



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-202

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

### **Appearances:**

The Law Office of Elisa Hyman, P.C., attorneys for the petitioners, by Erin McCormack-Herbert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which held that respondent (the district) offered the student an appropriate educational program for the 2020-21, 2021-22 and 2022-23 school years and denied their request for relief. The appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The 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. At approximately two years of age and again in May 2020 the student was referred to the Early Intervention Program but he did not qualify for services at either time (Parent Ex. C at p. 1).<sup>1</sup> For the 2020-21 school

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<sup>1</sup> The development of an Individualized Family Services Plan for children from birth through age two is the responsibility of the designated lead agency responsible for early intervention programs under 20 USC § 1435(a)(10) in Part C of the IDEA, and in New York the lead agency is the Department of Health (see Pub. Health Law § 2540 et. seq.; 34 CFR 303.340). Any disagreement or disputes arising with respect to the Early Intervention Program, including its requirements for transition, are not within the jurisdiction administrative proceedings conducted under Part B of the IDEA, and instead there is a separate due process hearing system for

year, the student attended a parochial preschool and his teacher expressed concerns about the student's ability to function in a group setting, follow directions, and socialize appropriately with peers (Parent Exs. C at p. 2; D at p. 1). On or about October 26, 2020, the parents sent a letter to the district requesting that the Committee on Preschool Special Education (CPSE) evaluate the student "as soon as possible" because the student was "having difficulty at school following directions" and with his speech skills (Dist. Ex. 9 at pp. 1-2). The district sent the parents a referral packet dated November 4, 2020, consisting of a prior written notice, a preschool evaluation agency list, a consent for initial preschool evaluation, a physical examination form, a family guide to preschool special education services, a housing questionnaire, an early childhood education options flyer, and a procedural safeguards notice (see Dist. Ex. 10). The prior written notice informed the parents that the student's "IEP meeting must take place within 60 days of the date [the parent] provided consent for the evaluation" (id. at p. 2). The following evaluations were conducted in November and December 2020 as part of the student's initial evaluation: a psychological evaluation, a social history update, an educational evaluation, a speech-language evaluation, an occupational therapy (OT) evaluation, and a classroom observation (see Parent Exs. C-H).

The CPSE convened on January 20, 2021, to review the initial evaluation reports and determine the student's eligibility for special education and related services (see Dist. Ex. 13). Finding the student eligible as a preschool student with a disability, the January 2021 CPSE recommended that the student receive three 60-minute sessions per week of individual special education itinerant teacher (SEIT) services, two 30-minute sessions per week of individual speech language therapy, and two 30-minute sessions per week of individual OT, all at an early childhood setting chosen by the parents (id. at p. 12).

On May 6, 2021, the student's SEIT requested that the district conduct a physical therapy (PT) evaluation due to concerns regarding the student's "lack of coordination and clumsy mobility" (Parent Ex. L). The parents sent a follow-up e-mail to the district on October 6, 2021, requesting the status of the student's PT evaluation (Parent Ex. N). On October 18, 2021, the parent provided written consent for an additional evaluation and a PT evaluation of the student was conducted that day (Parent Ex. I; Dist. Ex. 1 at p. 1). The October 2021 PT evaluation indicated that the student exhibited "poor coordination and motor planning" and that his "overall gross motor skills [we]re delayed" (Parent Ex. I at p. 3).

The CPSE convened on January 7, 2022, to conduct an annual review and develop an IEP with a projected implementation date of January 10, 2022 (Parent Ex. B at p. 3). The January 2022 CPSE recommended that the student receive three 60-minute sessions per week of individual SEIT services, two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (id. at p. 10).

In an email to the district dated February 23, 2022, the student's SEIT requested an increase of the student's SEIT services from three hours per week to five hours per week (Parent Ex. Z pp.

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alleged violations related to Part C obligations (see Pub. Health Law § 2549[1], [5]; 10 NYCRR 69-4.17 [f], h)).

1, 3). On April 4, 2022, the district conducted a psychoeducational evaluation and a classroom observation in anticipation of the student's transition to the CSE (see Parent Exs. J; K).

On May 3, 2022, the CSE convened and determined that the student was eligible for special education as a student with a speech or language impairment and developed an IEP for the 2022-23 school year (see Dist. Ex. 5). The May 2022 CSE recommended that the student receive one period per week of individual, direct special education teacher support services (SETSS) in math, two periods per week of individual, direct SETSS in English language arts (ELA), one 30-minute session per week of individual counseling services, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and two 30-minute sessions per week of speech-language therapy (id. at pp. 21-22).

In addition to the CSE meeting on May 3, 2022, the student's mother also emailed the district the same day and requested compensatory services, stating that although the student was supposed to be receiving PT twice a week starting in February 2022, he had not received any PT services because "the agency was never able to find a provider" (Parent Ex. O at pp. 1-2). The parent also informed the district that the student had missed six weeks of OT services because his provider was out on maternity leave, and she requested that the missed PT and OT services be made up over the summer (id. at p. 2).

In a prior written notice dated June 15, 2022, the district informed the parents of the May 2022 CSE's recommendations and the assigned public school site where the student's special education services would be implemented during the 2022-23 school year (Dist. Ex. 12).

In a due process complaint notice, dated October 3, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years and notified the district of their intent to "return the [s]tudent" to the preschool program where he would complete "his final year of preschool, given his September birthday" (Parent Ex. A ¶¶ 3, 90). The parents also invoked pendency pursuant to the student's "most recently implemented CPSE IEP" (id. ¶ 90).<sup>2</sup>

An impartial hearing convened on December 20, 2022, and December 21, 2022, with a district representative failing to appear at the latter hearing (Tr. pp. 1-22). The IHO granted the parents' request for a pendency placement on December 21, 2022, and thereafter amended his pendency order on December 29, 2022, directing the district to deliver services pursuant to the January 7, 2022 IEP (see December 21, 2022 Interim IHO Decision; December 29, 2022 Interim IHO Decision). The impartial hearing continued on December 23, 2022 and concluded on July 14, 2023, after 10 additional days of proceedings and three status conferences (Tr. pp. 23-835).

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<sup>2</sup> Although the parent testified that she did not believe the student "ha[d] autism," the parents' attorney explained that the due process complaint notice's allegation that the district "failed to identify that the [s]tudent has Autism" was included because the parents' attorney believed that "[w]e ha[d] to include all of the possible services that a child may need in the complaint, given the nature of when the complaint was filed, prior to any evaluations taking place" (Tr. p. 460, Parent Ex. A ¶ 98). The parents' attorney's practice of including a laundry list of allegations and demands unrelated to the particular facts and circumstances of the student's case is not best practice and should be avoided. For future due process complaint notices, the parents' attorney's counsel is advised to accurately represent the facts and circumstances of each particular student in lieu of using an overly broad boilerplate which results in a waste of public resources by unnecessarily obfuscating of the matter at hand.

In a decision dated August 14, 2023, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2020-21, 2021-22 and 2022-23 school years, denied the parents' request for compensatory services, and dismissed the parents' due process complaint (IHO Decision at pp. 41, 42, 43, 47, 48).

#### **IV. Appeal for State-Level Review**

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether the district violated its child find obligations by failing to evaluate the student prior to his turning three in September 2020;
2. Whether the IHO erred by determining that the district offered the student a FAPE for the 2020-21, 2021-22 and 2022-23 school years;<sup>3</sup>
3. Whether the student is entitled to compensatory educational services.

#### **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

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<sup>3</sup> The parents have also alleged that the district committed systemic violations (i.e., engaging in predetermination; failure to recommend specific methodology, and applying blanket policies that prevent CSEs from recommending appropriate school placements and services) and violations of various State and federal laws (see Parent Ex. A pp. 1-2, 5-7, 10-14; Req. for Rev. at pp. 9-10) which they assert should have been determined by the IHO. However, regardless of whether the IHO addressed any of these allegations, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, ADA claims, or claims with respect to alleged 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 federal 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 WL 261470, at \*9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory monetary damages are not available in the administrative forum under the IDEA, neither an IHO nor an SRO has jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). 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]). Therefore, even if the IHO had addressed these claims, an SRO would have no jurisdiction to review any portion of a parent's claims regarding section 504, section 1983, ADA claims, or systemic violations or policy claims, and accordingly such claims will not be further addressed.

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 Andrew 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]).<sup>4</sup>

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. Child Find**

The parents allege that the IHO erred by not finding that the district violated its child find obligations under 20 U.S.C. § 1412(a)(3)(A) because the district did not evaluate the student before

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<sup>4</sup> 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" (Andrew F., 580 U.S. at 402).

his third birthday despite the student having been evaluated twice by the Early Intervention Program.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at \*7 [S.D.N.Y. Oct. 28, 2019], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; E.T., 2012 WL 5936537, at \*11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent in failing to order testing, or have no rational justification for deciding not to evaluate the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's RtI program (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]). Related to child find is the referral process. State regulation requires that a student suspected of having a disability "shall



be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). While a parent and certain other specified individuals may refer a student for an initial evaluation (8 NYCRR 200.4[a]1[i]), a professional staff member of the school district in which the student resides and certain other specified individuals may request a referral for an initial evaluation (8 NYCRR 200.4[a]2[i][a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a]2[ii], [a]2[iv][a], [a]3-[a]5; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a]9). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a]9[iii][a]-[b]).

It should be noted that "Early Intervention Officials have explicit responsibility in the [Public Health Law] for notifying school districts, with parental consent, of children's potential eligibility for services under Section 4410 of the Education Law and for arranging transition conferences for these children and their families" ("The Transition of Children from The New York State Department of Health Early Intervention Program to The State Education Department Preschool Special Education Program or Other Early Childhood Services" NYS Dep't of Health Mem. [February 2005], available at [https://www.health.ny.gov/community/infants\\_children/early\\_intervention/transition/docs/transition.pdf](https://www.health.ny.gov/community/infants_children/early_intervention/transition/docs/transition.pdf) at p. 10). The New York State Department of Health's EIP "strongly recommend[s] that primary referral sources and parents of children age two and a half or older, who may have a developmental delay or disability and are not in the EIP, contact their school district CPSE to begin the CPSE process" (id. at p. 8). In this case, the evidence shows that the student was not found eligible for services under the State's Early Intervention Program on two occasions (see Parent Exs. C at p. 1; D at p. 1). Instead the evidence shows that it was unlikely that the local Early Intervention Program officials believed there would be any need to seek parental consent to initiate transition planning to the CPSE, the CPSE was not responsible to engage in child find activities until the child reached age three, and the district had no independent obligation to seek out the student's Early Intervention Program evaluations that found the student ineligible and use them as a basis to conduct further evaluation of the student.

The evidence in this case does not reveal an unreasonable delay by the CPSE by the time the parents contacted the CPSE and requested that the student be evaluated for special education services a few weeks later in a letter dated October 26, 2020 (Dist. Ex. 9). By means of a referral packet dated November 4, 2020, the district provided the parents with a prior written notice, a list of preschool evaluation agencies, a consent form for the parents to return to authorize an initial preschool evaluation, a physical examination form, a family guide to preschool special education services, a housing questionnaire, an early childhood education options flyer, and a procedural safeguards notice (see Dist. Ex. 10). As described in further detail above, the student had the

following evaluations between November 23, 2020 and December 9, 2020: a psychological evaluation, a social history, a classroom observation, a speech-language evaluation, an OT evaluation and an educational evaluation (Parent Exs. C-H). It is uncontested that the CPSE convened on January 20, 2021, to develop an IEP for the student, which was within 60 school days of the consent to evaluate pursuant to 8 NYCRR 200.4[d] (Dist. Ex. 13 at p. 3).<sup>5</sup>

Here the evidence does not show that the district violated its obligations under the child find provisions of the IDEA and State regulation. This case is not one in which a student was not "found" or identified as potentially eligible, rather the student was evaluated twice by the Early Intervention Program and was determined to be ineligible both times (Parent Ex. A ¶¶ 34, 37). Subsequent to those findings of ineligibility for services through the Early Intervention Program, the aforesaid evaluations were timely conducted and the January 2021 CPSE meeting was also convened in a timely manner based on the parents' October 26, 2020 letter to the district. Accordingly, the IHO correctly found that the district did not deny the student a FAPE based on a violation of its child find obligations.

## **B. January 2021 CPSE and IEP**

### **1. Physical Therapy Evaluation**

Turning next to the parties dispute over the adequacy of the January 2021 IEP, the parents argue on appeal that the IHO erred in finding that the student's 2020 evaluation process was sufficient as the CPSE did not evaluate the student in all areas of suspected disability, specifically in the area of PT. Federal and state regulations provide that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE (or CPSE) 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

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<sup>5</sup> Although the hearing record does not include the signed initial consent to evaluate form from the parents, the time between the parents' October 26, 2020 letter and January 20, 2021 CPSE meeting was less than 60 school days, the consent form was sent to the parents later with the referral packet on November 4, 2020, and the evaluations were completed in December 2020, thus the evidence does not support any findings of improper delay on the part of the CPSE under the facts of this case.

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]).

With respect to preschool students with disabilities, State regulation requires a parent to select an "approved program with a multidisciplinary evaluation component to conduct an individual evaluation"—as defined in 8 NYCRR 200.1(aa)—and the completion of a "summary report" that must include a "detailed statement of the preschool student's individual needs, if any" (8 NYCRR 200.16[c][1]-[c][2]). State regulation defines an individual evaluation as "any procedures, tests or assessments used selectively with an individual student, including a physical examination . . . , an individual psychological evaluation, . . . , a social history and other appropriate assessments or evaluations as may be necessary to determine whether a student has a disability and the extent of his/her special education needs" (8 NYCRR 200.1[aa]).

A review of the hearing record indicates that the January 2021 CPSE had before it and considered a November 2020 psychological evaluation and social history; December 2020 speech-language and OT evaluations and classroom observation, and an undated educational evaluation (see Parent Exs. C-H).<sup>6</sup> As discussed below, a review of the hearing record indicates that the January 2021 CPSE had information available regarding the student's notable deficits in the area of gross motor skills, such that a PT evaluation should have been conducted.

Specifically, the November 2020 psychological evaluation report indicated that the student could ambulate well within his environment but described him as "somewhat clumsy when he runs" (Parent Ex. C at p. 6). The evaluator indicated that the student put both feet on each step when descending stairs, and that the student was observed "'W' sitting on the floor" (*id.*). The November 2020 social history reflected reports that the student had been evaluated twice through the Early Intervention Program, in part due to gross motor concerns, and that even though he had improved, he continued to struggle with stairs (Parent Ex. D at p. 1). The November 2020 social history also indicated that the student's developmental history included walking late, falling and tripping (*id.* at p. 2). Additionally, the educational evaluation indicated that even though the student's gross motor skills fell in the average range on a standardized measure, the evaluator noted that the student could be 'clumsy' and would "fall easily"; struggled with reciprocal foot patterns when walking up and down the stairs; and was observed to sit in a "w" formation (Parent Ex. E at pp. 1, 4). The evaluator concluded that among other difficulties, the student's poor motor planning skills intervened with his ability to follow directions (*id.* at p. 4).

The December 2020 OT evaluation indicated that the student exhibited "overall moderate disorganized motor planning of his upper extremities," as well as "lower bilateral coordination skills" and "weaker and less coordinated gross motor bilateral skills throughout the evaluation" (Parent Ex. G at pp. 10-11). The evaluator further indicated that the student "demonstrated under registration of proprioceptive and deep pressure (tactile) input" and opined that this often resulted in poor body awareness including the student's "constant need for deep pressure" and "frequent

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<sup>6</sup> It appears that the educational evaluation is missing a page which may have contained the date the evaluation was conducted (see Parent Ex. E). However, comparison with the January 2021 IEP shows that information from the educational evaluation report was included in the IEP present levels of performance (compare Parent Ex. E, with Dist. Ex. 13 at pp. 4-6).

falling" (*id.* at p. 11). According to the evaluator, the student "almost always t[ook] movement or climbing risks that [we]re unsafe" and "los[t] his balance unexpectedly when walking on an uneven surface" (*id.*). The evaluator also noted that the student "almost always bump[ed] into things failing to notice objects or people in the way" (*id.*).

The parent testified in an affidavit that she expressed concern to the educational evaluator about the student's "gross motor delays" and that she recalled telling the educational evaluator that the student had "trouble navigating stairs and that he [wa]s clumsy" (Parent Ex. S ¶¶ 23-24). The parent noted that her concerns were captured in the social history report, but that the district failed to conduct a PT evaluation despite knowing about the student's gross motor delays (*id.* ¶¶ 25-26).

The evidence in the hearing record shows that the January 20, 2021 CPSE had information reflecting the student's gross motor delays but failed to conduct a PT evaluation. Contrary to the IHO's finding, the January 2021 CPSE did not have adequate evaluative information in order to develop the student's IEP with appropriate services.

## 2. SEIT Services

Turning next to the parents' claim that the IHO erred in finding that the January 2021 CPSE's recommendation of three 60-minute sessions per week of individual SEIT was sufficient to meet the student's identified needs, a review of the hearing record supports the parents' argument.

State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; *see* "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf>; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at <http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf>). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; *see* Educ. Law § 4410[1][k]).

The November 2020 psychological evaluation report described that, while the student remained cooperative and agreeable throughout the one-to-one sessions, he seemed "somewhat distractible" and "refocusing was repeatedly necessary," he frequently looked away and required constant reminders to 'look at me' (Parent Ex. C at p. 2). The evaluator reported that the student's teacher described the student as 'spacey' and opined that he "seem[ed] to have difficulty processing what [wa]s going on in the classroom" (*id.*).

With regard to the student's adaptive functioning, the results of an administration of the Vineland Adaptive Behavior Scales (Vineland) completed by the student's parents, indicated that the student achieved an overall composite score of 83 which was "at the [m]oderately [l]ow level" (Parent Ex. C at p. 4). The evaluator opined that this was not commensurate with the student's

cognitive potential as measured by a cognitive assessment, which yielded scores in the average range (id. at pp. 3, 4). The student's communication abilities were "measured to be at the [a]dequate level" on the communication portion of the Vineland; however, he was unable to follow directions to do two things that go together and directions to do the same thing to two different objects, did not yet ask "wh" questions or use past tense verbs (id. at p. 5).

The November 2020 social history indicated that the student was referred for an evaluation due to his overall functioning in the classroom, specifically noting his difficulty keeping up with the group, following directions, completing tasks, and socializing appropriately with peers (Parent Ex. D at p. 1). Additional parental concerns reported included that the student was reliant on visual supports to help him, his speech was difficult to understand, he lacked sensory processing and safety awareness, and he did not follow directions consistently (id.).

The educational evaluation was completed due to concerns regarding the student's "social/emotional, focusing, speech and language and overall functioning in the classroom" (Parent Ex. E at p. 4). The report indicated that the student's teacher was concerned about his ability to 'process information' and follow directions within the group, his distractibility, and his difficulty following directions (id. at p. 1). The teacher reported that the student struggled to partake in a group activity and indicated that he did not always interact with peers and would remain in the same activity and "just hold objects in his hand" (id.). He required reminders to move somewhere else to play or to transition to the next activity (id.).

Results of the Preschool Evaluation Scale (PES-2) contained within the educational evaluation indicated that with the exception of gross motor skills, the student scored below average for all subtests (Parent Ex. E at p. 1). The evaluator described that the student's cognitive skills fell below the average range, and that when the student was asked something that was unfamiliar, he would "look around the room and require redirection" and that "[a]fter redirection, he would just look 'aimlessly'" (id. at pp. 1-2). According to the evaluator, the student's "knowledge of spatial [concepts] ha[d] not been confirmed as he was unable to place various objects inside, under and on top" (id. at p. 1). The evaluator indicated that the student had difficulty responding to "what do you do when" questions and noted that he would repeat the question but was not always able to respond to it (id. at p. 2). She explained that he had difficulty understanding negatives and objects that were different, and was unable to rote count or use one-to-one correspondence (id.). Further, the evaluator described that when the student was feeling more challenged, he became more fidgety and that with some visual tasks he presented with a delayed response (id.).

The evaluator indicated that the student understood some simple one step commands such as "sit" and "eat" and showed interest in all activities that were presented; however, she noted that the student would sometimes start a task, then wander or become distracted and not complete the task until given a cue or the direction was repeated (Parent Ex. E at p. 2). The evaluator opined that the student required a lot of repetition and visual supports and noted that he struggled with two-step related directions (i.e., touch your head and clap your hands) (id.). She further explained that the student "really struggled with auditory and verbal directions, requests and questions," and opined that even though he did better with visual supports he was not confident in his responses therefore he was observed to be constantly looking around and became easily distracted (id.). The evaluator indicated that the student's cognitive abilities were inconsistent, he required a lot of repetition in order to follow directions, his responses to questions, inferencing and oral vocabulary were areas of challenge for him, and she noted that his "responses were on a delay" (id.).

Moreover, she opined that his "high level of distractibility impact[ed] upon his cognitive abilities, as well, making it difficult for him to concentrate on and consequently grasp new information which explain[ed] his inconsistencies" (id.).

Finally, the evaluator indicated that "[t]hroughout this evaluation, it became clearer and more obvious that [the student] relied heavily on cues, and visual supports" and noted that he struggled when expected to respond to auditory information alone (Parent Ex. E at p. 4). She further described that the student was very difficult to understand both in and out of context; and opined that his "distractibility, fidgetiness, poor motor planning and weak cognitive skills seem[ed] to be intervening with [the student's] ability to follow directions, and give over information" (id.).

The December 2020 speech-language evaluation report indicated that communication breakdowns occurred frequently, noting that the student was aware of his difficulties and that he became visibly anxious when he was unable to get his message across (Parent Ex. F at p. 5). Additionally, the evaluator indicated that the student performed best when visual cues were present, and that "[i]n the absence of cues, [the student] became distracted and/or took an extended period of time before responding" (id.). She opined that the student struggled daily to communicate his wants and needs and ideas, and indicated that these difficulties were present at home, in the classroom and in one-to-one peer interactions (id.). The evaluator indicated that the student's poor speech intelligibility would impact skills such as letter sound development, rhyming and syllable segmentation (id.). Finally, the evaluator reported that based on the Descriptive Pragmatic Profile, his pragmatics skills were inadequate (id.).

A December 2020 classroom observation reported that the student was found playing on his own during free play time, sitting on the floor holding a train; however, he could not put the pieces together so he "quickly abandoned [it]," stood up and went to sit by himself at a table "staring into space" despite a group of children playing a game right next to him (Parent Ex. H at p. 1). He then went back to the floor and was observed to hold a box of animals on his lap, which he then took and pushed across the floor to the other side of the room collecting animals as he went (id.). He abandoned this activity and then sat down in "w" formation next to two peers without indicating any interest in playing with them and proceeded to pick up a car and hold it in his hand (id.). He then abandoned the car and began to roam around the room (id.). The student did not respond when the teacher announced clean up time, did not follow the prompt 'get the animal on the floor' and required the teacher to physically prompt him to pick up the animal saying 'pick it up please' while pointing (id.). During snack time, the student was the last one to find a seat and required redirection from the teacher (id.). During circle time, the student was unable to "go find something that is a square" even after watching other children bringing back square items, instead he stood up and looked to the teachers for help (id.).

The classroom observation reflected teacher report that the student was "behind in following class routines" and that he would stay in one area when the class moved to another (i.e., he will stay at circle time instead of moving to snack) (Parent Ex. H at p. 1). The teacher further described that the student would follow one directive and then become distracted and wander (id. at p. 2). She also indicated that the student had strong memory skills and would respond to a question by repeating the last thing he heard said by a friend, or something he remembers said in relation to the question from the previous day (id.). The evaluator further described the student during an art activity on video, noting that the student did not engage in the activity (id.). She opined that "[h]e appeared to be in his own world and showed a lack of awareness" (id.). The

teacher indicated that 'this happen[ed] a lot by project, table activity time' and reported that the student exhibited 'delayed reaction' and 'slow to respond' disposition, and that he required verbal prompts with modeling, repetition and visuals to get him to engage and "keep up with the group" (id.). Finally, the evaluator opined that if verbal repetition and visual support were not provided, the student could not complete a task (id.).

Review of the evaluative information available to the January 2021 CPSE shows that the student exhibited pre-academic and language skill delays, and had difficulty engaging in and following directions for classroom activities without adult support, and I find that the district did not demonstrate that three 60-minute sessions per week of SEIT services was sufficient to meet the student's needs for adult support as reflected in the evaluative information the January 2021 CPSE had before it when developing the student's IEP. As such, the January 2021 CPSE's failure to conduct a PT evaluation of the student and offer sufficient SEIT services resulted in a denial of a FAPE for the remainder of the 2020-21 school year and this deficiency in the design of the IEP lasted through the beginning portion of the 2021-22 school year until the January 2022 IEP was proposed by the CPSE.

### **C. January 2022 CPSE and IEP**

#### **1. Physical Therapy Evaluation and Implementation**

The parents argue that the district's delay in evaluating the student for PT and failure to implement the PT services once they were recommended in the January 2022 IEP denied the student a FAPE for the remainder of the 2021-2022 school year.

On May 6, 2021, the student's SEIT completed a request that the district conduct a PT evaluation, because while maneuvering around the classroom, the student "often bump[ed] into people or objects due to his spaciness and lack of coordination," he was "clumsy when he walk[ed] or jump[ed]," he "trip[ped] frequently and ha[d] poor eye hand coordination" and he "ha[d] a hard time pulling his pants up in the bathroom, coloring in the lines or with enough pressure, catching a ball, and opening his own snack" (Parent Ex. L at pp. 1-2). The SEIT noted that a PT evaluation of the student had not been conducted as part of his initial evaluation and expressed concern for the student's safety (id.). She recommended that the student receive PT "so he c[ould] learn to perform gross motor and functional mobility skills successfully and independently" (id. at p. 2).

On October 6, 2021 the parent emailed the district indicating that she had "sent in a justification letter on May 11 2021" for a PT evaluation "numerous times, through the month of June, but never received a response" (Parent Ex. N). The parent requested that the district "fast track [the student's] PT evaluation this year so we could get him the servicing he really needs" (id.). On October 18, 2021, the district conducted a PT evaluation (Parent Ex. I at p. 1).

According to the resulting evaluation report, the October 2021 PT evaluation was conducted due to concerns regarding the student's safety awareness and poor motor planning (Parent Ex. I at p. 1). The evaluation report indicated that the student's overall gross motor skills were delayed, specifically noting that he could not walk along raised surfaces with appropriate balance, could not imitate a tandem pattern, his jumping skills were immature, and he could not coordinate a two footed pattern (id. at p. 3). The evaluator further reported that the student could not jump over a 2-inch hurdle, hop or gallop forward (id.). Additionally, the student used an

immature pattern to descend stairs, and he did not exhibit appropriate motor skills or safety awareness for climbing simple indoor equipment (id.). The evaluator opined that due to the student's poor coordination, muscle weakness and gross motor delays, he would be unable to keep up with peers on the stairs or playground (id.).

The January 7, 2022 CPSE considered the PT evaluation, recommended that the student's IEP be revised, and that he receive two 30-minute sessions per week of individual PT (Parent Ex. B at p. 10). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Here, the evidence shows that in a May 2022 email, the parent notified the district that the student "was supposed to receive PT twice a week starting at the beginning of February, but the agency was never able to find a provider" and requested that the student "be able to receive those services over the summer" (Parent Ex. O at pp. 1-2). On May 4, 2022, a district administrator replied to the parent's email and affirmed that the student was "entitled to compensatory services" (id. at p. 1). However, while evidence described above clearly shows the student's need for the services insofar as he had gross motor delays and was tripping, falling, and bumping into people and objects in an unsafe manner, it does not show any attempt by the district to deliver the services called for by the IEP or make them up. Accordingly, the failure of the district to implement the student's PT mandate for an extended period of time was a material deviation from the terms of the January 2022 IEP and, contrary to the finding of the IHO, constituted a denial of FAPE.

## 2. SEIT Services

Next, turning to the dispute over the sufficiency of the recommendation for SEIT services in the January 7, 2022 IEP, review of the hearing record indicated that the January 2022 CPSE had before it and considered a May 2021 SEIT quarterly report, the October 2021 PT evaluation report, a December 2021 SEIT progress report, a December 2021 speech-language progress update, and an undated OT progress update (Dist. Ex. 1; see Parent Ex. B at pp. 3-4). In order to support the student's identified needs, the January 2022 CPSE recommended that the student receive three 60-minute sessions per week of individual SEIT services, and two 30-minute sessions per week each of individual speech-language therapy, individual OT, and individual PT (Parent Ex. B at pp. 1, 10).

The May 2021 quarterly SEIT progress report reflected that the student showed significant social delays, had difficulty making eye contact, and often spoke too quietly to be heard (Dist. Ex. 1 at pp. 11). The SEIT indicated that the student was making slow progress, and he was beginning to move from parallel play to associative play (id.). The student's teacher reported to the SEIT that she was "very concerned about [the student's] delay in many areas," and that the student was making slow progress joining his classmates in play, he had difficulty maintaining eye contact and directing his words towards listeners and also had a hard time focusing when working on projects (id. at p. 11). Additionally, the progress report indicated that the student had a weak grasp on a crayon, poor coordination and focus, and that he tripped or walked into chairs or children in his



way (id. at pp. 11-12). The teacher expressed concern that the student would "not be able to keep up with his classmates next year" (id. at p. 12).

The May 2021 SEIT progress report included information about the student's annual goals, indicating that while he was making progress with classroom routines and knew to stop playing and start putting away toys when announced, he needed constant direction after each toy he put away to look around for more, as well as that the bigger trucks go on the bottom and smaller on the top shelves (Dist. Ex. 1 at p. 12). She noted that after "clean up" the student would sit down for snack without being reminded (id.). The report reflected that the student had made little progress on the annual goal designed to improve speech intelligibility and that he spoke in a low tone with poor articulation without making eye contact (id.). Additionally, the provider reported that the student was very difficult to understand, he did not seem to realize when he was not heard and would continue speaking without any responses from his peers, and that he was frequently asked to repeat himself by adult listeners (id.). The SEIT reported that the student was making progress on his goal to improve peer interactions and indicated that he would play alongside his classmates and noticed the activities they were doing, specifically noting that if it was an activity of interest to him, he would follow along with the other children (id. at pp. 12-13). The student made some progress toward the annual goal to improve classroom functioning by joining group activities; however, the SEIT reported that "most of the things [the student said were] off target" and that he missed the main point of the conversation (id. at p. 13). Moreover, the SEIT indicated that while the student had made progress on his annual goals, she clarified that he had not made sufficient progress to meet the annual goals "by the end of the IEP" (id. at p. 14). She specifically noted that the student continued to need assistance during social interactions, and that focusing on both physical activities and on classroom lessons was challenging for him (id.). Finally, the SEIT indicated that the student would benefit from additional hours of SEIT services (id.).

A December 2021 progress report by the SEIT described the student as "a compliant boy who follow[ed] the classroom routine well" and indicated that he exhibited poor articulation skills which affected his ability to socialize with peers in an age-appropriate manner (Dist. Ex. 1 at p. 15).<sup>7</sup> Additionally, the SEIT indicated that the student lacked "the ability to initiate interaction with his peers" and that he frequently spoke very quietly and needed prompting to raise his voice so others could hear him (id.). The SEIT further described that the student exhibited poor fine motor skills, used an immature pencil grasp and required support with cutting, as well as poor motor planning and spatial awareness (id.). The SEIT indicated that the student was "demonstrating a 25% delay in his social/emotional skills" and recommended that services continue as recommended on his IEP (id.).

As described above, the January 2022 CPSE had before it information concerning the student's continued struggle to function in the classroom and his need for significant adult support as well as information that he was making considerably less progress toward his annual goals than would be reasonably anticipated under the circumstances. Accordingly, because the hearing record lacked evidence that the student's recommended PT was implemented according to the

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<sup>7</sup> The December 2021 SEIT progress report was completed by a SEIT who began working with the student in November 2021 (Parent Ex. X ¶¶ 10, 11). In the SEIT's written testimony, she indicated that she was asked to write this progress update after working with the student for three to four weeks because the previous provider had not produced one (id. ¶¶ 21-22).

January 2022 IEP, and that three hours of SEIT per week was a sufficient level of service to appropriately meet the student's needs and provide him with educational benefit, the IHO erred in finding that the district offered the student a FAPE for the remainder of the 2021-22 school year.

#### **D. May 2022 CSE and IEP**

##### **1. Sufficiency of Evaluative Information**

On May 3, 2022 the CSE convened and after determining that the student was eligible for school-age special education services as a student with a speech or language impairment, developed an IEP to be implemented during the 2022-23 school year (kindergarten) (Dist. Ex. 5 at pp. 1, 26). The parents argue the IHO erred in determining that the evaluations available to the May 2022 CSE were adequate.

Review of the hearing record indicated that the May 2022 CSE considered a January 2022 turning five quarterly progress report, an April 2022 psychoeducational evaluation, and an April 2022 classroom observation (Parent Exs. J; K; Dist. Ex. 5 at pp. 1-6). The May 2022 IEP present levels of performance show that the CSE also utilized the October 2021 PT evaluation report, a December 2021 OT progress report, an April 2022 speech-language progress report, an April 2022 teacher interview, and information provided by the student's special education and regular education teachers (see Dist. Exs. 1 at pp. 4-10; 5 at pp. 1-6).<sup>8</sup>

The January 13, 2022 turning five quarterly progress report indicated that the student had shown some improvement in his social skills and was beginning to interact with his peers more independently; however, he continued to require prompts, cues and modeling at times to initiate or maintain an interaction (Dist. Ex. 3 at p. 1). The SEIT explained that the student mostly engaged in parallel play, with some cooperative play at times, and that he required some support to help maintain play schemes when playing with his classmates (id.). She further reported that while there had been some recent improvement in the student's intelligibility, he often spoke quickly and had difficulty producing many sounds which affected his peers' ability to understand him (id.). Additionally, the SEIT indicated that the student was joining his class in group activities and was able to follow routine and basic one-step directions; however, he had difficulty following directions with regard to spatial awareness and motor planning during fine motor and gross motor activities (id.). The student was reported to trip often in the classroom and had difficulty processing directions and information when his body was in motion (id.). The student had difficulty identifying and labeling letters and numbers and showed poor eye contact when conversing (id.). The student was able to understand concepts and stories taught in the group setting and was most able to learn when his body was still and with no distractions (id.). The SEIT's reports regarding the student's progress toward his annual goals indicated that he was making some progress toward his goals to follow directions in the classroom, and improve speech intelligibility and peer interaction skills (id. at pp. 2-3). Additionally, the SEIT reported that the student had met his annual goal to improve his classroom functioning by joining in group activities, noting that he participated in all group activities throughout the day and followed classroom routines well (id. at p. 3). The SEIT also reported that the student's teacher was concerned about

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<sup>8</sup> The December 2021 OT progress report and the April 2022 speech-language progress report referenced in the May 2022 IEP are contained in the hearing record (Dist. Ex. 5 at pp. 4-6).

his ability to socialize appropriately with peers and noted that even though there had been some improvement, his socialization was not consistent nor age appropriate (id. at p. 2). Additionally, the student's teacher observed a discrepancy between the student's cognitive abilities and his ability to process information while doing motor actions, noting that he had difficulty playing matching games, recognizing his name, and completing puzzles (id.).

The April 2022 psychoeducational evaluation indicated that the student's composite IQ fell within the average range, with both the verbal score and nonverbal score falling within the average range (Parent Ex. J at p. 4). The student's academic functioning was assessed using the Kaufman Survey of Early Academic and Language Skills (K-SEALS), which indicated that the student's vocabulary, receptive and expressive skills all fell within the average range (id.). The student's score for recognizing numbers, letters and words fell within the below average range in the 21st percentile (id.). Additionally, the evaluator reported that the student was able to identify "biggest" and "smallest"; count using one-to-one correspondence up to five, but had difficulty when presented with nine items; had difficulty identifying numbers receptively and expressively; and was able to identify the letter "H" but had difficulty identifying other letters, both upper and lowercase, receptively or expressively (id.).

With regard to the student's behaviors during the psychoeducational evaluation, the evaluator indicated that the student responded to her questions with "brief verbal responses and at times his responses were difficult to understand" (Parent Ex. J at p. 2). She further indicated that he exhibited age-appropriate eye contact and social relatedness during the evaluation session, and noted that his mood, affect, and attention span were also appropriate (id.). The psychoeducational evaluation contains progress report information which indicated that the student was demonstrating approximately 25 percent delay in his social/emotional skills, articulation skills and fine motor skills (id. at p. 1). Information provided by the parent indicated that the student had made progress; however, he continued to have difficulty focusing and following directions, did not always pick up on social cues, his speech and language challenges affected his social interactions with other students, and that school was a challenge, noting that he knew a lot of academic information but could not always show that during class lessons (id.).

The April 2022 classroom observation described that the student was observed to eat independently, transition appropriately from snack to circle time, participate in circle time by attending and raising his hands to answer questions a few times, participate in singing songs, and noted that "a few times" he became distracted by a nearby student or his clothes (Parent Ex. K at p. 1). The evaluator reported that the student's teacher indicated that this was a typical example of his performance, and that he often participated in circle time and attended well (id.). She further reported that the student had made progress, but continued to have difficulties with social skills, following multiple-step directions, retaining preacademic skills, and expressing himself clearly (id.). The teacher reported that the student could identify shapes and colors, recognize his name, count using one-to-one correspondence, and identify the use of objects (id.). She further reported that the student had difficulty recognizing letters and numbers, similarities and differences, quantities, and direction or position (id.). The teacher reported the student was independent in using the bathroom, eating and getting dressed and his play skills were emerging as were his ability to express his needs (id.). She shared that the student continued to have some difficulty sharing and turn taking in class, and he required redirection and prompting at times to follow the classroom routine (id.). Finally, the teacher indicated that the student's fine motor skills such as holding a pencil, drawing a straight line, shapes and using scissors were also emerging (id.).

The May 2022 IEP present levels of performance contained information from an April 2022 speech and language progress report (Dist. Ex. 5 at p. 2). The IEP reflected that the student continued to have "[l]ingering issues with vowel distortion of short vowel i and oo (as in book), as well as distortions of prevocalic /r/ and /l/ at times, [which] c[ould] render [the student] unintelligible without a referent" (id.). The speech-language pathologist indicated that while these skills have improved, there was "limited carryover to conversational speech without a structured activity" (id.). Furthermore, she opined that due to these deficits, the student did not initiate or maintain conversations with peers and teachers did not always understand his requests (id.).

Additionally, the May 2022 IEP indicated that due to the student's speech and language delays, difficulty focusing, following multiple-step directions, and retaining previously taught information, his "expected progress in acquiring skills and information at times was slower compared to other students his age" (Dist. Ex. 5 at p. 3). The IEP further indicated that the student benefitted from a "multisensory approach to learning with visual supports, hands on learning, time to process his thoughts, pre-teaching, modeling, small group lessons, movement breaks, teacher facilitation, repetition of instructions, and praise and encouragement when he doe[s] not give up and shut down" (id.).

With regard to social development, the May 2022 IEP present levels of performance indicated that the student had a few peers in his class he preferred and would play parallel to those students (Dist. Ex. 5 at p. 3). The IEP further indicated that the student continued to require prompts, cues and modeling to initiate and maintain peer interactions as well as support to maintain play schemes when playing with classmates (id.). Additionally, the student occasionally spoke quickly and had difficulty articulating many sounds, which affected his peers' ability to understand him during play (id. at pp. 3-4). If peers did not understand him, he was observed to "break away from the activity and play on his own" (id. at p. 4). The IEP reported that the student had difficulty picking up on social cues, which made it harder for him to join groups of peers; his speech deficits made it difficult for the student to express frustration when a peer took a toy; and he did not advocate for himself in those situations and would walk away (id.). The school staff reported that the student was aware of his speech difficulties and would shut down when he could not express his feelings or needs (id.).

Additionally, the May 2022 IEP identified the following management needs: verbal and nonverbal cues; clear and concise directions; repetition of instructions; multisensory approach to learning; break down tasks into easier to understand segments; pre-teaching when possible; small groups when possible; reduce distractions; memory strategies; hands on materials; visual reminders; alphabet strip and number line on desk or nearby wall; peer modeling; additional time for verbal responses; praise and encouragement; frequent movement breaks; preferential seating near adult; and strategies provided to help increase interactions with peers (id. at pp. 5-6).

After considering the evaluative information relied on by the January 2022 CSE, including the information described above, I find that the evidence in the hearing record shows that the May 2022 CSE had sufficient evaluative information from a variety of sources that informed the CSE's identification of the student's current needs and development of the student's IEP for the 2022-23 school year.

## 2. Annual Goals

Turning next to the parents' argument that the annual goals in the May 2022 IEP were inadequate, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In this case, review of the May 2022 IEP indicated that the CSE developed approximately 17 annual goals designed to improve the student's ability to: follow directions in the classroom; improve peer interactions and initiate play in group activities; follow multi-step directions that require spatial awareness and motor planning; expressively and receptively identify letters and sounds; expressively and receptively identify numbers 1-10; count manipulatives to 20; listen to a grade level story and answer questions about the story; write the letters of his name without a model; improve his intelligibility by consistently using fricatives and affricates; produce short vowel "i" and "a" sounds in words, phrases and sentences and repair possible communication breakdowns; improve pragmatic and play skills by maintaining a topic, engaging in two conversational exchanges with peers and engaging in pretend play of varying roles using props and role related vocabulary with peers; demonstrate appropriate grasp pattern and visual perceptual skills to imitate letters with proper directionality; improve bilateral coordination skills by using age appropriate scissors; improve overall coordination in age related gross motor activities (jump, run, and climb) alongside peers; improve stair negotiation skills; accurately identify feelings, social cues and coping strategies; and play with 1-2 peers in unstructured activities (Dist. Ex. 5 at pp. 7-20). Review of the annual goals shows that they relate to the student's areas of need described above, and contain criteria for measurement, methods of how progress would be measured, and schedules of when progress would be determined (*id.*). As such, while some of the annual goals contained in the May 2022 IEP may be broad or perhaps overly ambitious, any deficiencies related to the annual goals did not rise to the level of denial of FAPE.

## 3. SETSS

The May 2022 CSE recommended the student receive one period per week of direct, individual SETSS in math and two periods per week of direct, individual SETSS in ELA together with related services (Dist. Ex. 5 at pp. 21-22). Unlike SEIT services described above, SETSS is a primarily undefined term used within the district that shifts in meaning from student to student (see Application of the Dep't of Educ., Appeal No. 23-234 [describing the SETSS as being provided at times other than "secular studies" at a provider location away from the school the child attended at various times during the school day]).<sup>9</sup> With regard to the parents' claim that the May

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<sup>9</sup> The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and it went largely undefined in the hearing record in this case. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS"

2022 CSE's recommendation for SETSS was insufficient, the evidence in the hearing record shows that, consistent with the findings related to the January 2021 and January 2022 IEPs, the student continued to demonstrate delays and difficulties across settings and domains which required a greater level of support than the three periods per week of SETSS would have provided. The evaluative information discussed in detail above leads me to conclude that in order to make reasonable progress in light of his circumstances the student required a more supportive environment such as ICT services within a general education classroom, or a greater number of consultant teacher services in combination with indirect consultant teacher services to support the regular education teacher considering the breadth of the student's academic, attention, language, social/emotional, and management needs. Therefore, the hearing record does not support the IHO's finding that the student was offered a FAPE for the 2022-23 school year.

### **E. Compensatory Education Relief**

Turning to the parents' request for 318 hours of 1:1 consultant teacher services, 172.5 hours of OT and 81 hours of PT calculated on a twelve month basis, I find that the IHO erred in denying the parent compensatory education, and therefore I will order compensatory education in the amounts stated below for the reasons that follow.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award

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does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047). Consultant teacher services is the service on the continuum of services which most closely approximates the relief requested by the parents (see 8 NYCRR 200.1[m][1]; 200.6[d]; Application of the Bd. Of Educ., Appeal No. 14-109). Consultant teacher services are "for the purpose of providing direct and/or indirect services to students with disabilities who attend regular education classes . . . and/or to such students' regular education teachers" (8 NYCRR 200.6[d]). They are also "provided to a student with a disability in the student's regular education classes and/or to such student's regular education teachers" (8 NYCRR 200.1[m]). SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6) and is not adequately defined in the hearing record in this matter (see Tr. pp. 157-60, 193).

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

First, regarding the parents' request that the award of compensatory education be calculated on a twelve-month basis, State regulations provide that, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). "Substantial regression" is defined as "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], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "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>). Review of all three of the student's IEPs shows they were developed for a ten-month school year, which I decline to modify as the hearing record does not show that the student lost skills previously learned in a manner that can be described as substantial regression (Parent Ex. B at p. 11; Dist. Exs. 5 at p. 22; 13 at p. 13). As there is insufficient evidence that the student required services on a 12-month basis, I decline to develop compensatory education relief in a manner that is based on a failure of the CPSE or CSE to provide extended school year programming to the student.

Next, with regard to remediating the denials of FAPE related to the three IEPs in dispute, the hearing record shows that on February 23, 2022, the student's SEIT emailed the district a SEIT justification request which asked for "[a]n increase of SEIT hours from 3 hours to 5 hours a week" (Parent Ex. Z at pp. 1, 3). The rationale for the proposed increase in SEIT hours is that the increase in hours "would allow [the student] to have the daily consistency to promote appropriate peer interaction, play skills and increase his ability to focus. It would allow him more opportunity to work on his attention to tasks and ability to follow directions" (id. at 3). Having reviewed the evidence in the hearing record, I find the SEIT's request was reasonable and appropriate. Therefore, I will rely on the SEIT's request of five hours per week of special education teacher services to calculate the amount of compensatory education, in the form of consultant teacher services for the now school-age student, owed for both the 2020-21 and 2021-22 school years.

Having found that for the 2020-21 school year the student should have received five hours per week of SEIT services, instead of the three hours recommended in the January 2021 IEP, the student is therefore entitled to an award of compensatory consultant teacher services for the appropriate additional SEIT services not provided to the student during the 2020-21 school year

from the date of the IEP meeting, January 21, 2021, through the end of June 2021, totaling 44 hours of consultant teacher services (approximately 22 weeks x 2 hours per week).

As the January 2022 CPSE similarly should have recommended that the student receive five hours per week of SEIT services, an award of consultant teacher services for the 2021-22 school year is appropriate. The 2021-22 school year had approximately 40 weeks of school with the first portion covered by the January 2021 IEP and then the second portion by the January 2022 IEP and, overall, the student should have received an additional two hours of SEIT services each week of the 2021-22 school year. Therefore, the student will be awarded 80 hours of compensatory consultant teacher services for the appropriate additional SEIT services the student should have received during the 2021-22 school year (40 weeks x 2 hours per week).

Regarding the lapse in OT services, the parent testified that the student's "OT provider went out on maternity leave for the last 8 weeks [approximately 16 OT sessions] of the 2021-2022 school year" and that although the district provided eight compensatory OT sessions in July 2022, the student was owed eight OT sessions for those missed during the 2021-22 school year (Tr. pp. 444-45; Parent Exs. O at p. 2; S ¶¶ 70-75). As such, the evidence shows that the student is entitled to eight sessions of OT services as compensatory education.

With regard to PT services, having determined that the student should have received two 30-minute sessions per week of PT from the January 2021 CSE meeting through the end of the school year (22 weeks x 60 minutes per week), the student is therefore entitled to an award of 22 hours of compensatory education for PT for the 2020-21 school year. Further, having determined that the student should have continued to receive two 30-minute sessions per a week of PT from the start of the 2021-22 school year through the January 10, 2022 implementation date in the January 2022 IEP, and because the hearing record also indicates that the student did not receive the PT services called for by the January 2022 IEP for the remainder of the school year, overall the student is entitled to 40 hours of PT services as compensatory education for the 2021-22 school year (40 weeks x 60 minutes per week).

As I have concluded that the district failed to offer the student a FAPE for the 2022-23 school year due to insufficiently supportive SETSS, the student is entitled to two hours per week of compensatory consultant teacher services for a total of 80 hours (40 weeks x 2 hours).

As such, the total compensatory education awarded is as follows: (1) 204 hours of consultant teacher services (44+80 +80); (2) 8 hours of OT as compensation for the OT the district failed to provide the student during the 2020-21 school year (Tr. pp. 444-46); and (3) 62 hours of PT as compensatory education (22+40).

## **VII. Conclusion**

Review of the evidence in the hearing record does not support the IHO's findings that the January 2021, January 2022, and the May 2022 IEPs offered the student a FAPE, and the IHO erred in denying the parents' request for compensatory educational services.

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



**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated August 14, 2023 is modified by reversing those portions which found that the January 2021, January 2022, and May 2022 IEPs offered the student a FAPE and which found that the student was not entitled to compensatory education; and

**IT IS FURTHER ORDERED** that, unless the parties shall otherwise agree, the district shall provide the student with compensatory education in the form of 204 hours of consultant teacher services, 8 hours of OT services; 62 hours of PT services as described above; and

**IT IS FURTHER ORDERED** that the compensatory education services awarded herein shall be provided by the district to the student within two years from the date of this decision if the student has not used them by such date.

**Dated: Albany, New York  
December 13, 2023**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**