group instruction; content and questions scaffolded and rephrased; different methods of assessment; and assistive technology (id. at p. 5). The CSE recommended supplementary aids, modifications, and accommodations including: extra time to complete assignments, organizers, checklists, small group instructions, scaffolded questions, and focus prompts (id. at p. 17). The June CSE recommended that the student be provided assistive technology devices and 25 hours of individual assistive technology services (id. at p. 17). The CSE further recommended the student for a 12-month program consisting of direct individual s SETSS for math and ELA in a separate location at a district non-specialized school (id. at pp. 17-18). The CSE also recommended testing accommodations of extended time (time and a half); tests read; on-task focusing prompts; separate location of no more than 12 students; and the use of aids and an assistive technology device (id. at p. 18). The educational program and services developed by the CSE and set forth on the June 2018 IEP appear to incorporate specific services previously ordered by the September 2017 IHO Decision to be included in the student's IEP (compare Parent Ex. B at pp. 20-22 with Parent Ex. C).

On June 30, 2019 the parent filed a second due progress complaint notice with regard to the 2017-18, 2018-19, and 2019-20 school years and asserted that the student's pendency (stay-put) placement was derived from the September 2017 IHO Finding of Fact and Decision and the June 28, 2018 IEP (Parent Ex. A at p. 11).

On September 10, 2019 during the student's sixth grade school year a district speech-language pathologist conducted an evaluation of the student and determined that he did not require speech-language therapy (Dist. Ex. 3 at p. 1).

On November 22, 2019 the parent filed a third due process complaint regarding the 2019-20 school year which was consolidated with the second due process complaint notice described above (Parent Ex. A at p. 11).

In an interim decision that addressed the issue of pendency dated December 20, 2019, an IHO ordered the district to provide the student with ICT services, counseling, occupational therapy, tutoring, physical therapy and speech-language therapy as described in his June 28, 2018 IEP and as directed by the IHO in his order of September 18, 2017, 10 hours of 1:1 after school tutoring, counseling two hours per week, and individual speech-language therapy (3x30), occupational therapy (3x30) and physical therapy (2x30) after school at an enhanced rate (Parent Ex. D).⁵

⁵ In a final decision dated December 23, 2020, the IHO in that proceeding ordered compensatory education relief which the parties had agreed to (Parent Ex. E).

A SETSS-ABA progress report dated June 3, 2020, indicated that the student received 10 hours of SETSS at his home each week from a private provider through a contracted agency (Parent Ex. R at pp. 1, 12).

A CSE convened on June 8, 2020 to develop an IEP for the student for the 2020-21 school year (Dist. Ex. 1 at pp. 1, 21). The CSE determined that the student remained eligible for special education services as a student with a learning disability and recommended that he receive ICT services for math and ELA for 10 periods per week each and direct SETSS in a group for mathematics and ELA for two periods per week each (SETSS classroom) (*id.* at pp. 1, 14). With respect to related services the CSE recommended that the student receive one 30-minute session per week of group (3:1) counseling, one 30-minute session per week of individual counseling; and one 30-minute session per week of group (3:1) OT (*id.* at pp. 14-15). The CSE also recommended management resources to support the student's access, participation, and progress in the general education curriculum including: graphic organizers for extended writing responses; checklists for multi-step tasks; question prompts; transition words and key words charted; extended time to complete assignments; small group instruction for reteaching and reinforcement; content and questions scaffolded and rephrased; assistive technology with writing supports; and on task focusing prompts (*id.* at p. 7). The June 2020 IEP included recommendations for testing accommodations including: extended time (time and a half); testing in a separate location of not more than 12 other students; aids/assistive technology for writing; and tests read (*id.* at p. 17).

The district issued a prior written notice on June 15, 2020, that summarized the student's continued eligibility for special education services, identified the recommendations for a 10-month program and reviewed the additional placement options that were considered by the CSE and why they were rejected (Dist. Ex. 2 at pp. 1-2). Specifically, the prior written notice indicated that a general education program with no academic supports was considered but rejected because it did not provide the student with adequate academic instruction and a special class was deemed to be too restrictive an environment for the student (Dist. Ex. 2 at p. 2).

A. Due Process Complaint Notice

The parent filed a fourth due process complaint notice dated April 30, 2021, the one that underlies this proceeding (Parent Ex. A). The parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2020-21 school year (Parent Ex. A).⁶ Initially, the parent alleged that the district failed to provide the parent with a copy of an IEP for the 2020-21 school year and that therefore the parent was unable to bring specific claims about its contents (*id.* at p. 11). With respect to CSE process, the parent alleged that the CSE was improperly constituted, failed to consider adequate evaluative information and failed to discuss goals and accommodations with the parent (*id.* at pp. 11-12).. Nonetheless, the parent alleged that the IEP failed to include methodologies for reading and writing, that the CSE applied "illegal blanket" policies concerning availability of 1:1 instruction and after school services, and that the IEP failed to include sufficient speech-language therapy, PT and OT related services and assistive technology

⁶ The copy of the April 2021 due process complaint notice in the hearing record is misdated as "April 30, 2020." (Dist. Ex. A at p. 1; *see* March 4, 2022 Tr. p. 24). In the due process complaint, 9 of the 14 pages re-alleged matters relevant to prior school years and/or the prior due process hearings because the parent asserted it was relevant to relief (*see* Parent Ex A at pp. 2-11).

(id. at pp. 11-12). The parent further alleged that the IEP failed to address the student's executive functioning needs and followed "illegal blanket" district policies by restricting the student's access to non-academic after school activities (id. at p. 12).

The parent also challenged an alleged "illegal policy" of refusing to implement the student's pendency placement without an order from an IHO and requested both as relief and pendency a suite of services arising from a prior unappealed IHO order and subsequent district developed IEP consisting of, in summary here, ICT services for academics, a twelve month school year with weekly services consisting of 10 hours of 1:1 after school tutoring, four hours of 1:1 after school speech-language therapy; three 30-minute sessions of 1:1 after school OT; and one hour of 1:1 after school PT (Parent Ex. A at p. 13). Additionally, the parent's pendency and relief claim included in-school counseling, assistive technology and testing accommodations (id.). The parent also sought compensatory education from the district for an alleged failure to implement the student's pendency (id. at p. 14).

B. Impartial Hearing, Impartial Hearing Officer Decisions, and Intervening Events

The parties proceeded to an impartial hearing on March 4, 2022, which concluded on March 6, 2023 after 11 days of proceedings (March 4, 2022 Tr. pp. 1-26; June 21, 2022 Tr. pp. 27-32; June 23, 2022 Tr. pp. 33-35; July 19, 2022 Tr. pp. 36-39; Sept. 27, 2022 Tr. pp. 40-44; Oct. 25, 2022 Tr. pp. 45-54; Nov. 14, 2022 Tr. pp. 55-59; Nov. 23, 2022 Tr. pp. 60-110; Jan. 26, 2023 Tr. pp. 1-106; Feb. 7, 2023 Tr. pp. 1-95; Mar. 6, 2023 Tr. pp. 1-28).⁷

The parties appeared for a hearing date devoted to addressing the student's pendency placement on March 4, 2022 before IHO I (Mar. 4, 2022 Tr. pp. 1-26). In an interim decision, dated April 10, 2022, IHO I found the student's pendency stay-put placement lay in the September 2017 unappealed IHO Decision and June 2018 IEP (Parent Ex. F; see Parent Exs. B; C). IHO I's interim decision found that the parties agreed that the pendency program consisted of the following:

(1) ICT in ELA, Math, Social Studies, and Science 10 Months, (2) Counseling 2x60 (1:1)- 10 months, (3) Occupational Therapy, after-school, 3x30, 1:1- 10 Months; (4) Tutoring, after-school, 10x60; 1:1- 12 Months; (5) Physical Therapy, after-school, 1x60, 1:1- 10 Months; (6) Speech Language Therapy, after-school, 4x60, 1:1- 10 Months; (7) AT: Touchscreen tablet with external keyboard, word prediction, auditory feedback, digital note taking, digital graphic organizer software, and scanning software, Daily, 1:1 10 Months; (8) AT services 25 hours, 1:1; (9) Testing accommodation: Extended time, (time and a half), tests read, on task focusing prompts, use of aids, assistive technology device. On all state, city-

⁷ The transcripts of the proceedings that took place before the first two IHOs assigned to this matter (IHO I and IHO II) are paginated separately from the proceedings that took place beginning January 2023 before the IHO who presided over the latter portion of the impartial hearing and rendered the final decision (IHO III hereinafter "IHO"). For the purposes of this decision, the transcripts of the proceedings will include the month, date and year in which the proceedings took place.

wide and classroom exams; (10) Testing Accommodation: Separate location/Room. On all state, city-wide, and classroom exams longer than 45 minutes

(Parent Ex. F at p. 3).

Following the recusal of IHO I, the matter was transferred to IHO II who presided over seven hearing dates from June 21, 2022 through November 23, 2022 (June 21, 2022 Tr. pp. 27-32; June 23, 2022 Tr. pp. 33-35; July 19, 2022 Tr. pp. 36-39; Sept. 27, 2022 Tr. pp. 40-44; Oct. 25, 2022 Tr. pp. 45-54; Nov. 14, 2022 Tr. pp. 55-59; Nov. 23, 2022 Tr. pp. 60-110).

Following the recusal of IHO II, the matter was thereafter assigned to a third IHO with the Office of Administrative Trials and Hearings (OATH) (hereinafter IHO) appointed on December 4, 2022 (IHO Decision at p. 14).

The IHO conducted a prehearing conference on December 16, 2022, and the matter proceeded to further hearings on the merits on January 26, February 7 and March 6, 2023 (IHO Ex. II; Jan. 26, 2023 Tr. pp. 1-106; Feb. 7, 2023 Tr. pp. 1-95; Mar. 6, 2023 Tr. pp. 1-28).

In a final decision dated March 27, 2023, the IHO found that the June 8, 2020 IEP developed by the June 2020 CSE provided the student with a FAPE for the 2020-21 school year (IHO Decision at pp. 5-15). With respect to a request made during the impartial hearing for the IHO to recuse himself from the matter, the IHO noted that he had orally denied the parent's request during the hearing and further explained his reasons for the denial in the decision (IHO Decision at pp. 1-3; see IHO Ex. I; Jan. 26, 2023 Tr. p. 105).

The IHO next addressed the parent's allegations of procedural violations by the CSE and found that the district provided the parent with prior written notice of the CSE's recommended educational program for the student and that with regard to the parent's claim that she did not receive a copy of the IEP, the district had satisfied the presumption of mailing and that even if a copy of the IEP had not been provided to the parent such a "procedural oversight" did not result in a denial of FAPE in this instance (IHO Decision at pp. 5, 11-12). Further, the IHO determined that the June 2020 CSE was properly constituted and considered sufficient evaluative information to develop an IEP for the student (id. at pp. 12-14).

The IHO also addressed the parent's challenges to the June 2020 IEP and determined that the IEP was reasonably calculated to enable the student to make progress appropriate with his abilities and offered the student a FAPE in the least restrictive environment (LRE) (IHO Decision at pp. 5-11). The IHO found the district school psychologist's testimony on the appropriateness of the June 2020 IEP to be credible and found that the student did not require a 12-month program or after school services in order to make educational progress and receive a FAPE (id. at pp. 9-11). The IHO also determined that the student did not require 1:1 instruction because it was not necessary for the student to make progress and would be too restrictive (id. at p. 9). The IHO found that the lack of speech-language therapy on the student's IEP did not deprive the student of a FAPE because the September 2019 speech-language evaluation determined that the student did not require speech-language therapy (id. at pp. 5, 10). The IHO also found that the ICT class placement along with SETSS for the student was appropriate, that the type and amount of related services in the IEP met the student's needs and the IEP goals also addressed the student's needs

resulting from his disability such that he could make progress in the general education curriculum (id. at pp. 10-11).

The IHO determined that the parent's claims brought under Section 504 of the Rehabilitation Act of 1973 (Section 504) as well some of the parent's claims which alleged "systemic violations" on the part of the district were outside of the IHO's jurisdiction to consider (IHO Decision at pp. 14-15). Lastly, with respect to the parent's request for compensatory services to remedy the district's alleged failure to implement pendency, the IHO found that the parent's allegations of illegal policies concerning pendency was a systemic claim outside of his jurisdiction, that the assertion that the district would or did fail to implement the student's stay put placement in the parent's due process complaint notice was premature and presumptuous insofar as the right to pendency did not arise until after the April 2021 due process complaint notice was filed and, lastly, pendency was granted in this proceeding and to the extent that the parent was seeking enforcement of a prior pendency order, the IHO did not have the authority to enforce a pendency order (id.).

Upon finding that the district offered the student a FAPE, the IHO denied the parent's requested relief and dismissed the April 2021 due process complaint notice with prejudice (IHO Decision at p. 15).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2020-21 school year. First, the parent contends that the IHO erred in failing to recuse himself from the matter, alleging a conflict of interest because the cost of relief ordered against the district must be borne by the IHO's employer. Relatedly the parent argues that the IHO decision should be reversed because the IHO exhibited bias against the parent during the impartial hearing. The parent contends that the IHO overly credited and deferred to district witnesses and evidence, erred in finding that the due process complaint notice was overly broad, presumptuous and unsubstantiated, and rejected the parent's testimony because she is an employed single mother, took umbrage at the parent's recusal motion, and allowed the district to make untimely objections to the parent's attempts to put certain evidence into the record. The parent attaches six documents to the request for review as additional evidence (see Req. for Rev. Exs. A-F).

Next, the parent asserts that the IHO erred in failing to find that the district denied the student a FAPE on procedural grounds, alleging that the CSE predetermined the student's program by refusing to consider after school services and that the district impeded the parent's participation by failing to provide her with a copy of the June 2020 IEP. The parent also asserts that the CSE failed to consider adequate evaluative information because the private evaluations made recommendations for after-school and 12-month services which were not followed, many district evaluations were older than three years, and changes were made to the student's program that were not supported by evaluative information.

The parent also asserts that the IHO erred in finding that the June 2020 IEP was appropriate because the student required after-school services, 1:1 related services, more SETSS than the IEP called for, speech-language therapy, PT, more OT and counseling than the IEP called for, and

assistive technology. The parent also asserts that the IEP goals were inadequate in that they were vague, unmeasurable, aggregated multiple skills into one goal and did not address all areas of need.

The parent also asserts that the IHO erroneously shifted the burden of proof to the parent regarding the remedy of compensatory education because the district bears this burden.

Lastly, the parent asserts that the IHO erred in failing to award relief under the parent's Section 504 claims.⁸

For relief, the parent requests "declaratory and compensatory FAPE relief" in the form of a finding that an appropriate program for the student includes all the services enumerated in the student's pendency program and an order to provide or fund as compensatory education the total amount of tutoring, speech-language therapy, OT, PT, and counseling the student should have received for the 12-month 2020-21 school year that have not already been provided to the student and paid for by the district under pendency.

Additionally, the parent requests an order for the district to provide make-up services for all mandated pendency services not provided to the extent not awarded as FAPE relief and contends that the pendency was in place for the student from July 1, 2020, through December 23, 2020 in a prior matter and from April 30, 2021 to the present in the instant matter (Req. for Rev. ¶ 24).

In an answer the district requests that the IHO decision be upheld and the parent's appeal of the IHO decision be dismissed. More specifically, the district contends that the claims against the neutrality and qualifications of OATH IHOs have been rejected in prior decisions rendered by SROs. The district contends that the additional evidence offered by the parent in the request for review should be rejected because the offered progress reports were not available to the June 2020 CSE and cannot be used to impeach the CSE's recommendations and that the emails between the parties and the district's impartial hearing office are not relevant to any issues in dispute. Regarding the parent's claim that her participation in development of the student's program was impeded by the alleged failure of the district to provide the parent with a copy of the June 2020 IEP, the district asserts that the hearing record establishes that the presumption of mailing was satisfied and that the IHO correctly determined that even had a copy of the IEP not been provided to the parent it would not have impeded the parent's participation because the parent attended the CSE meeting and was aware of the IEP's contents. The district also asserts that the June 2020 CSE did not engage in predetermination because it was aware that the student had after-school services from pendency, but the CSE did not believe that they were necessary for the student to make

⁸ An SRO lacks jurisdiction to consider challenges to an IHO's rulings, or failures to rule on section 504 or ADA claims, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]).

progress and disagreement with the parent is not predetermination. Next, the district asserts that the IHO correctly determined that the June 2020 CSE had sufficient evaluative information to develop a program for the student.

In support of the IHO's determination that the June 2020 IEP provided the student with a FAPE for the 2020-21 school year, the district asserts that the statement of the student's needs, abilities and present levels of educational performance in the IEP was accurate and included parental concerns expressed at the CSE meeting. Further, the IEP's provision of four periods of SETSS per week met the student's need for support and small group instruction and the continued recommendations for individual and group counseling as well as OT were appropriate. The district asserts that despite the clerical error of omitting assistive technology as a service on the IEP, the IEP does state that the student should receive assistive technology with writing support as a management need and assistive technology appears in one of the IEP goals, such that the clerical error regarding assistive technology did not deprive the student of a FAPE. The district contends that the evaluative information did not show a need for the student to receive speech-language therapy or PT because assessment of the student's articulation and other language skills did not reveal any significant areas of concern and the student did not present with any issues navigating the school environment and participated in regular physical education classes without restrictions.

Regarding the professed need for after-school services, 1:1 instruction and 12-month services the district contends that the IHO correctly determined that these were not required to provide the student with a FAPE because the student was performing at or near grade level in his academics while attending the ICT classroom, received small group instruction through the provision of SETSS and had not presented with any regression pointing to the need for 12-month services. The district also asserts that the June 2020 IEP goals were sufficient in that they addressed specific needs in writing, math, counseling and OT, were not vague or unmeasurable and that goals for PT or speech language therapy were not required because the student did not require those services.

With respect to the parent's request for compensatory education for missed services under pendency, the district asserts that the parent's request is akin to asking for enforcement of a pendency order, and that the parent obtained a pendency order that allowed her to select the private providers of pendency services. The district maintains that it has paid for all of the pendency services that the parent obtained and any missed services are the fault and responsibility of the parent and her chosen private providers. Accordingly, the district asserts that the parent's requests for relief should be denied and the request for review should be dismissed.

In a reply the parent addresses the district's arguments in the answer and provides additional argument for the claims asserted in the request for review.

V. Applicable Standards

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

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v.

Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁹

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. IHO Recusal and Bias

As a preliminary matter,¹⁰ the parent asserts that the assignment of an IHO from OATH, who is an employee of the City of New York presents an inherent conflict of interest, violated

⁹ 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).

¹⁰ I will briefly address the parent's request to submit additional evidence (Req. for Rev. Exs. A-F). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial

applicable law and that the IHO's denial of the parents' recusal motion was erroneous. The district responds that the parent's arguments about the neutrality and qualifications of OATH IHOs have been rejected by a District Court and an SRO.

Initially, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Recently, in response to a significant increase in the number of due process complaint notices filed in the district, an agreement between the New York State Education Department (NYSED), the New York City Department of Education, and OATH, dated December 1, 2021, explained a transition of the handling of special education impartial due process hearings in the district to OATH and provided for a separate special education unit to be staffed by IHOs employed by OATH (see Memorandum of Agreement [Dec. 1, 2021], available at <http://www.nysed.gov/common/nysed/files/office-of-administrative-trials-and-hearings-memorandum-of-agreement.pdf>). The Mayor of the City of New York issued Executive Order No. 91 on December 27, 2021 to further implement the transfer (Executive Order [de Blasio] No. 91 [Dec. 27, 2021], available at <https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2021/eo-91.pdf>).

In the motion for recusal the parent argued that "the Mayor controls both OATH and the New York City Department of Education" and that there is an "impermissible conflict of interest for IHOs to be employees of the City rather than independent contractors" (IHO Ex. I).

In review of the parent's claim and the above referenced authority regarding the transfer of special education due process hearings in New York City to OATH, I find the parent's claim to be a systemic one. An SRO lacks jurisdiction to consider a parent's claims with respect to alleged

hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The parent offered these exhibits as evidence during the impartial hearing, but the IHO did not enter them into the record, finding them not relevant (Jan. 26, 2023 Tr. pp. 90-91, 98-100). I will consider the 2020-21 school year private provider progress reports as potentially necessary to consider on the question of a compensatory education remedy (Req. for Rev. Exs. A; B). I decline to consider the remaining documents concerning the procedural history of the matter as they are unnecessary in order to render a decision (Req. for Rev. Exs. C; E; D; F).

systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Generally, "systemic violations [are] to be addressed by the courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 W L 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). One systemic challenge brought regarding the change from per diem IHOs to OATH IHOs was unsuccessful (Gronbach et. al v. New York State Educ. Dep't et.al, Index No. 910574-21 [N.Y. Sup. Ct. Alb. Cnty August 22, 2022]), and the attorneys for the parent filed a federal action which appears to remain pending (E.F. v. Adams, 2022 WL 601999, at *5 [S.D.N.Y. Mar. 1, 2022]).

Here, the parent's arguments in favor of recusal included no specific allegations against this particular IHO with respect to his impartiality or qualifications but rather were limited to the systemic issues discussed above. Federal regulations specify that the impartial a hearing officer may not be "[a]n employee of the SEA or the LEA that is involved in the education or care of the child" (34 CFR 300.511[c][1][i][A]), and there is no allegation or evidence that the IHO in this matter was an employee of the LEA, much less one that was involved in the education or care of the student. Accordingly, I find no reason for reversal on the basis that the IHO lacked impartiality or qualifications or that he erred in denying the parent's request that he recuse himself from the matter (see IHO Ex. I at p. 3).

Moving on, however, the parent also alleges that the IHO thereafter exhibited actual bias against her during the impartial hearing by "rejecting the parent's testimony because she is an employed single mother;"¹¹ "taking umbrage at the recusal motion;" "allowing the [district] to make untimely evidentiary objections;" and "disparaging the . . . compensatory pendency claim as 'presumptuous'" (Req. for Rev. ¶ 22).¹²

Regarding the parent's assertion that the IHO exhibited bias by "taking umbrage" at the parent's motion for the IHO to recuse himself, upon review of the transcript there is no evidence that the IHO's comments were the result of bias, rather counsel for the parent and the IHO were discussing the completeness of the hearing transcripts and the IHO merely stated that counsel may have had little faith in the IHO's ability to maintain a complete hearing record given the parent's

¹¹ The parent does not cite to the record directly in support of this fairly inflammatory claim, however there is a reference to the parent's status as an essential worker during the Covid-19 pandemic, a professional in a demanding position and a single mother in the text of the IHO decision, presumably as a factor weighing toward a possibility that the parent may have received a copy of the June 2020 IEP in the mail but was not cognizant of it in consideration of the parent's testimony that she typically receives IEPs and other special education documents in the mail (IHO Decision at p.12; see Parent Ex. GG ¶¶ 7, 8, 11). Assuming this is the reference that the parent was referring to, I do not find that these limited references are evidence of bias on the part of the IHO.

¹² The remaining instances of bias related by the parent are better couched as claims that the IHO mis-weighed the evidence or made erroneous legal and evidentiary rulings, both of which I have addressed directly in other portions of this decision. For example, the evidentiary rulings are discussed in the context of additional evidence, and the IHO's request that the parent make a complete calculation with respect to compensatory pendency services is discussed in the remedy context.

request that the IHO recuse himself from presiding over the matter, while the IHO assured counsel that the transcripts of all of the proceedings would be a part of the hearing record (see Tr. pp. 99-102).

With respect to biased evidentiary rulings, although the IHO did find some of the parent's offered documentary evidence to be irrelevant to the findings the IHO was required to make from claims in the due process complaint notice, the IHO admitted certain evidence offered by the parent regarding requested relief postdating the filing of the due process complaint notice as relevant but also decided against admitting similar evidence upon finding it not to be relevant, and this evidences that the IHO made thoughtful rulings based on the particular evidentiary matter before him rather than exhibiting bias against the parent specifically by consistently ruling against her as she claims (see Jan. 26, 2023 Tr. pp. 90-91, 95-96; see also Mar. 6, 2023 Tr. pp. 4-6 [ruling against the district on a mootness claim]).

In light of the above, while there are some instances of the IHO being brusque with the parties during the impartial hearing, he nonetheless remained courteous, and I see no evidence of actual bias for or against either party in the impartial hearing record. Accordingly, pursuant to my independent review of the hearing record, I decline to "reverse for bias" as the parent requests (Req. for Rev. ¶ 22).

B. CSE Process

The parent alleges that the CSE predetermined the student's program by refusing to consider after-school services and further impeded the parent's participation in developing a program for the student by failing to provide the parent with a copy of the June 2020 IEP. Additionally, the parent contends that the June 2020 CSE lacked adequate evaluative information.

1. Predetermination

In his decision, IHO generally stated that the parent's concerns were mentioned in the IEP and that other placement options were considered by the CSE, and that the evidence contradicted or did not support the parent's allegations of procedural flaws (IHO Decision at pp. 9-13). It is not clear the extent that the IHO intended to include the parent's predetermination and parent participation claims in these general findings, but if that was his intention, the rulings were adverse to the parent. As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of

Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The school psychologist testified that he was aware that the student received after school services in elementary school, but he did not specifically know what services the student was receiving during the 2019-20 school year (Jan. 26, 2023 Tr. p. 54; Feb. 7, 2023 Tr. pp. 20-21).¹³ The school psychologist stated that, with respect to after-school services, he did not believe those type of services were necessary for the student but also that the CSE meeting was not the place or the forum where the district could make those kind of determinations (Nov. 23, 2022 Tr. p. 99; Jan. 26, 2023, Tr. pp. 20, 58). He clarified that his testimonial statement about lacking authority to provide afterschool services meant that if he believed the student required such services, he would have to discuss the matter with a supervisor with reasons and data, but that he did not believe the student in this case required such services (Jan. 26, 2023, Tr. pp. 58-59). The school psychologist noted; however, that the parent could pursue the request for additional services with the district as it was not something that the CSE was able to do during the annual CSE meeting (Jan. 26, 2023 Tr. pp. 58, 61).¹⁴ Further, the school psychologist clarified a prior testimonial statement about his lack of authority meant that after school services could be recommended during a SBST meeting if they were deemed necessary but that they weren't something that he could put on the IEP during a CSE meeting itself without having further conversations with his supervisor and providing reasons and data as to why it was necessary (Jan. 26, 2023 Tr. pp. 58-59). Upon looking at the data for this student, he reported it was not something that was needed in this case (Jan. 26, 2023 Tr. pp. 58-59).

The IEP describes the parent's concerns on this point, stating that the parent "expressed concern about some of [the student's] related services interrupting his school day. It was explained to her that we are making school-based recommendations, and that if she feels other types of services would be necessary, she could make such requests directly on a district level, but we feel [the student's] needs could adequately be met with school based related services in an integrated Co-Teaching program" (Dist. Ex. 1 at p. 4).

¹³ The school psychologist testified that he was aware there was "an IEP in pendency that had home services" but was unaware of "whether those services were being provided at home with fidelity and . . . regularity" (Feb. 7, 2023 Tr. pp. 20-21).

¹⁴ With respect to the district school psychologist's comments that the CSE was "not the place nor forum" where after school services could be considered, I note that it appears that after school services were considered by the CSE but that the conclusion of the district participants was that the student did not require them (Jan. 26, 2023 Tr. p. 58). Nonetheless, there is Federal guidance suggesting that it is appropriate for a CSE to consider extended school day services in certain circumstances. For example, in Letter to Irby, a district inquired whether it could remove physical education from a student's schedule in order to provide specialized reading instruction during the school day (55 IDELR 231 [OSEP 2010]). The Office of Special Education Programs (OSEP) advised the school district that it was inappropriate to deny a student access to nondisabled peers in State-mandated physical education in order to provide additional reading instruction (id.). OSEP stated that a CSE should consider additional strategies and scheduling, such as extended school day or extended school year services, if the student required such instruction in order to receive a FAPE (id.).

Upon review of the evidence, the hearing record reflects that there was a disagreement between the parent and school district participants at the CSE meeting over whether afterschool services should be put on the proposed IEP as part of his placement, but this does not amount to predetermination by the district or a denial of the parents' meaningful participation in the development of the student's programming (see E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013]; DiRocco, 2013 WL 25959, at *18-*20; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; Sch. For Language & Comm'n Dev. v. N.Y. State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006]). The appropriateness of the district's placement recommendation is discussed further below.

2. Participation - Receipt of IEP

The parent asserts that the district failed to provide the parent with a copy of the student's IEP, the IHO erred in determining that the presumption of mailing had been satisfied or that even if district failed to provide the parent with a copy of the student's IEP it was harmless.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Among the procedural requirements in State and federal regulations is the requirement that parents must be afforded "an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a [FAPE] to the student" (8 NYCRR 200.5[d][6]; see 34 CFR 300.501; 300.613[a]).¹⁵ In addition, a district must ensure that the parents of a student with a disability are provided with a copy of their child's IEP (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]) and with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a [FAPE] to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1]). A failure to provide a copy of the IEP, the prior written notice, or other educational records is a procedural violation that does not necessarily rise to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). For example, evidence that the parent attended the CSE and had awareness of the programming recommended by the CSE may defeat a claim that such a procedural violation impeded a student's education (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013] [finding that any failure to provide the parents with a copy of the student's IEP prior to the start of the school year did not impede their opportunity to participate in the decision-making process when the parents, among other things, attended the CSE meeting with their attorney and participated in the development of the student's IEP]; see also Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

¹⁵ A district is only required to provide copies of education records "if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records" (34 CFR 300.613[b][2]).

The parent testified that she did not receive a copy of the June 2020 IEP until the impartial hearing was underway after the conclusion of the 2020-21 school year (Parent Ex. GG ¶ 30; Mar. 6, 2023 Tr. p. 14). The district school psychologist who participated in the June 8, 2020 CSE meeting speculated that since the CSE meeting took place over the phone that a copy of the June 2020 IEP was delivered to the parent via mail (Jan. 26, 2023 at p. 41; see Dist. Ex. 1 at p. 22). However, he noted that that he did not know when the IEP had been sent to the parent, and that he did not see it placed in the mail or otherwise observe a copy of the IEP being provided to the parent (Jan. 26, 2023 Tr. p. 41).

New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016]; Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that the officers of the government will do their duty and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing (T.C., 2016 WL 1261137, at *9; Nassau Ins. Co., 46 N.Y.2d at 829-30; In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires . . . in the absence of any evidence as to its being deposited with the post office authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (T.C., 2016 WL 1261137, at *9; Nassau Ins. Co., 46 N.Y.2d at 829-30).

Here, the district offered no evidence with respect to the "standard office practice or procedure" concerning the mailing of the IEP, prior written notice, or any other correspondence or documents that the district sent to the parent. Accordingly, there is no testimony by someone with personal knowledge of the regular course of business to support the legal presumption that the district attempts to rely upon. As a result, the IHO's determination that the presumption of mailing was satisfied must be set aside (see IHO Decision at p. 12).

But the IDEA does not specify precisely when a copy of a student's IEP must be provided to a parent, only that one must be "in effect" at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). The salient question,

therefore, is whether, under the circumstances present here, the failure of the district to provide the parent with a copy of the IEP resulted in a denial of a FAPE to the student. For example, in some cases, evidence that the parent attended the CSE meeting at issue and had awareness of the programming recommended by the CSE may defeat a claim that such a procedural violation contributed to a denial of FAPE (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student]; see also N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013]; Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

Here, the parent participated in the June 2020 CSE meeting via telephone (see Dist. Ex. 1 at p. 22) and there is evidence that she had knowledge of the program and placement recommendations contained in the June 2020 IEP as she was able ultimately to articulate specific challenges to the CSE's recommendations in her April 2021 due process complaint notice, despite testifying that she first saw the IEP in fall 2022 (Parent Ex. GG at ¶33). For example, the parent asserted objections to the contents of the June 2020 IEP including that the IEP failed to include methodologies for reading and writing, that the CSE applied blanket policies concerning availability of 1:1 instruction and after school services, and that the IEP failed to include sufficient speech-language therapy, PT and OT related services and assistive technology (Parent Ex. A at pp. 11-12). The parent further alleged that the IEP failed to address the student's executive functioning needs and followed district policy by restricting the student's access to non-academic after school activities (id. at p. 12). While I have determined that the presumption of mailing does not apply, I also find no evidence that the parent simply asked for a copy the missing IEP, which is not unduly burdensome since she testified that she usually receives it (Parent Ex. GG at p.7), and this sort of procedural "gotcha" is generally disfavored under IDEA. In light of the above, I decline to disturb the IHO's finding that the failure to provide the parent with a copy of the June 2020 IEP did not deprive the student of a FAPE in this instance.

3. Evaluative Information

The parent contends that the IHO erred in finding that the June 2020 CSE considered adequate evaluative information to develop an IEP for the student, asserting that the June 2017 neuropsychological evaluation recommended home-based SETSS and related services, that the 2017 educational evaluation recommended 1:1 after-school SETSS and that the district did not perform more current neuropsychological or psychoeducational evaluations prior to recommending no after-school services on the June 2020 IEP. Likewise, the parent claims that CSE did not seek a speech-language progress report before terminating the student's speech-language services and "did not recall reviewing" PT, assistive technology, or speech-language evaluations and that the OT evaluation was overdue. The parent also alleges that the June 2020 CSE had a copy of the student's June 3, 2020, tutoring progress report that recommended continuing after-school tutoring despite the district's assertion and record testimony that the CSE did not have access to the progress report (see Req. for Rev. ¶ 6; Reply ¶¶ 7-13).

The district contends that the June 2020 CSE considered sufficient evaluative data as the student's needs were reflected in the evaluative information available to the CSE and were appropriately represented in the June 2020 IEP.

Upon review of the hearing record evidence and testimony, I find that the IHO correctly determined that the June 2020 CSE considered adequate evaluative information for the reasons set forth below.

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]).

According to the school psychologist, and as documented on the June 2020 IEP, the CSE considered the September 2019 speech-language evaluation, spring 2019 New York State Exams for ELA and math, a level one vocational assessment, the student's i-Ready scores in math and reading and the data compiled from the Achieve 3000 2019-20 reading program (Nov. 23, 2022 Tr. pp. 99-101; January 26, 2023 Tr. pp. 41-44; Dist. Ex. 1 at pp. 1-2).^{16, 17} The June 2020 IEP also includes the student's May 2019 Fountas and Pinnell Benchmark (Parent Ex. 1 at p. 1).¹⁸

¹⁶ The school psychologist testified that the June 2020 CSE considered a neurological evaluation, but the hearing record is unclear as to what evaluation he is referring to as the psychologist cites to exhibit four which is not included in the admitted exhibits and does not confirm that exhibit K is the neuropsychological he was referring to (Jan. 26, 2023 Tr. p. 27, 42).

¹⁷ The school psychologist testified that he would not have referenced a November 2017 speech-language evaluation in developing the student's June 2020 IEP as there was a new speech-language evaluation performed two years later and he would be looking at the most recent assessment, not one that was old and had been replaced by a newer one (Jan. 26, 2023 Tr. p. 68).

¹⁸ At the time of the June 2020 CSE meeting the COVID-19 mandates limited in person contact with students and the public school students were receiving instruction remotely. As such, conducting appropriate and reliable formal assessments during the March to June portion of 2019-20 school year was not feasible.

The September 2019 speech-language evaluation was conducted using the following assessment procedures: a review of the student's records, interviews with the parent and student's teachers, observations of the student in his classroom and during testing, dynamic tasks and language testing, and the administration of standardized tests (see generally Dist. Ex. 3). The evaluation report indicated that, according to the parent, the student struggled with expressing his ideas and also with articulation, as his speech was "not clear" (*id.* at p. 2). According to the student's teachers, the student was functioning on the fifth grade level for both reading and math and he was well behaved, respectful, friendly, followed the rules and routines and classroom procedures with ease, and demonstrated appropriate eye contact as well as appropriate interactions with peers (*id.*). As part of the September 2019 speech-language evaluation the evaluator observed the student in his classroom where she noted he attended to the assigned activity, worked quietly and diligently to complete the task, and followed teachers' instructions with ease (*id.*). The speech-language evaluation report indicated that the student demonstrated socially related behavior during the evaluation in that he made eye contact, initiated/maintained topics of conversation, and engaged in reciprocal turn taking (*id.* at p. 3).

The evaluator administered the Goldman Fristoe Test of Articulation – 3 (GFTA-3) to assess the student's speech articulation and phonology and found that the student did not present with any sound errors or substitutions during a picture naming task, and noted that the student was very easily understood during production of single words as well as during all other testing activities (Dist. Ex. 3 at p. 3). Next, the evaluator assessed the student's language skills via dynamic tasks and formal testing (*id.* at p. 4). With respect to dynamic language tasks, the evaluator assessed the student's language comprehension, language formulation, and conversational skills via dialogue related to home and school and concluded that answering and asking simple question while engaged in conversation was an area of strength for the student (*id.*). The evaluator then assessed the student's narrative skills and listening comprehension skills using the Crowley & Baigorri School-age Language Assessment Measures (SLAM). Although the student required assistance with organizing picture sequence cards on a storytelling task, he "provided an organized oral narrative with a beginning/middle/ending, [and] essential story grammar elements plus an introduction, conclusion, temporal marker and cohesive ties" (*id.* at pp. 4-5, 9). With respect to listening comprehension, the evaluator reported that on a story comprehension task the student "responded to most questions appropriately and gathered information related to the main idea, details, and prediction" (*id.* at pp. 5-6, 9).

Next, the evaluator assessed the student's receptive and expressive language skills using the CELF-5 (Dist. Ex. 3 at p. 7). According to the evaluator, the student's scores on the word classes, formulated sentences, and recalling sentences subtests were "indicative of average abilities" in these areas (*id.* at pp. 7-8). On the following directions subtest the student's score was on the borderline between below/low average and average but the evaluator stated that it was "not a significant area of concern as the student had success comprehending one, two and three level commands with no orientation, serial order, left/right orientation and/or none, one or two modifiers" (*id.*). However, the evaluator noted that the student seemed to have more success when directives were shorter and contained simple language (*id.*). She suggested that presenting information in short, succinct and manageable chunks might be considered as a learning strategy in the academic setting (*id.*).

The evaluator stated that "[b]ased upon eligibility requirements and the results of [her] assessment, school-based speech/language services are not recommended at this time " (Dist. Ex. 3 at p. 9). She suggested strategies that might be helpful for the student (id. at pp. 9-10).

The student's June 8, 2020 IEP reflected the results of ELA and math assessments administered as part of the New York State Testing Program (NYSTP) (Dist. Ex. 1 at pp. 1-2). The student attained a performance level of "3" on the spring 2019 ELA examination which according to the IEP indicated that the student was proficient in standards for his grade (Dist. Ex. 1 at p. 1). Turning to math, the student's performance level score on the spring 2019 NYSTP math assessment indicated that he was "partially proficient in standards" for his grade (Dist. Ex. 1 at pp. 1-2). The school psychologist testified that the 2.83 proficiency score the student attained on the State testing was a "very high level 2, close to proficiency" and "close to fifth grade level" (Jan. 26, 2023 Tr. pp. 44-46). The school psychologist testified that during the 2019-20 school year, for math the student had an i-Ready grade equivalent of fifth grade (Jan. 26, 2023 Tr. p. 46; see Dist. Ex. 1 at p. 2). He clarified that his instructional level according to classwork, participation and teacher knowledge of the student would be on sixth grade level (Jan. 26, 2023 Tr. pp. 46-47; see Dist. Ex. 1 at p. 20).¹⁹

The June 2020 IEP also indicated that the data from the online program Achieve 3000 for the 2019-20 school year indicated that the student's Lexile level continued to increase as the year progressed (Dist. Ex. 1 at p. 1). The IEP stated that the student "demonstrated strength when asked to cite textual evidence to support an analysis of what the text s[aid] explicitly/implicitly and make logical inferences" (Dist. Ex. 1 at p. 1). According to the June 2020 IEP the student demonstrated a strong understanding "when asked to compare and contrast how different formats, including print and digital media, contributed to the understanding of [a] subject" (id.). The data from the Achieve 3000 program indicated that the student struggled to "determine a theme or central idea of a text and how it [wa]s developed by key supporting details over the course of the text" or when asked to summarize the text (id.). The IEP also reported that the student struggled when asked to gather relevant information from multiple sources, assess the credibility of the source, and quote or paraphrase the data and conclusions of others (id.).

The June 2020 IEP reflected the student's performance on a Fountas and Pinnell Benchmark administered in May 2019 which placed the student at reading level T/U, which was equivalent to an early fifth grade level (Dist. Ex. 1 at p. 1).

According to the parent's affidavit testimony the June 2020 CSE had the student's June 2020 after school progress report (June 2020 SETSS-ABA progress report) which reflected goals in reading, writing, mathematics, speech-language and communication skills, social/emotional functioning, and community inclusion/vocational skills (Parent Ex. GG ¶ 27-29; Parent Ex. R at pp. 1-12). The progress report indicated that baseline assessments of the student's SETSS-ABA goals indicated he "was not able to explain his math thinking, include details in his writing or write with stamina for an allotted amount of time, nor was he engaged in reading and able to comprehend

¹⁹ The school psychologist testified that the May 2019 scores were used as the 2020 scores would not have been available until the fall of 2020 (Jan. 26, 2023 Tr. p. 43). He stated that the scores were used to show his instructional level and his performance levels and less so as a guideline to the ultimate recommendations (Jan. 26, 2023 Tr. pp. 43-44).

texts well by synthesizing information together" (Parent Ex. R at p. 12). The SETSS-ABA progress report indicated that after ABA treatments were introduced to address the stated goals the student learned how to show his mathematical thinking and he had shown "vast improvement" in explaining his work (*id.*). The SETSS-ABA progress report also indicated that the student learned and mastered new mathematical skills but did not provide further specificity as to what skills were mastered (*id.*). The SETSS-ABA progress report noted that the student showed more engagement in reading and writing such that he wanted to read another chapter to find out what would happen or wanted to write about something because he had an idea (*id.*) The student had learned how to structure paragraphs and was learning how to write full pieces independently (*id.*). The June 2020 SETSS progress report indicated that the student's comprehension was improving, and he was now able to make inferences, and he had mastered including relevant details (*id.*). Additionally, the SETSS-ABA progress report indicated that the student was learning how to synthesize his ideas and add transitional sentences as well as learning new math concepts and study skills, etc. (*id.*). As reported in the SETSS-ABA progress report, the student benefited from having skills on maintenance because if he was not continuously putting what he had learned to practice he forgot the skills and he also benefited from using a motivational system to complete non-preferred tasks (*id.*). The providers recommended a continuation of SETSS-ABA services to allow more time for the student to acquire new skills and work on goals in maintenance (*id.*).

The school psychologist, who had the dual role as the district representative and school psychologist at the June 2020 CSE meeting, testified that the June 2020 CSE had sufficient information to create a full academic program for the student because the information covered the student's then-current academic proficiency and the language assessment would identify his needs related to speech and language skills (Nov. 23, 2022 Tr. pp. 92, 94, 101-02; Dist. Ex. 1 p. 22).

Upon review of the information considered by the June 2020 CSE and school psychologist's testimony that the meeting was a collaborative effort amongst the professionals who knew the student, the hearing record supports the IHO's conclusion that the evaluative information considered by the June 2020 CSE was sufficient to create a full academic program for the student and an IEP (IHO Decision at p. 9). As summarized above the hearing record demonstrates that the CSE considered an array of assessments and input from providers when determining the student's needs and the parent makes no claim that the IEP present levels of performance did not appropriately describe the student's needs; therefore, I find no reason to overturn the IHO's determination that the June 2020 CSE considered sufficient evaluative information.

C. June 2020 IEP

The parent asserts that the June 2020 IEP—which was implemented during the 2020-21 school year alongside the student's pendency program stemming from this matter and prior impartial hearings concerning the student's education—failed to provide the student a FAPE for numerous reasons, most notably in that the IEP did not provide after-school services or 12-month services, did not provide speech-language therapy or physical therapy, and failed to provide sufficient occupational therapy and 1:1 related services and instruction. Although there is discussion of each of these claims below, I will briefly recount the student's special education needs and educational abilities as described in the June 2020 IEP, as it provides further context for the analysis of the disputed issues between the parties, namely whether the June 2020 IEP

appropriately addressed those needs and was reasonably calculated to enable the student to receive educational benefits.

1. Present Levels of Performance

The parent does not point to any specific defects in the present levels of performance contained in the IEP. According to the June 8, 2020 IEP the student made a smooth transition to the middle school setting and he was able to independently navigate that environment (Dist. Ex. 1 at p. 2). The IEP indicated that the student had meaningful relationships with teachers and peers and he had age-appropriate daily living skills (*id.*). The IEP reported that the student participated in small group and whole class discussions and although he could get off task, refocusing prompts were successful in supporting the student to return to the task (*id.*). The student was known to become frustrated when he did not understand concepts and tended to shut down which, according to the IEP, was addressed by recommending counseling (*id.*). The IEP indicated that the student would ask his teacher for clarification of tasks and his teacher would provide him with scaffolds and prompts to assist him with understanding the task at hand (*id.*).

With respect to English Language Arts (ELA), the June 2020 IEP indicated that the student was working at grade level, and in some cases, beyond grade level in his ELA class (Dist. Ex. 1 at p. 3). The IEP noted that the student worked best in small groups and when he was provided the opportunity to have 1:1 conferring, as well as small group conversations, and that the student thrived when work was broken down into smaller, more manageable pieces (*id.*). The June 2020 IEP indicated that the student learned best when reading was modeled for him (*id.*). The June 2020 IEP also indicated that the student demonstrated strong skills when asked to use critical thinking, that he was able to go beyond what was stated in the text, and that he could make "deep and rich connections" (*id.*). The IEP also stated that the student was able to infer when asked and was strong at discussing the work that had been covered (*id.*). The June 2020 IEP indicated that the student struggled to gather relevant information from multiple sources, assess the credibility of each source, and quote or paraphrase the data and conclusions of others (*id.* at p. 4). The IEP also reported that the student presented with challenges in determining the theme or central idea of a text and how it was developed by key supporting details over the course of a text, and summarizing text (*id.*).

Regarding written expression, the June 2020 IEP indicated that the student worked well when writing responses were modeled—using them as a reference—and he benefited from the use of rubrics, graphic organizers, and sentence starters (Dist. Ex. 1 at p. 3). Because the student often completed his written work quickly, he needed reminders to take his time and work not only on content but handwriting as well (*id.*).

According to the June 2020 IEP the student arrived at math class ready to work, he participated in class, asked for clarification of tasks, and sometimes needed directions re-read and tasks broken down in order to process information correctly (Dist. Ex. 1 at p. 3). The June 2020 IEP noted that the student's math abilities included his ability to recognize that the mean for a numerical data set summarizes all of its values with a single number, identify the difference between a statistical and non-statistical question, write an inequality to represent a real world or mathematical problem, and represent solutions of inequalities on a number line (*id.* at p. 4). The IEP also noted that the student could solve simple one-step equations using inverse operation and

the properties of equality and he could solve percentage problems (id.). To support the student in math class the IEP indicated that the student was pulled into a small group where he was provided re-teaching of concepts that presented difficulty for him (id.). The June 2020 IEP indicate that in math the student struggled with geometry, found it difficult to use nets of three-dimensional figures to find the surface area of rectangular and triangular prisms and pyramids, and he struggled to apply knowledge of nets of three-dimensional figures to solve real world math problems involving spatial representation and surface areas as well as finding the area of rectangle with fraction side lengths by multiplying side lengths (id. at p. 4). The parent conveyed that due to the student's reading learning disorder he struggled in math class to complete word problems and tended to shut down when presented with them (id.). The IEP indicated that to support the student, he was offered academic vocabulary with the corresponding definitions (id.).

With respect to the student's social development, the June 2020 IEP again noted the student's pleasantness, his ability to get along with peers and adults, and his ability to express his feelings appropriately, but also indicated that the student became upset when he had an upcoming test due to his fear of not doing well (Dist. Ex. 1 at p. 5). The June 2020 IEP indicated that the student was "well prepared to enter the 7th grade for the 2020/21 school year"; however, noted that he would continue to need counseling services to "work on not being so hard on himself when preparing for tests" (id.). Overall, the June 2020 IEP noted that the student's rate of progress in acquiring new skills and information was in the average range when compared to same aged peers (id. at p. 3).

Regarding the student's physical development, the June 2020 IEP noted the student's diagnosis of ADHD which was managed with medication and indicated that the student received OT twice per week individually for 30-minutes per session in the classroom to address goal of using assistive technology goal to complete written tasks in the classroom at the same pace as his peers (Dist. Ex. 1 at p. 6). According to the June 2020 IEP, the student was reluctant to use assistive technology for writing assignments and when writing independently his penmanship was characterized by poor letter formation which improved when provided with cues (id.). During in-person instruction the occupational therapist noted the student only used his device once per week for 10-15 minutes with the provider but during remote learning he was cooperative and readily participated in the therapy sessions and was learning how to use word prediction and a word processor to complete writing tasks (id.). According to the IEP, the student was practicing his typing skills, transcribing text from dictation, and completing writing assignments but needed to improve his use of the iPad and increase typing speed to keep pace with the writing demands of the classroom (id.). Regarding the student's needs, the parent expressed her concern that the student's low tone was impacting his writing performance and that she would like the student to continue to have assistive technology (Dist. Ex. 1 at p. 6). The occupational therapist indicated she was working on the student's writing as per the parent's request and noted the student was reluctant to complete writing activities as he reported pain in his hand when writing (id.).

According to the June 2020 IEP the student's parent expressed concern in September 2019, about the student being pulled out from "minor" subject classes for speech-language therapy and requested that his speech-language services be provided outside of school, and as a result, the student did not attend school-based speech-language therapy (Dist. Ex. 1 at p. 3). The June 2020 IEP indicated that when remote learning commenced the student joined speech-language therapy one session per week even though he was encouraged to join both scheduled tele-therapy sessions

(id.). As noted above, the September 2019 speech-language evaluation determined that "based on eligibility requirements" speech-language therapy was not recommended at that time (id.). The June 2020 IEP indicated that at the CSE meeting the parent expressed her concern that the related services were interrupting the student's day and that the CSE explained that the CSE made school-based recommendations and if the parent believed that other types of services were necessary, she could make that request directly on a district level (id. at p. 4). However, the IEP noted that the CSE believed the student's needs could be adequately met with school-based related services in an integrated co-teaching program (id.).

2. IEP Goals

Turning to the parent's challenges to the goals in the IEP, the evidence shows that to address the student's needs in academics, physical development, and social/emotional functioning, the June 2020 IEP included six annual goals (Dist. Ex. 1 at pp. 9-14).²⁰ The IEP reading goals addressed the student's need to determine a theme or central idea of a text and how it was developed by key supporting details and targeted the student's need to gather relevant information from multiple sources, assess their credibility and quote or paraphrase the data (id. at pp. 9-10). For math, the IEP included a goal to solve word problems that involved finding the surface area of three-dimensional figures and to address the student's social/emotional needs the IEP included a goal that addressed the student's self-esteem (id. at pp. 10-11).²¹ The June 2020 IEP included a goal for written expression that targeted the student's ability to independently use assistive technology with writing support to improve his legibility and spelling when completing a writing task in the allotted time (id. at p. 12). Lastly, the IEP included an OT goal to improve the student's motor coordination skills, dexterity skills as well as his typing skills to support the student's ability to keep pace with the classroom writing demands and his ability to complete typed classwork on time (id. at p. 13). Notwithstanding the parent's contentions to the contrary, the June 2020 IEP goals reflected specific targets in the student's identified areas of need and identified the criteria by which progress was to be measured (see id. at pp. 9-13).

3. IEP Recommendations

Having determined that the student remained eligible for special education services as a student with a learning disability the June 2020 CSE recommended that he receive 10 periods per week of ICT services for both mathematics and ELA (totaling 20 periods) and two periods per week each of direct group SETSS for mathematics and ELA (Dist. Ex. 1 at pp. 1, 14). With respect to related services the CSE recommended that the student receive one 30-minute session per week

²⁰ The school psychologist was generally unable to specify of how the goals were developed other than to indicate that generally goals would be developed based on the kind of work the student was able to do or not do in the classroom (Feb. 7, 2023 Tr. pp. 13-19).

²¹ With respect to the goals on the June 2020 IEP, the school psychologist testified that there was a question regarding the student's self-esteem in the classroom, so a goal was developed to support his confidence in the classroom (Feb. 7, 2023 Tr. p. 7). Further, the school psychologist stated that the single counseling goal was sufficient because it would address the student's anxiety and although he indicated he might have worded it differently if he wrote it, it was sufficient for the student (Feb. 7, 2023 Tr. p. 36). He recalled being informed that the student was social, had friends, was not a behavior problem, and did not have maladaptive behaviors in the classroom and at the time this goal was written the student was in remote learning (id.).

of group (3:1) counseling, one 30-minute session per week of individual counseling, and one 30-minute session per week of group (3:1) OT (*id.* at pp. 14-15). The CSE also recommended resources to support the student's management needs and access, participation, and progress in the general education curriculum including: graphic organizers for extended writing responses; checklists for multi-step tasks; question prompts; transition words and key words charted; extended time to complete assignments; small group instruction for reteaching and reinforcement; content and questions scaffolded and rephrased; assistive technology with writing supports; and on task focusing prompts (*id.* at p. 7). In addition, the June 2020 IEP recommended testing accommodations including extended time (time and a half); on-task focusing prompts (verbal and gestural prompts, quiet verbal prompts to focus, a tap on the shoulder and point to the paper); testing in a separate location/room with minimal distraction and no more than 12 students; use of aids/assistive technology including the use of a writing program for all assessment/written assignments longer than a phrase; and tests read (test messages, questions, items and multiple choice responses and reread as requested, for all test except those measuring reading skills) (*id.* at p. 17).

4. Integrated Co-Teaching Services and 1:1 Instruction

Although the parties do not dispute the appropriateness of the recommended ICT services, a brief discussion of the services is pertinent to consideration of how the June 2020 IEP addressed the student's needs and the parent's allegations that the CSE should have provided 1:1 instruction on the IEP. The June 2020 IEP indicated that because of the student's academic needs, he benefited from the support of "an Integrated Co-teaching program that involved a general education and special education teacher, along with [SETSS]" (Dist. Ex. 1 at p. 7). The IEP noted that the student required "academic support and scaffolds to allow him access the general education curriculum" (*id.*). It further noted that "[w]ith modification and accommodation in an ICT classroom along with the related services of counseling and occupational therapy" the student could access the general education curriculum (*id.*).²² With respect to the June 2020 CSE's recommendation for ICT services, the school psychologist testified that it was the student's least restrictive environment because he would be paired in a classroom with 60 percent of the students being general education students, who would be in his grade at the same level socially, emotionally, and academically (Jan. 26, 2023 Tr. p. 10). He testified that he considered the least restrictive environment for the student to be general education with ICT services because the student was doing well academically, he was near proficiency or at proficiency in reading and math, there were no behavioral concerns, and the district wanted the student to develop amongst students that were developing at the same level, so general education with ICT services was the best setting for the student (Jan. 26, 2023 Tr. pp. 8-9).²³ Therefore, the June 2020 CSE recommended the student receive ICT services for math and

²² It is noteworthy that both the parent and the district agree that a general education classroom with ICT services is an appropriate setting for the student, which allows the student to be educated among nondisabled peers with exposure to the general education curriculum. 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).

²³ Consistent with the school psychologist's testimony, the student's SETSS provider testified via affidavit that

ELA for 10 periods per week, each (Dist. Ex. 1 at p. 14). In addition to the ICT services the June 2020 CSE recommended four periods of SETSS per week (two for math and two for ELA) in a separate location to offer the student "a little bit more individualized instruction," an extra level of support academically, and to help where the student may need a bit of assistance that would be better provided in a smaller group that could be more personalized (Jan. 26, 2023 Tr. p. 11; Dist. Ex. 1 at p. 14). The school psychologist explained that the recommended level of SETSS was appropriate as the student's teachers reported that the student was doing well and was at or very close to grade level competency in his subjects (Jan. 26, 2023 Tr. pp. 11-12).²⁴

The June 2020 CSE also recommended related services including one 30-minute session per week of group (3:1) counseling, one 30-minute session per week of individual counseling, and one 30-minute session per week of group (3:1) OT (Dist. Ex. 1 at pp. 14-15).²⁵ According to the school psychologist the student was recommended for counseling because he experienced periods of stress at school, possibly related to workload; became upset before upcoming tests due to a fear of not doing well; and wanted to succeed and do well in all of his classes (Jan. 26, 2023 Tr. pp. 13-15). The school psychologist testified that the student was being provided with OT because his low muscle tone impacted his dexterity and writing performance (Jan. 26, 2003 Tr. pp. 15-16). He recalled that the occupational therapist was working with the student to support his use of an assistive device effectively and efficiently (Jan. 26, 2023 Tr. pp. 15-16). Regarding speech-language therapy, the school psychologist testified that although the student had speech-language therapy in the past he no longer required it according to the evaluation that was completed, nor did he need physical therapy as the student was able to navigate the school environment, and he participated in physical education with no restrictions (Jan. 26, 2023 Tr. p. 16).²⁶ According to the school psychologist, the parent requested that additional programs be provided to the student after school (Jan. 26, 2023 at pp. 20). The school psychologist testified that he explained to the parent that it was "not a recommendation that [he] felt would be appropriate or that [he] could make" but advised her of her right to request a due process hearing to request other services she felt were appropriate (Jan. 26, 2023 at p. 20). He further explained to that the recommendations on the IEP that the district made were discussed and made at the CSE meeting and "deemed appropriate by the SBST at the school" (Jan. 26, 2023 Tr. p. 20). In contrast, the student's private after-school SETSS provider testified via affidavit that the student required after school counseling so as to not exacerbate his anxiety or interfere with his academic instruction time (Parent Ex. DD at ¶ 28). She opined that the student required one hour counseling sessions as 30-minute sessions

the student was functioning at the fifth to sixth grade level in reading and math when he was in sixth grade (Parent Ex. DD ¶19).

²⁴ The school psychologist was not able to recall the rationale as to why group SETSS was recommended rather than 1:1 instruction but suggested that it was probably what the SETSS teacher felt would be most appropriate for the student (Feb. 7, 2023 Tr. p. 30).

²⁵ The school psychologist testified that the student's classroom special education teacher was the one who wrote the June 2020 IEP (Feb. 7, 2023 Tr. p. 22).

²⁶ The school psychologist testified that the June 2020 IEP noted the student's need for assistive technology in the present levels of performance and in the goals and it should have been listed on the program page but otherwise he believed the June 2020 IEP was appropriate (Jan. 26, 2023 Tr. p. 20-21).

would be ineffective and also opined it would be harder for the student to learn how to manage and cope with his anxiety in a group than it would be individually (Parent Ex. DD ¶ 28).

The parent contends that the IHO erred in not finding that the student required 1:1 instruction as the student needed individualized support and allow the student to focus and complete tasks. The student's home-based SETSS teacher stated that the student required 1:1 instruction due to the student's "high level of distractibility and task avoidance in group settings" (Parent Ex. DD ¶24). Further, the SETSS provider indicated that the student needed 10 hours per week because the four hours recommended by the district would not be enough time to work on the student's goals for the 2020-21 school year, and, that it was inappropriate to pull the student out of the classroom for therapy services as it would cause the student to miss academic instruction which would "exacerbate[]" his anxiety (Feb. 7, 2023 Tr. pp. 67-68; Parent Ex. DD ¶24).

However, the district school psychologist testified that 1:1 instruction was not recommended for the student because "he was doing very nice" in class and his "grades were very good" (Nov. 23, 2022 Tr. pp. 104-105). He stated that the student was doing well and his was proficient or above in all subjects (Nov. 23, 2022 Tr. pp. 105-06). The school psychologist explained that the restrictiveness of 1:1 instruction or services was not necessary, with the possible exception of OT where the therapist pushed into the classrooms to do 1:1 instruction within the natural environment (Nov. 23, 2022 Tr. pp. 105-06). He indicated that with the exception of counseling, no 1:1 services were recommended for the student (Nov. 23, 2022 (Tr. p. 105). The after-school SETSS provider testified that the student required 1:1 SETSS after school to further work on the goals he needed to succeed, to provide additional practice, to prevent regression and to prevent anxiety and distress in the classroom when he was pulled out for lessons (Feb 7, 2023 Tr. p. 67). However, the June 2020 IEP present level of performance, which are not in dispute, indicated that the student made a smooth transition to middle school, he independently navigated the building, he developed meaningful relationships with staff and peers, and that when he was off task refocusing prompts enabled him to resume working on the necessary task (Dist. Ex. 1 at p. 2).

The school psychologist testified that he agreed with the recommendations contained in the June 2020 IEP and noted that the student's actual classroom work was at or very close to grade level, that he was doing very well, he was competent in all his of his subjects, he was not failing any subjects and so his academic and related service needs could be met through school based services (Feb. 7, 2023 Tr. p. 35).

With respect to the need for a 12-month program, the private SETSS teacher testified that the student forgot learned math concepts as well as literacy skills and needed a 12-month program in order to practice and maintain skills (Feb. 7, 2023 Tr. pp. 80-81). Further, she indicated that the student required a 12-month program to allow for pre-teaching content curriculum skills for the next grade particularly in math (Feb. 7, 2023 Tr. pp. 80-81).²⁷ According to the school psychologist, the student did not demonstrate difficulty recovering information that was learned the previous year after the summer break because he was able to begin his classes in September and he "worked well, worked...competently" so the 12-month program was not required for him

²⁷ Although his after-school teacher testified that the student would regress without the 12-month program there was little evidence to support actual regression (Feb. 7, 2023 Tr. pp. 80-81).

(Jan. 26, 2023 Tr. p. 17). He testified that the student had access to after school activities although the activities were limited due to the COVID-19 restrictions (*id.*). Further, he indicated that the student did not have executive functioning delays, behavior issues, and did not need an FBA/BIP as the student was a delightful, wonderful student (Jan. 26, 2023 Tr. pp. 17-18).

The school psychologist opined that additional services may have been helpful for the student but that given the student's expression of stress, being overwhelmed, and needing counseling in school, additional services would have taken away from the student's free time and may have had a detrimental effect on his feeling overwhelmed and stressed (Jan. 26, 2023 Tr. p. 23). He also testified that he did not believe the student required any additional services other than assistive technology, which was included in the present levels of performance and noted in the goals, "was certainly appropriate" and should have been included on the program plan page of the June 2020 IEP (Jan. 26, 2023 Tr. pp. 20-21, 23).

While the IEP at issue may not have provided a more intensive level of services that would have been more desirable to the parent, the evidence supports a finding that the 2020-21 IEP was reasonably calculated to provide the student with educational benefit. As described above, the student was functioning at or near grade level in academic areas and he did not present with significant behavioral challenges that required interventions other than what could be addressed by classroom management strategies. The recommended ICT services would provide the student with the additional support of a special education teacher in a general education classroom and the recommended SETSS would allow for added support and instruction for the student in a smaller group setting. The IEP included appropriate management strategies and accommodations to allow the student to access the general education curriculum and the goals targeted the student's identified academic, physical, and social/emotional needs and were characterized by the school psychologist as "high leverage" goals that might address multiple areas (Feb. 7, 2023 Tr. p. 38). Review of the student's needs and the IEP recommendations supports a finding that the IEP offered the student 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).

The student's home speech-language provider only noted in testimony the student's need for spelling, grammar, and pragmatic skills which could be addressed in the curriculum and counseling sessions as the student was performing near grade level academically and was known to have good peer relationships (Parent Exs. R at p. 1; FF at ¶18; Dist. Ex. 1 at p. 5). Regarding the lack of a recommendation for physical therapy, as noted above the hearing record did not demonstrate sufficient evidence that the student required such intervention to meaningfully access the general education curriculum at the time of June 2020 CSE meeting.

Although the parent contends that the student needs a significant amount of 1:1 instruction by a special education teacher and a necessity that it be provided at home after the school day, the evidence in the record does not bear that out. Even if a student required more intensive services, which is not this case, the next step in the continuum of services for a student with more significant needs would be to recommend programming in a special class rather than to recommend that the student receive his related services and additional special education intervention through an extended school day at home. A 12-month school year is required when it is well documented that the student has demonstrated substantial regression over breaks in service and is intended to

alleviate substantial regression.²⁸ The pre-teaching of skills described by the home-based provider for the next academic school to enhance the student's entrance to the upcoming school year is not justification for recommending a 12-month services (see Feb. 7, 2023 Tr. pp. 80-81). 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).

Therefore, an independent review of the hearing record leads me to find that, based on the testimonial and documentary evidence presented, there is no basis upon which to disturb the IHO's conclusions regarding the district's provision of FAPE for the 2020-21 school year.

D. Remedy

Although I have determined that the IHO correctly found that the district offered the student a FAPE during the 2020-21 school year, I nonetheless find further proceedings are appropriate to address the extent to which the student's pendency placement was implemented during these proceedings.

The parent contends that the district failed to implement the PT or any other after-school services called for under the student's pendency placement and that while the parent was able to obtain private providers to implement some of the after-school tutoring, speech-language therapy, and OT services in the pendency order, the parent was unable to obtain the full amount of those services and was unable to obtain any of the PT services. Further, the parent contends that the district failed to demonstrate what portion, if any, of the in-school services that were called for under the pendency program.

The district argues that the parent's request for compensatory pendency services is "akin to enforcement" and that the district also contends that the district was not "directly responsible for the delivery of services under pendency" because the "parent obtained an IHO order allowing her to select the providers to deliver [the student's] stay-put after-school services" (Answer ¶ 11). Therefore, the district asserts that it has paid for the services that the parent's private providers

²⁸ The purpose of 12-month services is "to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred."

delivered, and any missed services are the fault and responsibility of the parent and the private providers.

Initially, as to the IHO's finding that he did not have authority to enforce a pendency determination, the IHO was correct in stating that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R., 407 F.3d at 76, 78 n.13 [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). To be sure, the parent, in part, seeks an order related to pendency in a prior proceeding, and the IHO was correct that enforcement of pendency services from that proceeding was not the subject of this proceeding.

However, here the parent also sought to ensure pendency was available to the student in this proceeding, and the IHO did have jurisdiction regarding the interim decision issued by IHO I in this proceeding which the parent alleged was not implemented by the district (see Parent Ex. F). Thus, to the extent that the parent sought relief related to an interim decision issued in the present matter, the district was obligated to provide the student with a pendency placement in the first instance (see Zvi D., 694 F.2d at 906). For this reason, the parent's allegation that there were problems with pendency services in this proceeding is distinguishable from a request for enforcement of IHO decisions from prior proceedings.

Here, contrary to the district's position the wording of the interim decision issued by IHO I on the issue of pendency did not specify whether the district or the parent is to select the providers and be responsible for "implementing" the pendency order (see Parent Ex. F). Rather, the order provides only that the parties agree that the "pendency program consists of the following:" and lists the services to be provided (id. at p. 3). Thus, the district's assertion in this appeal that it was not responsible for implementing the student's pendency services is incorrect. The district does not assert that it directly implemented any of the student's in-school or after-school pendency services. The parent has documented the total amount of after-school services that were provided during the entire 2020-21 school year, however, the pendency order in the present matter correctly states that the student's pendency rights began with the filing of the April 30, 2021 due process complaint notice in this proceeding (Parent Ex. X; see Parent Exs. A at p. 1; F at p. 3).

Accordingly the remediation for missed pendency services should only address the time period between the April 30, 2021 due process complaint notice up to the present while these proceedings are pending. Additionally, because the parties have not identified and there an insufficient evidentiary record upon which to determine what pendency services the district failed to implement during these proceedings, the matter must be remanded to the IHO for a determination of that issue. Each party shall be required to specify to the IHO their respective positions regarding the number of hours of pendency services were delivered to the student after April 30, 2021 and present evidence to corroborate their position.

VII. Conclusion

Having found that the IHO correctly determined that the district offered the student a FAPE during the 2020-21 school year but erred in failing to address the parties dispute regarding the implementation of pendency programming, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that IHO's decision dated March 27, 2023 is modified by reversing that the portion which declined to address the student's pendency placement after April 30, 2021 for the duration of these proceedings; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO who issued the March 27, 2023 decision to hear the parties respective positions and evidence and thereafter issue a determination regarding the amount of missed pendency services after April 30, 2021.

Dated: **Albany, New York**
 July 24, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER