The University of the State of New York

The State Education Department
State Review Officer
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No. 24-092

Application of the BOARD OF EDUCATION OF THE NORTH BABYLON UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Guercio & Guercio, LLP, attorneys for petitioner, by Lisa L. Hutchinson, Esq.

Law Offices of Susan Deedy & Associates, attorneys for respondent, by Richard F. Corrao, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer appropriate educational programming to respondent's (the parent's) son during the 2021-22 school year and ordered it to fund compensatory education services. The parent cross-appeals from the IHO's denial of her request for an independent functional behavioral assessment (FBA) and behavioral intervention plan (BIP), and from the IHO's findings that the district did not deny the student a FAPE for the 2021-22 school year on other grounds. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student in this matter has received diagnoses of attention-deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD) (Dist. Ex. 32 at p. 1). During the 2020-21 school year (kindergarten) the student was eligible to receive special education services as a student with an other health-impairment, and he attended a district elementary school where he received

integrated co-teaching (ICT) and 1:1 paraprofessional services (id.).[1] A BIP was created for the student on October 22, 2020, and revised on February 8, 2021 in contemplation of the student's first grade year (Parent Ex. B; Dist. Exs. 33; 48).[2]

The CSE convened on May 4, 2021, to formulate the student's IEP for the 2021-22 school year (first grade) (see generally Dist. Ex. 1). The May 2021 CSE recommended that the student receive ICT services, full-time 1:1 aide services, one 30-minute session per week of small group (5:1) counseling, and one 30-minute session per week of individual counseling (id. at pp. 7-8).[3] Additionally, the CSE recommended one 60-minute session per month of individual parent counseling and training (id. at p. 7). According to testimony, the student started the 2021-22 school year in a class of two teachers, the same 1:1 aide that had worked with him during kindergarten, and approximately 26 students without exhibiting significant behavioral difficulties (Tr. pp. 259-60, 798, 971-72, 977-78, 1146-47, 1242-43, 1658).[4, 5] The student's first grade special education teacher testified that the student was well-behaved from September 2021 through December 2021 (Tr. pp. 1242, 1265, 1278-79). As the school year progressed, the demands on the student increased and in winter 2021-22 he began engaging in behaviors such as aggression, non-compliance, and property destruction (Tr. pp. 936-37, 1265-67, 1268, 1360-61; Dist. Ex. 2 at p. 1). In winter 2021-22, the district began collecting data toward a new FBA of the student (Tr. pp. 1361-66, 1373, 1383).

On February 9, 2022, the student was involved in a major behavioral incident and was suspended from school for five days (Tr. pp. 118-25, 617-19, 625-26, 980-992, 1078, 1080-81, 1113-15, 1285-87, 1313-14, 1330, 1368-72; Dist. Ex. 61). The CSE convened on February 15, 2022 to hold a manifestation determination review (MDR) in which the CSE determined that "a nexus was found between [the student's] behavioral incident and his educational classification as a student with an Other Health Impairment" (Dist. Exs. 2 at p. 1; 3 at p. 1). Immediately following the February 15, 2022 MDR, the CSE convened to review the student's IEP (Dist. Ex. 2 at p. 1).

[1] The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 8 NYCRR 200.1[zz][10).

[2] Parent Exhibits B and H are duplicate copies of a BIP dated June 11, 2021. Parent Exhibit B will be used throughout the remainder of this decision to refer to the student's June 11, 2021 BIP.

[3] The May 2021 IEP recommended that the following program modifications and accommodations be delivered to the student on a daily basis: refocusing and redirection, preferential seating, check for understanding, support for organizational skills, and breaks (Dist. Ex. 1 at pp. 7-8).

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

[5] Although the district's assistant director of special education (assistant director) testified that there were "26 kids in the [student's first grade ICT] class" the district's February 15, 2022 IEP reported that "[t]here [we]re 21 students in his class" (compare Tr. p. 798, with Dist. Ex. 2 at p. 3).

The February 15, 2022 IEP noted that "[d]ue to the health and safety concerns presented, [the student] w[ould] be provided with the support of a 1:1 behaviorist throughout the school day until a Behavior Intervention Plan [wa]s developed" (id. at p. 2). The February 15, 2022 CSE recommended that the student continue to receive ICT services in his then-current class with a 1:1 aide, one 30-minute session per week of small group (5:1) counseling, two 30-minute sessions per week of individual counseling, and 15 1-hour sessions per year of behavior intervention services (Dist. Ex. 2 at pp. 8-9).[6, 7] The February 15, 2022 IEP reflected that the CSE discussed "sending out packets to explore placements that include embedded therapeutic and behavioral supports throughout the school day which is not available in district" and that the parents were not in agreement with sending packets out at that time (id. at p. 2).

On February 21, 2022, the district completed its updated FBA (Parent Ex. KK). On February 28, 2022, the CSE convened to discuss the results of the FBA that had been conducted earlier that month but noted that due to the student's suspension following the February 9, 2022 incident, the FBA data collection was interrupted and the district was unable to complete the assessment (Tr. pp. 205-06; Dist. Ex. 4 at p. 1). The February 28, 2022 CSE continued to recommend the same special education program, related services, and accommodations as in the February 15, 2022 IEP (compare Dist. Ex. 2 at pp. 8-9, with Dist. Ex. 4 at pp. 9-10).[8]

The CSE reconvened on March 16, 2022 to review the "new FBA [that] was conducted 2/22" and noted that "[a] BIP was developed and created with input from the parent on 3/16/22" (Dist. Ex. 5 at pp. 1, 8). The March 2022 IEP reflected that the CSE recommended sending out packets to potential out-of-district placements and the parents agreed (id. at p. 2).[9] The March 2022 IEP also reflected that there was a revised BIP for the student with a projected beginning/service date of March 16, 2022 (id. at p. 10). The CSE reconvened on May 20, 2022 and recommended the student's placement in an Eastern Suffolk Board of Cooperative Educational Services (BOCES) 8:1+3 special class located in a public school beginning June 1, 2022 with curb to curb transportation (Dist. Ex. 6 at pp. 11, 15). The student's recommended related services and accommodations remained unchanged from the student's March 2022 IEP (compare Dist Ex. 5 at pp. 9-11, with Dist. Ex. 6 at pp. 11-13). The May 2022 IEP noted that the "[p]arent stated she

[6] The February 15, 2022 IEP recommended individual counseling services which represented an increase of once per week to twice per week from the May 2021 IEP and also represented a change in location from "[c]ounselor's office" to "[f]lexibility in location of service, push-in or pull-out from classroom, at the provider's discretion" (compare Dist. Ex. 1 at p. 7, with Dist. Ex. 2 at p. 8).

[7] The February 15, 2022 IEP accommodations section was modified from the May 2021 IEP to include a BIP with a projected beginning/service date of February 28, 2022 (Dist. Ex. 2 at p. 9). The February 15, 2022 IEP noted that "[a]n updated FBA [wa]s being conducted in order to update the plan to more appropriately address [the student's] presenting needs" (id.).

[8] The section of the student's IEPs referenced in this decision as "accommodations" is documented in the student's IEPs as "supplementary aids and services/program modifications/accommodations" (see Dist. Exs. 2 at pp. 8-9; 4 at pp. 9-10).

[9] The March 2022 CSE did not change the student's recommended special education program or related services from the student's February 15, 2022 IEP (compare Dist. Ex. 2 at pp. 8-9, with Dist. Ex. 5 at pp. 9-10).

[wa]s not in agreement with this placement" (Dist. Ex. 6 at p. 2). During the May 2022 CSE meeting the parent requested "an independent evaluation" and the CSE approved her request (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated June 2, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. A at p. 3). The parent invoked pendency by requesting that the district maintain the student in his "then current educational placement" and requested an order directing the CSE to reconvene to create an appropriate IEP for the student based on the results of the independent educational evaluation (IEE), and award compensatory services (id. at pp. 12-13).

B. Events Post-Dating the Due Process Complaint Notice

On July 18, 2022 a private psychoeducational evaluator selected by the parent (psychoeducational evaluator) finalized the student's IEE (Dist. Ex. 38; see Dist. Ex. 7 at p. 1). On July 20, 2022, the CSE convened for the student's annual review and to discuss the results of the psychoeducational IEE (Dist. Ex. 7 at p. 1). The CSE meeting information noted that due to requirements to maintain the student's pendency placement, the student did not attend the BOCES placement as recommended in the May 2022 IEP, rather, he had continued to receive ICT services in the district elementary school (id.). The July 2022 CSE recommended the same BOCES 8:1+3 special class placement for the student as was recommended in the May 2022 IEP, along with the same related services (compare Dist. Ex. 6 at pp. 11-12, 15, with Dist. Ex. 7 at pp. 9-10, 13). The July 2022 IEP included a new accommodation of a scribe daily for use during writing assignments and a new BIP both with a projected beginning/service date of September 6, 2022 (Dist. Ex. 7 at p. 10). During the July 2022 CSE meeting, the CSE "did not agree to an independent FBA and denied the [p]arent's request, but did state that an updated FBA w[ould] be conducted in September 2022 . . . by an independent evaluator of the [d]istrict's choice" (id. at p. 2).

Via an email dated August 8, 2022, the parent brought a motion before the IHO requesting an order directing the district to fund an independent FBA (see Parent Ex. P). The parent stated that during the July 2022 CSE when she requested an independent FBA, the district informed her that it "would not be filing a due process complaint defending the [d]istrict's February 2022 FBA and would instead perform its own FBA sometime in or about September 2022" (id. at p. 2). Through an email to the IHO dated August 15, 2022, the district responded to the parent's motion admitting that the parent "did request an IEE for an FBA" during the July 2022 CSE meeting but argued that the district denied the parent's request pursuant to A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 178 [D. Conn. 2006] (Parent Ex. Q at p. 1). The IHO ruled on October 17, 2022 that as the parent just received the psychoeducational IEE, her request for an independent FBA was "in fact asking for two IEEs in connection to the reevaluation conducted in February, 2022, which she is not entitled to pursuant to 34 C.F.R. Sect. 300.502(b)(5)" (Parent Ex. X at p. 6).

C. Impartial Hearing Officer Decision

An impartial hearing convened on September 15, 2022 and concluded on September 22, 2023 after seventeen days of proceedings (Tr. pp. 1-2392). In a decision dated February 7, 2024, the IHO dismissed some of the parent's claims but ultimately determined that the district failed to

offer the student a free appropriate public education (FAPE) for the 2021-22 school year and consequently granted a portion of the parent's request for compensatory education (IHO Decision at pp. 11-23). As relief, the IHO ordered the district to fund at least 54 hours of 1:1 compensatory writing tutoring services, at least 30 hours of group counseling, at least 35 hours of individual counseling, and at least 8.5 hours of parent counseling and training (id. at pp. 22-23).

IV. Appeal for State-Level Review

The district appeals and the parent cross-appeals. The following issues presented by the parties on appeal will be addressed below:

1. Whether the IHO erred in not finding parent's claims to be moot;

2. Whether the IHO erred in finding that the district denied the student a FAPE for the 2021-22 school year by failing to implement the student's counseling and behavioral services, and by failing to provide parent counseling and training;

3. Whether the IHO erred in finding that the district failed to provide the student a FAPE for the 2021-22 school year by failing to conduct an OT evaluation of the student;

4. Whether the IHO erred in finding that the district denied the student a FAPE for the 2021-22 school year due to the May 2022 CSE's failure to recommend a placement in the LRE;

5. Whether the IHO erred in awarding compensatory writing tutoring services, individual counseling, and parent counseling and training; and,

6. Whether the IHO erred in failing to find that the district denied the student a FAPE on additional grounds and failing to order an independent FBA and BIP.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in

an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's

needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[10]

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

As an initial matter, my independent review of the hearing record leads me to find that the IHO relied on the proper legal standards to support his conclusion that the district failed to provide the student a FAPE for the 2021-22 school year and, further, that the decision also demonstrates that the IHO carefully recited and considered the testimonial and documentary evidence presented by both parties, and carefully marshalled and weighed the evidence in support of his conclusions. Specifically, the IHO in this proceeding set forth the factual background that included details regarding the student's pre-kindergarten, kindergarten, and first grade school years including the student's pre-kindergarten psychological evaluation and subsequent FBA, a detailed description of the student's kindergarten year and kindergarten FBA, and a description of the testimony of both of the student's kindergarten ICT teachers reflecting the student's difficult behaviors and how his teachers implemented his BIP to address his behaviors (IHO Decision at pp. 2-4). Next, the IHO's decision included a description of the May 2021 CSE meeting conducted to develop the student's IEP for the 2021-22 school year, concerns expressed by district staff during the May 2021 CSE meeting, testimony from the district's board certified behavior analyst (district BCBA) regarding the student's behavior becoming increasingly more aggressive as the 2021-22 school year progressed, a detailed description of the student's February 9, 2022 behavioral incident, a detailed chronological description of the multiple CSE meetings held, and IEPs and BIPs the district developed in response to the student's behaviors (id. at pp. 4-7). The IHO described the student's refusal to leave the classroom to attend his counseling sessions, the district's push-in counseling model, and that following the February 9, 2022 incident the student would go home early, which impacted his learning (id. at p. 7). The IHO detailed the independent psychological evaluation dated July 19, 2022, which reflected that the student's "intellectual functioning ranged from below average to extremely high" (id. at p. 8). Further, the IHO provided an in depth summary of the May 20, 2022 CSE's recommended BOCES placement and why the CSE determined that programming was appropriate for the student (id. at pp. 8-9). The IHO noted that the proposed BOCES class included students with lower intellectual functioning than the student (id. at p. 9).

[10] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

A. Mootness

After setting forth the legal standard to be applied, the IHO discussed the district's assertion that the instant case should be dismissed as moot because the CSE convened multiple times and created multiple new IEPs after the filing of the parent's due process complaint (IHO Decision at pp. 10-11). The IHO summarized the parent's response to the district's allegation as follows:

> Here, the parents are seeking compensatory education as a result of the alleged FAPE violations. As a result, even without any consideration of whether this case is capable of repetition and avoiding review, it cannot be deemed moot because the Student could, and is, receiving additional services as a result of this decision

(IHO Decision at p. 11). The IHO correctly held that despite the district having convened multiple CSE meetings and created many IEPs for the student since the parent filed her complaint, those actions did not relieve the district of being potentially responsible for compensatory services in the event that the IHO held that the district denied the student a FAPE for the 2021-22 school year (IHO Decision at p. 11). The IHO also cited to the relevant caselaw in support of his rejection of the district's argument that the case should be dismissed as moot because the school year at issue had ended and the district had developed a number of subsequent IEPs (see Honig v. Doe, 484 U.S. 305 (1988), Maine School Administrative District No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 18 (1st Cir.2003); Independent Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 774 (8th Cir.2001); Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 890 (9th Cir. 1995) (id. at pp. 10-11). Ultimately, the IHO awarded some of the parent's request for compensatory education, which was an example of why the parent's due process complaint was not moot and, indeed, warranted relief (id. at pp. 22-23). Because the IHO determined that the student was denied a FAPE as a result of the district's failure to provide him with certain services, which affected his overall educational performance during the 2021-22 school year, it was proper for the IHO to hold that the parent's claims for the 2021-22 school year were not moot (id. at pp. 21-22).

B. Implementation

In reaching his determination that the district denied the student a FAPE for the 2021-22 school year, the IHO also summarized the relevant case law surrounding the parent's allegations that the district failed to implement the IEP, and found that such claims were actionable if the district failed to "materially" implement the student's IEP (IHO Decision at p. 13).[11] The IHO noted that failure to implement claims "must show more than a de minimis failure" (id.).

[11] The IHO referenced the following legal authority in rendering his determination as to whether the district failed to implement the student's IEPs: Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012); Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007); 34 C.F.R. Sect. 300.530(b)-(d); White v. District of Columbia, 80 IDELR 284 (D.D.C. March 31, 2018); and Wilson, 770 F. Supp. 2d at 275. (D.D.C.2011). Cases from this jurisdiction have relied on language found in Van Duyn and essentially employed the same standard (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails

1. Counseling

The IHO discussed evidence of how the student was mandated to receive "at least three weekly counseling sessions under his various IEPs" but that the student's counselor testified that following the February 9, 2022 incident, she no longer provided counseling to the student, instead she would push-in to the classroom to observe the student (id. at p. 14).

> The [s]tudent missed counseling services during the second half of the 2021- 2022 school year, even though the [s]tudent was certainly in need of counseling given the disruption that was a consequence of his actions. While one can understand the [d]istrict's position here, since the [s]tudent was effectively refusing the services, in this situation the [d]istrict [wa]s obliged to convene an IEP meeting and revise the IEP so that different behavioral support services should be offered. It is noted that impossibility is not considered a defense to IEP implementation claims

(IHO Decision at p. 14). The IHO cited relevant caselaw which buttressed his finding that it was not sufficient for the district to offer the student the possibility of counseling; rather it was the district's obligation to ensure that the student actually received his mandated counseling (IHO Decision at pp. 14-15). The evidence in the hearing record reflects that the CSE identified the student's social/emotional needs and had recommended the student receive counseling for the entirety of the 2021-22 school year (Dist. Exs. 1 at pp. 1, 5, 7; 2 at pp. 1-2, 4, 5, 8; 4 at pp. 1-2, 5, 6, 9; 5 at pp. 1, 5, 6, 7, 9; 6 at pp. 1-2, 7, 8, 9, 12).[12] In particular, the IEPs developed between February and May 2022 each included annual goals to improve the student's use of anger management strategies, peer interaction and cooperative play skills, ability to transition from one activity to the next, and use of positive strategies to resolve conflicts with peers (Dist. Exs. 2 at p. 7; 4 at p. 8; 5 at pp. 8-9; 6 at p. 11).

Testimony from the district social worker (social worker) who provided the student with counseling services for the 2021-22 school year indicated that she and the student successfully engaged in individual and group counseling sessions until January 2022, but that following an incident in January 2022 "the rapport that [she] had established with [the student]" seemed to change and she began "meeting with more resistance" (Tr. pp. 1133, 1140-49).[13] The social worker stated that "there were many times that [the student] did not want to leave the classroom" with her (Tr. pp. 1161-162). The social worker confirmed in her testimony that after the February 9, 2022 incident she provided push-in services for the student (Tr. pp. 1161-62, 1191). The social worker further testified that transitions could be "a trigger" for the student, so if the student was "enjoying

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to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]).

[12] The hearing record reflects that the CSE increased the student's counseling services following the February 9, 2022 incident (compare Dist. Ex. 1 at pp. 1, 7, with Dist. Ex. 2 at pp. 1-2, 8).

[13] The social worker testified that the change occurred after another individual, who shared the office space, attempted psychoeducational testing with the student and that she thought he may have developed "a negative association" with the room (Tr. pp. 1148-49).

what he was doing in the classroom, [she] was present in the classroom and observing" (Tr. pp. 1161-162).[14] In her testimony, the social worker stated that "[t]he class setting was [not] really conducive" to the provision of individual or group counseling (Tr. pp. 1167-168). During cross-examination the social worker was asked if she pushed into the classroom and "basically observe[d]" the student, and she responded "[y]es, exactly, correct" (Tr. pp. 1191, 1192).

According to a progress report for IEP annual goals, in the first trimester of the 2021-22 school year, the student was progressing satisfactorily toward four out of five of his counseling goals, and progressing inconsistently toward the goal to use positive strategies to resolve conflicts (Dist. Ex. 45 at pp. 2-3).[15] However, the second trimester comments indicated for the student's anger management and peer interaction goals that "[d]ata for th[ese] goal[s] was not sufficiently collected due to [the student's] refusal to go to the counselor's office" (id. at p. 2). Second trimester comments included in the progress report regarding the annual goals to transition among activities and use positive strategies to resolve conflicts indicated that the student had "regressed" with those goals since the last progress report (id. at pp. 2-3). By the third trimester, the progress report only reflected comments toward two of the student's social/emotional annual goals, indicating that the student had made inconsistent progress toward improving his ability to transition, and that he had "not made any progress" toward his goal to resolve conflicts (id.). The student's behaviors were a substantial area of concern and as such, the IHO correctly found that the evidence in the hearing record supported a finding that the social worker's observation of the student in the classroom did constitute a material failure to implement the student's counseling services and, therefore, contributed to a denial of a FAPE for the 2021-22 school year (IHO Decision at pp. 7, 14-15).[16]

2. Parent Counseling and Training

The IHO continued his analysis of whether the district failed to implement the student's IEP by noting the parent's testimony that she did not receive all of the IEP mandated parent counseling and training services (IHO Decision at p. 15). The student's 2021-22 IEPs provide for one 1-hour session per month of individual parent counseling and training during the school year (Dist. Exs. 1 at p. 7; 2 at p. 8; 3 at p. 6; 4 at p. 9; 5 at p. 9; 6 at p. 12). The hearing record contained very little information from the district about the provision of this service. The school psychologist testified that for the 2021-22 school year, the social worker "provid[ed] the parent training for [the student]" (Tr. pp. 44, 45). The school psychologist also testified that the parent counseling and training was included in the IEP "to assist with behaviors and problems at home" (Tr. pp. 96-97).

[14] The social worker testified that during her observations of the student in his classroom between February and June 2022, she did not "observe behaviors… [t]hat were of concern" (Tr. pp. 1162, 1167).

[15] The social worker testified that "between September and December" 2021, "[t]hings were going, you know, quite well" and that she "was meeting with [the student] regularly individually and for group intervention" (Tr. p. 1146). She further testified that "[t]here were three students in the group and he was doing very nicely in the small group, really never had too much difficulty in that setting" and that the student "was demonstrating some appropriate social skills and it was going quite well" (id.).

[16] I can appreciate the unease the social worker may have felt with regard to triggering behavior incidents, but that did not result in a revision of the student's IEP, nor did it relieve the district of the obligation to implement counseling services, and instead he just stopped receiving them for lack of a different plan.

The parent testified that she only received some of the recommended parent counseling and training (Tr. p. 2211). Specifically, the parent testified that she "received three 30-minute sessions in the fall," which consisted of a phone call "provided during school hours" with the social worker, who also "provide[d] [the student's] counseling services" (id.). Based on a 10-month school year, the parent further testified that she missed "eight and a half hours" of parent counseling and training (Tr. pp. 2211-122). The hearing record does not contain evidence to refute the parent's allegation regarding the provision of parent counseling and training, as such, the IHO's determination that the district failed to implement portions of the student's IEPs mandating parent counseling and training services is supported by the evidentiary record (IHO Decision at p 15; see Dist. Exs. 1-67).

3. Behavior Support Services

Further examining the district's failure to implement the student's IEPs, the IHO determined that the student "was mandated to receive home-based behavior support services" but that the district failed to provide those services for "about a month during the school year" (IHO Decision at p. 15). The hearing record support's the IHO's determination (Tr. pp. 789, 797, 1498, 2157-158, 2197-199: Parent Ex. G; Dist. Exs. 2 at pp. 1, 2, 8; 6 at pp. 1, 2, 12).

According to the testimony of the assistant director, the behavior intervention services were added to the February 15, 2022 IEP at the parent's request "because [the student's] behavior was also occurring at home" (Tr. p. 789; Dist. Ex. 2 at p. 8). The assistant director testified that after the February 15, 2022 CSE meeting, the "home services probably" did not begin right away as the district had "to find somebody with that availability and [the parent] ha[d] to coordinate it" (Tr. p. 797). The district BCBA testified that she began providing the service after March 15, 2022 but did not provide the service for "long" as she was "taken off" the student's case and a provider from an agency subsequently provided the services (Tr. pp. 1498-99). The parent testified that the service began in March 2022, "probably" sometime "after March 15," and made reference to the provider who completed a May 2022 behavior intervention services annual review (Tr. pp. 2157-158, 2197).

Regarding the parent's failure to implement claims against the district, the IHO discussed the district's argument "point[ing] out that [the parent] offered no proof of deprivation of educational benefit (IHO Decision at p. 15). On this assertion the IHO held:

> [H]arm is ordinarily not a requirement when determining whether a failure to implement claim should result in a finding of FAPE denial. Rather, the focus is on the percentage of services delivered . . . [The parent] has shown that [the district] denied the [s]tudent a FAPE by failing to provide counseling, behavior services and parent training during the 2021- 2022 school year

(IHO Decision at p. 15).

Therefore, an independent review of the evidence in the hearing record supports the IHO's determinations that the district was required to implement the counseling services, parent counseling and training, and behavior intervention services that were mandated in the student's IEPs, and that such failure to do so contributed to a denial of a FAPE for the 2021-22 school year.

C. Occupational Therapy Evaluation

The IHO continued his FAPE analysis by citing to 34 CFR. sections 300.303 (a) and (b), 300.304(c)(1) and (c)(4), 300.305(a)(1) and (a)(2), (c) and 300.311 and 20 U.S.C. §§ 1414(b)(3)(B) and (c)(1) in discussing the district's obligations to reevaluate students at least once every three years, what the reevaluations must consist of, and how the district must review the data obtained to determine whether it was sufficient or if the district needed to obtain more data through further assessments or evaluations (IHO Decision at pp. 15-16).

> [The parent] argued that the [d]istrict failed to evaluate the [s]tudent in the areas of assistive technology, occupational therapy, and speech-language in the face of obvious and pervasive needs in writing skills and functional communication. [The parent]'s expert provided testimony in support of this claim insofar as occupational therapy is concerned, and there [wa]s an occupational therapy [] evaluation in the record that support[ed] this claim . . . The evaluation shows that the [s]tudent did exhibit sensory deficits, which [d]istrict witnesses themselves linked to the [s]tudent's behavioral concerns . . . The [d]istrict argued that the independent occupational therapy evaluation came after the school year ended, but the deficits exposed by the evaluation almost certainly also existed at the time that the parent wanted the evaluation . . . But I agree with [the parent] that the [s]tudent should have been evaluated for occupational therapy concerns after the February 9, 202[2] incident, and that [the district] accordingly denied the [s]tudent a FAPE

(IHO Decision at pp. 16-17). The student's struggle to complete and resistance to writing tasks, which suggested the need for an OT evaluation, is supported by the hearing record (Tr. pp. 70, 80-81, 84, 379-80, 381, 406, 426, 428-431, 488, 518, 540, 568, 699, 798, 827, 923, 972, 978-79, 1003-004, 1006, 1011, 1032, 1259, 1260-261, 1271, 1274-276, 1276-277, 1287, 1292, 1305-306, 1307, 1330, 1441, 1709-710, 1711-712, 1807-808, 1831, 1841, 1843, 1859, 2141, 2201-204; Parent Exs. E; KK at p. 3; Dist. Exs. 1 at pp. 1, 4, 5, 6, 7; 5 at p. 5; 34 at p. 3; 35 at p. 7; 38 at pp. 6, 11, 12, 17; 41 at p. 1; 45 at p. 1). The hearing record included testimony from the student's kindergarten teachers, first grade teachers, the district BCBA, CSE chairperson, assistant director, parent, and documentation from the student's IEPs, BIPs, and annual goal progress monitoring, that writing was a "trigger" or "nonpreferred" activity for the student (Tr. pp. 70, 379-80, 381, 406, 518, 540, 568, 699, 798, 827, 972, 978-79, 1003-004, 1032, 1276-277, 1287, 1305-306, 1330, 1441, 1709-710, 1711-712, 2141, 2201-02; Parent Ex. KK at p. 3; Dist. Exs. 1 at pp. 1, 4; 5 at pp. 5, 6; 34 at p. 3; 35 at pp. 7, 10; 41 at p. 1; 45 at p. 1). The district and parent agreed to trial providing the student with a speech-to-text device and/or scribe in order to avoid triggering the student by asking him to write, and the first grade special education teacher testified the student was "compliant" with writing activities when a scribe was used (Tr. pp. 1011, 1292, 1305-306, 1307, 2201-204; Dist. Ex. 5 at p. 6). Overall, the hearing record contains numerous examples of the student's reluctance to engage in writing activities, which should have alerted the district to investigate the student's difficulties in this area through an OT evaluation.

D. May 2022 BOCES Placement and LRE

Next, the IHO addressed the district's responsibility to comply with the IDEA by providing students with disabilities the opportunity to be educated in the LRE (IHO Decision at pp. 17-18).

The IHO analyzed the criteria set forth in P. v Newington in evaluating the student's recommended placement for purposes of LRE (id. at pp. 18-19).[17] The IHO held that the district established that it made "reasonable efforts to accommodate the child in a regular classroom" by "provid[ing] the [s]tudent with a 1:1 aide, a 1:1 BCBA, preferential seating, refocusing and redirection, breaks, behavioral intervention plans, functional behavioral assessments, and the like" (id. at p. 19). Likewise, the IHO determined that the district proved that the student's behavior resulted in "negative effects to other students in the classroom" (id.). As such, the IHO agreed that the district had met the first prong of the Newington test regarding the need to move the student to a more restrictive setting than a general education classroom (Newington, 546 F.3d at 120).

However, the IHO decided that the district failed to appropriately consider "the educational benefits to the [s]tudent in a regular education classroom as compared to the benefits in a special education class" and further found that "the evidence indicate[d] that the [s]tudent's academic levels d[id] not sync with the levels in the proposed BOCES classroom, which contained students who [we]re functioning well below grade level" (id.). According to the IHO

> [The parent] [wa]s rightly concerned that putting the [s]tudent in such an environment would worsen the [s]tudent's behavioral issues and that the answer should have been something other than [the] BOCES 8:1:1 +3 placement. As [the parent] pointed out, even [], the former [d]istrict BCBA assigned to the [s]tudent, said the BOCES placement was not right for the [s]tudent, whose behaviors were beginning to improve by this time of the year. In fact, the BOCES placement was especially restrictive even for BOCES since it was an 8:1:1+3, not a less restrictive 15:1 or 12:1 program. There was testimony about nonverbal students in the class, and how few children in the class could even have a conversation with the [s]tudent, who [wa]s largely functioning at grade level. [The assistant principal] at BOCES

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[17] The Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test];Newington, 546 F.3d at 119-20). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

> (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

(Newington, 546 F.3d at 120). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120). If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

> herself expressed surprise that the [s]tudent would be placed at BOCES before revising her opinion. [The district] pointed out that BOCES had interventions such as a crisis response team and special education teachers in the classroom, but there [wa]s no reason why these kind of interventions could [not] have been implemented in an inclusive general education setting. I agree with [the parent] that [the district] did not offer the [s]tudent a FAPE in the LRE at the IEP meeting in May, 2022
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> (IHO Decision at pp. 19-20).

Although I ultimately agree with the outcome of the IHO's LRE determination, on this issue I do so on different grounds. First, I disagree with the IHO's statement comparing student-to-staff ratios, such as that an 8:1:1+3 special class is "more restrictive" than a 15:1 or a 12:1 special class, because all special classes by their nature remove the student from the general education setting and, as a result, limit a student's access to nondisabled peers irrespective of the particular student-to-teacher ratio of the special class and its place on the special education continuum (8 NYCRR 200.6[h]; see R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015][stating that "[t]he requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement"; T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [finding that the IHO's application of LRE requirement to a ratio dispute was improper, stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). Next, while the IHO also determined that the student would not be functionally grouped in an appropriate manner with students with similar needs in the BOCES special class, in this instance, that distinct and separate analysis would be appropriate to undertake after it had been determined that a full time special class placement without access to nondisabled peers was the student's LRE,[18] which upon my review, was not established by the evidence in the hearing record.

The second Newington prong requires "consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate" (Newington, 546 F.3d at 120). Here, the evidence shows that the student would not have had any opportunities to access any nondisabled peers at the BOCES placement at all. Specifically, the BOCES special education teacher testified that the classroom included "a play area for recess time" (Tr. p. 1562). During cross-examination, the BOCES special education teacher testified that breakfast and lunch were in the classroom, and that "recess would either be in the classroom or on the playground" (Tr. p. 1590). Additionally, the CSE chairperson testified that she did not "believe mainstreaming was possible in [the BOCES special class] environment" (Tr. p. 660).

[18] With regard to what is often called "functional grouping," State regulations provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]), but a functional grouping analysis is distinct from an LRE analysis of the extent to which a student with a disability should be placed in a general education setting with nondisabled peers.

However, the evidence in the hearing record shows that despite the student's difficulties, he did exhibit some success in the general education setting during the 2021-22 school year (Tr. pp. 971-72, 974, 1160, 1278-79; Dist. Exs. 39 at pp. 1-2; 45 at p. 2). For example, during the first half of the 2021-22 school year the student was able to complete most tasks and activities in the class with minimal teacher support, he was independent, and the social worker stated that during "many" of her classroom observations the student "enjoy[ed] what he was doing" and "enjoy[ed] being there" (Tr. pp. 971-72, 1160). The first grade special education teacher testified that the student was "able to engage in cooperative play with other students" and that "[h]e enjoyed being with other students" (Tr. pp. 1278-279). In addition, the progress report for IEP annual goals indicated the student had achieved the goal related to engagement in cooperative play with peers (Dist. Ex. 45 at p. 2).

The prior written notice issued after the May 2022 CSE meeting indicated that the CSE "considered programs and/or services that [we]re less restrictive (more time within the general education setting) but rejected those due to the student's current functioning levels and skills" (Dist. Exs. 19 at p. 3; 20 at p. 3). However, while the CSE may have been correct in determining that the student's needs warranted a significant amount of instruction provided in a special class setting, the evidence does not sufficiently explain the decision to remove the student from the general education environment and place him in a BOCES special class without any access to nondisabled peers whatsoever.

Accordingly, once removal from the general education setting was warranted, the district was required to show whether it included the student in school programs with nondisabled students to the maximum extent appropriate, but the district did not explain how it complied with that second aspect of the Newington test. Based on the foregoing failure of the district to demonstrate that it had provided the student with access to nondisabled peers to the maximum extent appropriate in light of his needs and abilities, the IHO's conclusion that the district's recommended BOCES program failed to offer the student an appropriate placement in the LRE was correct and will not be disturbed.

E. Independent FBA and BIP

Turning next to the parent's cross-appeal regarding the IHO's denial of the parent's request for an IEE at public expense, the IHO noted in his final decision that he denied the parent's "request for the FBA and BIP since [he] did not find that [the district] denied the [s]tudent a FAPE because of issues associated with the FBA and BIP" (IHO Decision at p. 22). In his interim decision the IHO also noted that a parent is entitled to only one IEE at public expense (IHO Interim Decision dated October 17, 2022).[19] The hearing record reveals that the IHO denied the parent's August 8,

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

2022 motion requesting an independent FBA via an interim order dated October 17, 2022 (see Parent Exs. P; X). In his interim order, the IHO indicated that the parent sought an FBA following the recommendations of the student's July 2022 independent psychoeducational evaluation and argued that the district's February 2022 FBA was flawed (Parent Ex. X at p. 1). The IHO stated that the parent anticipated the district's argument regarding D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]) by arguing that FBAs were not "evaluations" for IEE purposes (id. at p. 2). The IHO described the district's August 15, 2022 responsive brief opposing the parent's motion and contending that it conducted an updated FBA in February 2022 and that the parent thereafter requested an independent psychoeducational evaluation, but failed to simultaneously request an independent FBA (id. at pp. 2-3).

Importantly, the IHO noted the district argument that the parent's "request for an independent FBA [wa]s not ripe because [the parent] ha[d] already received an IEE at public expense after disagreeing with the [d]istrict's reevaluation" and that the parent "was entitled to one IEE at public expense each time the public agency conducts an evaluation with which the parent disagree[d]" (id. at p. 3). The IHO agreed with the district's position, applied the Trumbull holding and other relevant legal authority to the parent's request for an independent FBA at public expense, and denied the request based on his finding that the parent was "in fact asking for two IEEs in connection to the reevaluation conducted in February, 2022, which she [wa]s not entitled to pursuant to 34 C.F.R. Sect. 300.502(b)(5)" (IHO Interim Decision at p. 6).

Upon my independent review of the IHO's well-reasoned analysis of the FBA issue, including his application of Trumbull and other relevant authority to the evidence in the hearing record, and I find no basis to depart from the IHO's determination that the parent was not entitled to an independent FBA.

F. Compensatory Education Relief

Lastly, the district argues that a compensatory education award is not warranted because the IHO did not find that the IEPs in question were substantively inappropriate. However, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Instead, as the IHO found in his decision, a denial of FAPE may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). Accordingly, having found that the

2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

IHO correctly determined that the district failed to provide the student a FAPE based on its material failure to implement aspects of the student's IEP, I similarly find no reason to disturb the IHO's equitable award of compensatory education in the amount of 54 hours of compensatory writing services, 30 hours of group counseling, 35 hours of individual counseling, and 8.5 hours of parent counseling and training (IHO Decision at pp. 21-23).

VII. Conclusion

Upon my independent review of the hearing record, I find that the IHO in this matter conducted thorough and well-reasoned analysis of the relevant evidence and controlling authority and, accordingly, adopt his findings of fact and conclusions of law as my own, with the exception of those few instances noted in this decision that do not affect the outcome. Having found no basis in the hearing record to disturb the IHO's conclusions that the parent's complaint was not moot, the district failed to offer the student a FAPE for the 2021-22 school year in the LRE, and compensatory education was an appropriate remedy for the district's denial of FAPE, and that the parent was not entitled to an independent FBA at public expense, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 9, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER