The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-127

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Irene B. Dimoh, Esq. and Brian Davenport, Esq.

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, by Sonia Mendez-Castro, Esq., Linda A. Goldman, Esq., Ricki Parks, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Cooke Center Academy (Cooke) for the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here. Briefly, the student was 17 years old during the 2020-21 school year and was unilaterally placed at the Cooke School and Institute (Cooke) where he had attended since 2017 (Parent Ex. P ¶ 4). The student has received diagnoses of autism, attention deficit hyperactivity disorder (ADHD) and Tourette Syndrome (id. ¶ 5).

The CSE convened on May 6, 2020, to formulate the student's IEP for the 2020-21 school year (see generally Dist. Ex. 1). The parents disagreed with the recommendations contained in the May 2020 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2020-21 school year and, as a result, notified the district of their intent to unilaterally place the student at Cooke (see Dist. Ex. 1; Parent Ex. B). In a due process complaint notice, dated October 27, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A).

An impartial hearing convened on April 7, 2021 and concluded on April 19, 2023 after 22 days of proceedings (Tr. pp. 1-299). In a decision dated May 21, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 5-9). As relief, the IHO ordered the district to directly fund/reimburse the parents for the cost of the student's tuition at Cooke for the 2020-21 school year (id. at p. 9).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The gravamen of the parties' dispute on appeal is whether the May 6, 2020 IEP was substantively and procedurally appropriate to confer an educational benefit to the student in light of his circumstances.

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]).[1]

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. Scope of Review

Initially, I note that the district did not appeal the IHO's findings on the second and third Burlington/Carter criteria, namely that the Cooke was an appropriate placement for the student for the 2020-21 school year or that equitable considerations favored the parent, as such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, the parties' remaining dispute regarding the district's liability for tuition reimbursement centers on whether the IHO erred in finding that the district failed to offer the student a FAPE for the 2020-21 school year.

B. FAPE

The IHO found that there was no cogent and responsive explanation for the CSE's program and placement recommendations and therefore, the district did not meet its burden of showing it offered the student a FAPE for the 2020-21 school year (IHO Decision at p. 6). With regard to her reasoning on the first Burlington/Carter criterion, the IHO determined that there were no "current objective evaluations" of the student noted in the May 2020 IEP (id.). In addition, the IHO found that although May 2020 CSE relied on progress reports from the unilateral placement, it "discarded the specific recommendations made by the professionals most familiar with [the student] and recommended a program contrary to the reports" (id.). The IHO further found that the district

[1] 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).

failed to recommend OT for the student despite representation that it was necessary, the parents were not included in the discussion of goals, and the CSE failed to develop goals or a behavioral intervention plan to address the student's increased anxiety (id.). The IHO also noted that the district witness did not know when the student was last evaluated (id.).

On appeal, the district argues that contrary to the IHO's finding, the information provided in the student's progress report from Cooke, combined with information provided by the student's parents, English Language Arts (ELA) teacher and Cooke consulting teacher provided sufficient information about the student's needs to develop an IEP for the 2020-21 school year. The evidence in the hearing record does not support the district's argument.

During the impartial hearing the district offered a November 2019 Cooke progress report into evidence which indicated that the student's needs included improving his self-confidence, emotional regulation, problem solving abilities, pragmatic language, functional vocabulary, executive functioning skills, and activities of daily living (Dist. Ex. 3 at pp. 2-7). The May 2019 progress report further noted that regarding academics, the student was working on improving reading comprehension, connecting writing to reading content, and solving addition and subtraction problems for numbers under 100 (id. at pp. 8-10; see Dist. Ex. 3 at pp. 13-15).

However, the evidence is unclear with respect to what evaluative information the May 2020 CSE actually relied on when formulating the student's programming and developing his IEP for the 2020-21 school year. When asked what documents she reviewed for the May 2020 CSE meeting, the district school psychologist testified that she "typically" reviewed all documents in the district's "electronic internal system," which she noted could "date back to when the student was first identified as having a disability" (Tr. pp. 112-13). However, during her testimony the school psychologist did not actually identify any of the documents in the student's record or note that any of the evaluative information in the electronic system was reviewed for the May 2020 CSE meeting (id.). When asked whether she reviewed any specific documents from Cooke, the school psychologist testified that she reviewed the "teacher/provider reports," and identified that the November 2019 Cooke progress report included in the hearing record as the document she reviewed prior to the May 2020 CSE (Tr. pp. 112-13). A review of the record shows that the May 2020 IEP contained information that appears verbatim in the student's November 2019 Cooke progress report (compare Dist. Ex. 1 at pp. 1-5, with Dist. Ex. 3 at pp. 2-7, 9-11).

The district school psychologist testified that generally, a CSE meeting starts off by "gathering information, speaking to the teachers," reviewing data and identifying the student's "special education needs, strengths, weaknesses, and areas of deficit[]" (Tr. p. 114). The school psychologist further testified that in the instant case the parent and the consulting teacher from Cooke contributed during the May 2020 CSE meeting and added that any concerns expressed by representatives from Cooke would be listed "right under the parents' concerns" (Tr. pp. 115-16). However, although the hearing record shows that the Cooke consulting teacher and the student's ELA teacher provided input during the May 2020 CSE meeting, the present levels of performance in the May 2020 IEP do not reflect any information regarding the student's needs attributed to the

verbal input of Cooke representatives (Tr. pp. 116, 234; Parent Ex. O ¶ 9; compare Dist. Ex. 1 at pp. 1-5 with Dist. Ex. 3).[2]

While the narrative information included in the May 2020 IEP appears to be drawn from the student's November 2019 progress report from Cooke, the Cooke consulting teacher provided direct testimony by affidavit that prior to the CSE meeting, Cooke had provided the district with a progress report which was dated January 2020 (Parent Ex. O ¶ 9). The evidence is unclear whether the January 2020 progress report contained the same information as the November 2019 progress report or if it provided updated information on the student, as neither party entered that report into the hearing record. Regardless, the Cooke consulting teacher testified that the January 2020 report was not "directly discussed or referred to" during the May 2020 CSE meeting but that verbal information provided by her, and the student's ELA teacher included information contained in the report (id.). The district did not cross examine the witness on this point. Thus, it is unclear whether the information on the student's needs included in the May 2020 IEP is consistent with the information provided in the January 2020 Cooke progress report or with verbal information provided by Cooke representatives during the May 2020 CSE meeting.

Further adding to the inconsistencies, the CSE was responsible to issue a prior written notice after the development of the May 2020 IEP, which among other things, provided "a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed … action" of the CSE (8 NYCRR 200.5[a][3][iv]; see 34 CFR 300.503[b][3]). The district issued a prior written notice in this case; however, the June 2020 prior written notice identified the evaluative information used by the May 2020 CSE as "teacher report" dated April 2020 (Dist. Ex. 5 at p. 2).[3] Thus the district has not present evidence with sufficient reliability to show what information the IEP was based upon.[4]

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[2] The IHO found the district's case deficient because there was no discussion of the IEP's annual goals during the CSE meeting, however the IHO failed to discuss the evidence and applied an incorrect legal standard on that point. First, the evidence was conflicting regarding the discussion of goals, with the Cooke consulting teacher indicating that the topic was not discussed and the school psychologist statements during testimony about the discussion of goals and areas that the goals would address (Tr. pp. 114, 119, 120, 155, 205; Parent Ex. Q at p. 3). There is no indication in the evidence that the parents attempted to raise a specific concern with the annual goals but were rebuffed from discussion by the other participants of the CSE. In general, there is no specific requirement that the IEP goals be discussed by the meeting participants during a CSE meeting, especially if no participant is bringing forward a discussion of specific concerns (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010]).

[3] The lack of information before the CSE regarding this student demonstrates why the use of a single source of evaluation is not what was envisioned under IDEA when a CSE is creating an educational program for a student.

[4] The IHO's finding included a lack of a reference to an "objective" assessment of the student "in the IEP," (IHO Decision at p. 6 [emphasis added]). It is not clear what the IHO meant, but neither the IDEA nor State law require that a student's IEP itself specifically identify or be based solely upon objective measurements. To the extent the IHO's finding suggests a rejection of a CSE efforts to use reports from teachers from a student's private school, it is worded too broadly. There are in fact times when the CSE should be seeking reports from teachers of students who have been placed by their parents in a nonpublic school. It is appropriate in some cases to rely upon teacher reports to assist in the development of the IEP (Y.N. v. Bd. of Educ. of Harrison Cent. Sch. Dist., 2018 WL

The problem cannot be overlooked in this case. For example, I will turn to the district's argument that the May 2020 IEP addressed the student's needs and briefly address the IHO's finding regarding the lack of OT services. After a review of the evidence, I find no reason to overturn that aspect of the IHO's decision.

The November 2019 progress report contained in the evidence noted that at Cooke, the student received occupational therapy (OT) services daily during morning and afternoon "advisory," in adaptive skills class seven periods per week, and during a weekly, three-period community trip (Dist. Ex. 3 at p. 7).[5] The November 2019 OT progress report noted that at Cooke, the student's OT was focused on the development of adaptive living skills through an adaptive skills program and described the student's performance and progress toward goals focused on school participation and organization, health and hygiene, and travel training and obtaining resources (id.). The Cooke consulting teacher testified that in addition to providing support in the adaptive skills class, the occupational therapist pushed into the student's morning and afternoon advisory sessions and focused on executive functioning skills and sensory tools and strategies (Tr. pp. 236-38, 240-241).

According to the school psychologist, the May 2020 CSE did not recommend OT, which she noted typically addressed "fine motor skills," (Tr. p. 139). The school psychologist noted that she informed the student's parents that if the student had "significant fine motor skills that impede[d] on [his] academic success" they could request an OT evaluation and OT services could be added if deemed appropriate (Tr. p. 139).[6] The school psychologist indicated that that the district specialized school would address vocational skills, daily living skills, and personal hygiene skills and were "all equipped to handle" the daily living skills training "that the student [] require[d]" (Tr. pp. 139-40). The school psychologist did not actually use the term "programmatic" as the district has in the past, but the thrust of her testimony is that the student could receive services available at the public school site, but that were not actually listed on his IEP. This kind of after the fact justification of an IEP with the further possibility of potential services that are not listed on the IEP is impermissible (see P.L. v. New York Dep't of Educ., 56 F. Supp. 3d 147, 163 [E.D.N.Y. 2014]). In this case, it appears that the CSE deferred consideration of the student's needs until the parent made a formal request for an OT assessment, and while the May 2020 IEP

4609117, at *22 [S.D.N.Y. Sept. 25, 2018]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011] [noting that formal testing was not required to supplement the information provided to update the student's IEP and that the use of "teacher estimates" was not inappropriate in that circumstance).

[5] The Cooke consulting teacher described "advisory" as being akin to a homeroom setting but largely focused on executive functioning and organization (Tr. p. 241).

[6] It is noted that the district argues that it had sufficient information to make an appropriate program recommendation, which included an appropriate recommendation regarding OT; however, the evidence presented during the impartial hearing indicated that the student would need to have an OT evaluation for such services to be added to the IEP. This is a direct contradiction from the district's argument in the request for review. It is clear from the testimony of the school psychologist, if the parent wanted OT services, the parent had to request an evaluation (Tr. p. 139). Moreover, there was no explanation as to why the district did not perform an OT evaluation.

indicated that the student received OT services programmatically at Cooke it did not include any information detailing the student's physical or sensory needs or his needs related to adaptive living skills (see Dist. Ex. 1 at p. 5). Regardless of whether the recommended program could have provided instruction to support the student's sensory needs, executive functioning skills, or adaptive daily living skills, as a part of the regular program, the district failed to define those needs in the May 2020 IEP (id.).

Given the numerous discrepancies in the evidence, it is unclear what information was really utilized by the CSE as the IEP lacks any specific description of the assessments or reports that were before the CSE, and the prior written notice identified a different, later teacher report from April 2020 than the November 2019 report that was offered into evidence, which in turn was different that the January 2020 report identified by Cooke staff (see Parent Ex. Q at p. 1; Dist. Exs.3; 5). This is particularly concerning considering the challenges to the adequacy of the evaluative information contained in the due process complaint notice at the outset of the proceeding and lack of any description of other evaluative information on the student that the school psychologist said she reviewed. The evidence also indicates that during the CSE meeting and the development of the IEP, the district psychologist stopped short of stating that the CSE did not believe the student required OT services and instead indicated that the parents would have to request an evaluation of the student. Under these circumstances, I find insufficient reason for disturbing the IHO's finding that the district failed to meet its burden of proof that it offered the student a FAPE for the 2020-21 school year (see IHO Decision at p. 6).

If additional, reliable information had been presented by the district, it is possible that the IEP would have been found appropriate for the student, but I cannot say it is more likely than not given the paucity of evidence the district presented. Based on this, there is no reason to overturn the IHO's finding that the district failed to offer the student a FAPE for the 2020-21 school year.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district did not offer the student a FAPE for the 2020-21 school year, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 21, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER