The University of the State of New York

The State Education Department
State Review Officer
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No. 24-161

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Elisa Hyman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Kashif Forbes, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) that denied her request for compensatory education related to the 2021-22, 2022-23, and 2023-24 school years, denied her request for funding by respondent (the district) for the costs of an independent educational evaluation (IEE), and held that awards for special education services should be delivered via special education teacher support services (SETSS) instead of special education itinerant teacher (SEIT) services. The district cross-appeals the IHO's finding that the district committed procedural violations; the order directing the district to conduct evaluations for the 2023-24 school year; and the order directing the district to fund services for the 2023-24 school year. The appeal must be dismissed. The cross-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 hearing record reflects that the student received "special instruction," speech-language therapy, occupational therapy (OT), and physical therapy (PT) through the Early Intervention Program (Dist. Ex. 2 at p. 24). In February 2021, the student was evaluated remotely by the Committee on Preschool Special Education (CPSE) to determine his eligibility for services (id. at

pp. 8, 24, 26, 33, 34, 40). A CPSE convened on March 31, 2021, found the student eligible for special education as a preschool student with a disability, and developed an IEP for the student with a projected implementation date of September 1, 2021 (Parent Ex. M at pp. 1, 16). The March 2021 CPSE recommended that the student receive services in a childcare location selected by the parent, consisting of five one-hour sessions per week of 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, all on a 10-month basis (id. at pp. 16-17). On April 5, 2021, the parent signed the district's final notice of recommendation indicating that she consented to the 10-month preschool services as recommended by the district (Dist. Ex. 10).

The student attended a preschool during the 2021-22 school year, where he received five hours per week of SEIT services along with the recommended speech-language, OT, and PT services (Dist. Ex. 13 at p. 1). A February 13, 2022 annual report, written by the student's SEIT provider, indicated that the student could be "defiant and disruptive at times when sitting in [a] group," had difficulty socializing with peers in an appropriate manner and could become "argumentative or physical," copied other student's negative behaviors, could be uncooperative, and did not always follow rules or teacher directions (id.). The student's SEIT provider reported that the student displayed signs of regression after vacations and long weekends, and the SEIT provider recommended that the student receive SEIT services on a 12-month basis (Parent Exs. D; E).

A CPSE convened on March 23, 2022, and developed an IEP for the student with a projected implementation date of April 25, 2022 (Dist. Ex. 19 at pp. 1, 13). For the 10-month school year, the March 2022 CPSE recommended that the student receive five hours of SEIT services per week broken into 30- to 60-minute sessions; one 30-minute session per week of individual speech-language therapy; one 30-minute session per week of group (of two) speech-language therapy; two 30-minute sessions per week of individual OT; and one 30-minute session per week of individual PT (id. at p. 13). In addition, the CPSE recommended that the student receive five hours per week of SEIT services in a group of two from July 4, 2022 through August 12, 2022 (id. at p. 14). The district provided the parent a final notice of recommendation / modification of IEP and an authorization of the IEP change, both dated April 12, 2022 (Dist. Exs. 20; 21).[1] The parent signed the final notice of recommendation/modification of IEP on April 14, 2022 indicating her consent to the provision of 10-month and 12-month preschool services as recommended by the district (Dist. Ex. 21).

The CPSE reconvened on September 22, 2022, at the request of the parent and SEIT provider and recommended an increase in the student's SEIT services from five hours per week to seven-and-a-half hours per week (Parent Ex. B. at pp. 1, 4, 12-13; Dist. Ex. 38).[2] In the SEIT

[1] The authorization of IEP change indicated that the student's speech-language therapy was changed from two individual sessions per week to one individual and one group (2:1) session per week and the student's PT was reduced from two sessions per week to one session per week, both effective April 25, 2022 (Dist. Ex. 20).

[2] The hearing record contains some duplicative exhibits (compare Parent Exs. B; C; G, with Dist. Exs. 24; 26; 35). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she

provider's August 2022 request for an increase in services, she reported that "the frequency and duration of [the student's] negative behaviors ha[d] sharply escalated" and suggested the increase was due to the demands of the student's new school environment (Parent Ex. 38).[3] The projected implementation date for the increase in SEIT services was October 11, 2022 (Parent Ex. B at pp. 1, 12). The district provided the parent with an authorization of IEP change dated October 4, 2022 (Dist. Ex. 25). The student continued to attend the same preschool during the 2022-23 school year and also continued to receive SEIT, speech-language therapy, OT, and PT services (see Dist. Exs. 28; 29; 30).[4]

The hearing record shows that a CSE convened on May 8, 2023, found the student eligible for special education as a student with a speech or language impairment, and created an individualized education services program (IESP) for the student, as the parent had informed the district that the student would "be attending [a nonpublic school] in September 2023" (see Dist. Exs. 33; 34 at p. 2).[5, 6] The May 2023 CSE recommended that for the 2023-24 school year the student receive two periods per week of individual SETSS, three periods per week of group SETSS, two 30-minute sessions per week of individual OT, one 30-minute session per week of group PT, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and one 30-minute session per week of individual counseling (Dist. Ex. 33 at pp. 11-12). The district provided the parent with a prior written notice of recommendation, dated May 16, 2023, which summarized the recommendations of the May 2023 CSE and noted that the parent intended to place the student in a nonpublic school (Dist. Ex. 34). The prior written notice stated that the May 2023 CSE reviewed a March 23, 2023 educational evaluation report (id. at p. 1).

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determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] The SEIT provider indicated that, while the student attended "the same [summer] school program as before, some of the children and all of the teachers were new" and the class size increased from 15 to 20 students (Parent Ex. 38). Although the summer program was similar to the program during the school year, the student was expected, at times, to be more independent (id.). The SEIT provider stated that the student "w[ould] be continuing in the same program in . . . September but some demands w[ould] increase "and explained that she was requesting the increase in SEIT services to help the student adjust to his new environment and demands and become more able to control his behavior (id.).

[4] Although both the March and September 2022 IEPs recommended that the student receive one 30-minute session per week of PT, due to a provider shortage, the student was not provided PT services for approximately two months during the 2022-23 school year (Parent Exs. B at p. 12; T at ¶ 39; Dist. Ex. 19 at p. 13).

[5] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[6] The parent had alleged that "[a]n IEP meeting was held in March 2023" and the parent "never received a copy of this IEP" (Parent Ex. T ¶ 41). However, the district's representative stated on the record that "[t]here [wa]s no March 2023 meeting" and that "[t]here[wa]s only the May meeting" (Tr. p. 165). There is no evidence in the hearing record regarding a March 2023 meeting.

On July 19, 2023, the parent electronically signed an agreement with EdZone, LLC (EdZone) for the provision of special education services during the 2023-24 school year (Parent Ex. I).[7]

Via email dated August 24, 2023, the parent requested that the CSE create an IEP for the student (Parent Ex. G). In response, a CSE convened on August 25, 2023 and developed an IEP for the student's 2023-24 school year (kindergarten) (see Dist. Ex. 36). The August 2023 CSE recommended that the student attend a district non-specialized school and receive two periods per week of group SETSS for math, three periods per week of group SETSS for English language arts (ELA), one 30-minute session per week of individual counseling services, two 30-minute sessions per week of individual OT, one 30-minute session per week of individual PT, one 30-minute session per week of group (of three) speech-language therapy, and one 30-minute session per week of individual speech-language therapy (id. at pp. 21-23, 25). As with the May 2023 IESP, the August 2023 CSE noted that it relied on an educational evaluation report dated March 23, 2023, in making its recommendations (Dist. Exs. 36 at p. 1; 37 at p. 2). The district provided the parent with a prior written notice of recommendation dated August 25, 2023, informing the parent of the recommendations made by the August 2023 CSE (Dist. Ex. 37).

According to the hearing record, the student attended a religious nonpublic school for the 2023-24 school year and EdZone began providing the student with 7.5 hours of "special education teacher services" (Parent Ex. Q).

A. Due Process Complaint Notices and Intervening Events

In a due process complaint notice dated September 11, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years (Parent Ex. A).

By letter dated September 13, 2023, the parent notified the district that she disagreed with its most recent evaluations of the student (Parent Ex. L). The parent requested that the district "fund and/or reimburse" the following independent evaluations and reports: a neuropsychological evaluation, an autism/ABA assessment, an OT evaluation, a speech-language evaluation, an assistive technology evaluation, an observation by an expert in behavior at the student's school and home, and a functional behavioral assessment (FBA), as well as a positive behavior plan for school and home (id.).

In an amended due process complaint notice dated November 8, 2023, the parent included new details to her allegations that the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years and added allegations that the district had failed to respond to the parent's request for IEEs (Parent Ex. T). For relief, the parent requested an IEE at district expense, compensatory education, funding for private SEIT services for the 2023-24 school year (Parent Ex. T at pp. 13-14).

[7] EdZone is a limited liability company and has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

B. Impartial Hearing Officer Decision

An IHO with the Office of Administrative Trials and Hearings (OATH) was assigned to preside over the matter. A prehearing conference was held on October 19, 2023 (Tr. pp. 1-25). A pendency hearing was held on November 6, 2023, resulting in an order on pendency dated November 13, 2023 (Tr. pp. 1-61; IHO I at pp. 1-2).[8] An impartial hearing convened on December 20, 2023, and concluded on January 30, 2024, after three days of proceedings (Tr. pp. 62-674). In a decision dated March 20, 2024, the IHO found that, although the district failed to comply with all of the procedural requirements of the IDEA, the district did not substantively deny the student a FAPE for the for the 2021-22, 2022-23, and 2023-24 school years (IHO Decision at pp. 18-19). The IHO found that the parent failed to prove that she notified the district of her disagreements with the student's evaluations prior to the filing of her due process complaint notice and therefore denied the parent her request for IEEs (id. at pp. 20-21). However, the IHO held that the district failed to provide the student with PT services for a portion of the 2022-23 school year and, therefore, ordered the district to calculate the hours of missed PT and fund make-up PT sessions as compensatory services (id. at p. 20). In addition, the IHO ordered the district to conduct a classroom observation, a psychoeducational evaluation, and OT, PT and speech-language evaluations, and for the CSE to convene within 14 days of the completion of the evaluations (id. at p. 22). The IHO ordered the district to fund SETSS and related services for the student for the remainder of the 2023-24 school year (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the district's procedural violations did not deny the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years. The parent further argues that the district denied the student a FAPE for the school years at issue by failing to perform an FBA and create a BIP for the student. The parent claims that the IHO's finding that the student was provided with a FAPE for the 2021-22 and 2022-23 school years should be overturned because the hearing record contains evidence that the district failed to materially implement the student's IEPs for those years. The parent alleges that the district failed to prove that it provided the student a FAPE for the 2023-24 school year and that the IHO's finding should be reversed. The parent states that the IHO's conduct during the hearing displayed bias that deprived the parent of due process. The parent argues that the IHO should have ordered interim IEEs and erred by failing to order the district to perform IEEs as part of the final decision and order. The parent asserts that the IHO's directive that any award for 1:1 instruction should be SETSS instead of SEIT violates the IDEA. Finally, the parent claims that the IHO erred in failing to address the parent's claims regarding Section 504 of the Rehabilitation Act (section 504) and predetermination.[9]

[8] The IHO's interim decision on pendency was the subject of a prior appeal before the Office of State Review (see Application of a Student with a Disability, Appeal No. 23-313).

[9] Regarding the parent's section 504 claims, an SRO lacks jurisdiction to consider a party's challenge to an IHO's finding or failure or refusal to rule on section 504, 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

The district cross-appeals, arguing that the IHO erred in finding that the district committed procedural violations, and further asserting that any procedural violations that occurred did not deny the student a FAPE for the 2021-22, 2022-23 or 2023-24 school years. In addition, the district alleges that the IHO erred in ordering the district to conduct new evaluations and by ordering the district to fund services for the student's 2023-24 school year.

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'

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an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the IHO's decision or the parent's claims as they relate to section 504, and accordingly such claims will not be further addressed.

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]

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

[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).

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. Preliminary Matters—IHO Bias

In her appeal, the parent alleges that the IHO displayed bias against the parent's counsel and that the IHO's conduct during the impartial hearing denied the parent and the student due process. Specifically, the parent alleges that the IHO berated the parent's attorney for not following through with presenting a subpoena for signature, allowed a district witness to testify from undisclosed meeting notes, prevented the parent's attorney from pursuing issues on cross-examination, unduly criticized the parent's attorney, and refused the parent's attorney's request to submit a written closing statement. The IHO noted in her decision that she was entering certain documents into the hearing record as IHO exhibits because the "parent's representative accused the IHO of prejudice and of refusing to sign a subpoena, which is not accurate" and that the IHO exhibits were "being offered to give context to conversations had on and off the record" (IHO Decision at p. 24).

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

The hearing record shows that, on September 29, 2023, the IHO emailed the parties notifying them that she had been appointed as the impartial hearing officer for their case and that she had "no personal, professional, or financial relationship with either party to the case that would affect [her] ability to make an impartial decision" (IHO Ex. I at p. 77). The parent's attorney replied

on October 2, 2023 via email that her "firm ha[d] filed a putative class action against the City, [and] OATH . . . alleging that, inter alia, the transfer of the impartial hearing function to OATH violated, inter alia, the IDEA and State laws" (id. at p. 76). The parent's attorney then requested that the IHO recuse herself from the case because the IHO's "employment status raise[d] the appearance of a conflict of interest" or, in the alternative, for the IHO to "make a record of [her] background, if any . . . in special education, other than the three-day training that [she] received from New York State Education Department" (id. at pp. 76-77). On October 2, 2023, the IHO denied the parent's attorney's request for the IHO to recuse herself or provide details of her special education background (id. at p. 76).

As to the parent's allegations about the subpoena, during the November 6, 2023 pendency hearing, the parties discussed whether a subpoena was necessary in order for the parent's attorney to obtain the information she needed to proceed with her case and the IHO summarized this discussion during the December 20, 2023 hearing (Tr. pp. 33-39, 311-21). The district's attorney stated that the documents contained in the parent's proposed subpoena "[we]re documents that c[ould] be provided without the issuance of a subpoena" and the district's attorney stated he would "undertake to personally go through and provide th[o]se documents if that would alleviate anything" (Tr. p. 36). The parent's attorney agreed, with the IHO stating that "if there's something missing . . . then [the parent's attorney could] send back out a subpoena and [the IHO] could sign it in two weeks, just in preparation for hearing" (Tr. pp. 37-39).[11] The parent's attorney did not resubmit the subpoena to the IHO for signature after the December 20, 2023 hearing (Tr. pp. 290-91). Review of the discussions about the subpoena does not evidence that the IHO acted with bias toward the parent's attorney.

Many of the parent's bias allegations stem from the testimony of the district's CPSE administrator (CPSE administrator). During the beginning of the parent's attorney's cross-examination of the CPSE administrator, the administrator indicated that she was testifying both from memory and from her notes (Tr. pp. 265-66). Later in her December 20, 2023 cross-examination, the CPSE administrator explained that she was referencing her "meeting minutes" while testifying, which were not in evidence (Tr. pp. 279-80). The CPSE administrator clarified that what she described as "meeting minutes" were her "informal notes that [we]re handwritten" by her "in preparation for [the student's] meeting" and based on "the conversations that we ha[d]" (Tr. pp. 281-82). The parent's attorney requested that the hearing be postponed so that she could obtain a copy of the "meeting minutes" to review before continuing her cross-examination of the CPSE administrator because she had requested meeting minutes be disclosed as part of discovery (Tr. pp. 281-83). The IHO stated that the witness testified at the beginning of her cross-examination that she was using "both her recollection and notes" and inquired why the parent's attorney did not request the witness's notes at the beginning of her cross-examination (Tr. p. 281). There was a discussion between the IHO, the parent's attorney, and the district's attorney regarding information that was sought in an unsigned subpoena culminating with the parent's attorney stating that "this whole hearing has been so extremely prejudicial towards the [p]arent" (Tr. pp. 284-85).

[11] The parent's attorney proposed admitting the unsigned subpoena into the hearing record as Parent Exhibit U, but the IHO denied this request because "[i]t was never sent, and [p]arent had never indicated [at] any point prior to this [hearing] that . . . they felt that they didn't get any documents. Because if [the parent] did, then of course, the subpoena would've [been] sent and [the IHO] would've signed it" (Tr. pp. 77-82).

Regarding the CPSE administrator's handwritten notes, the IHO directed the district to provide them to the parent's attorney over the district attorney's objections (Tr. pp. 32-21; IHO Ex. I at p. 102). The handwritten notes of the CPSE administrator were entered into the hearing record (see Dist. Ex. 39). After the parent's attorney received the CPSE administrator's handwritten notes, the CPSE administrator was called back to be cross-examined by the parent's attorney in a January 30, 2024 impartial hearing (Tr. pp. 635-43). Accordingly, even if the CPSE administrator should not have been permitted to consult her notes during her testimony, any prejudice resulting therefrom was mitigated by the provision of the notes and recalling the witness.

The parent's attorney also alleges bias related to the presentation of a closing statement. On November 6, 2023, the IHO disclosed early in the proceeding that she preferred "verbal closings, not closing briefs" (Tr. p. 56). The parent's attorney stated that she generally preferred to present a closing brief, but if it was the IHO's "rule as an IHO to only allow verbal closings, that's obviously [her] rule, but [the parent's attorney] generally . . . request[ed] the opportunity to present a written brief" (id.). The IHO reiterated that she preferred closing statements, not briefs, and that a closing statement "doesn't have to be too long. The closing is just a summation of whatever hours that we just went through" (id.). The IHO repeated her directive that "closings will be verbal on the record, not closing briefs" at the December 20, 2023 impartial hearing (Tr. p. 69). On January 23, 2024, the parent's attorney requested "the opportunity to submit a written closing brief" due to the "extensive transcript and the multi-year case" but the IHO denied this request stating that she had access to the "extensive transcript" and she did not wish for the parties to submit closing briefs (Tr. p. 626). The IHO asked both parties if an hour would be sufficient time for the parent's attorney to cross-examine a witness and for both parties to submit closing statements on the record and both parties confirmed that was an appropriate amount of time (Tr. p. 627). The parent's attorney presented her closing statement on January 30, 2024 and was able to refer to transcripts from the prior hearing dates (Tr. pp. 652-66). It was clear from the IHO's clarifying questions after the parent's attorney's closing statement that the IHO was carefully listening to the parent's closing argument, reviewing the parent's due process complaint, and giving the parent's attorney and the parent the opportunity to specify exactly what was being sought as compensatory education and other relief (Tr. pp. 666-71).

From my review of the hearing record, the IHO was professional, courteous, and collaborative throughout the entire hearing process. The parent's attorney was granted access to requested documentation and witnesses were called back in for second days of cross-examination. While the record reveals that the IHO made efforts to move the impartial hearing along, the hearing record does not support the parent's allegations that the IHO prevented the parent's attorney from pursuing her cross-examination as she saw proper. The IHO allowed the parties to discuss discovery and to reach a mutually agreed upon discovery process, but the IHO also allowed the parent's attorney the opportunity to submit a subpoena for signature if she determined that she had not received the necessary documentation. From my reading of the transcripts, I failed to see evidence of the IHO displaying "frustration and a lack of patience" with the parent's counsel, nor evidence that the IHO "berated [parent's] counsel with unfair criticisms" (Req. for Rev. ¶ 12). As for the allegation that it was improper for the IHO to deny the parent's request to submit a closing brief instead of a closing statement, the IHO clearly outlined her desire for the parties to submit closing statements early in the proceeding and I will not fault her for conducting her hearings as she sees fit, especially since she put both parties on notice of her expectations early in the hearing.

I find that the IHO was fair and impartial and that her conduct during the impartial hearing did not reflect the appearance of impropriety or prejudice.

B. FAPE—CPSE and CSE Processes and IEPs

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years (IHO Decision at p. 19). The IHO accurately recounted the facts of the case (id. at pp. 3-13), identified the issues to be resolved (id. at p. 13), set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years (id. at pp. 13-18), and applied that standard to the facts at hand (id. at pp. 18-21). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions. Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed in some respects, the conclusions of the IHO are hereby adopted with some further discussion of the parent's allegations on appeal set forth below.

1. 2021-22 School Year

The parent asserts that the initial evaluations conducted in February 2021 were inadequate because they were conducted remotely.

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]).

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 S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether

or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The IHO found that the CPSE conducted appropriate initial evaluations of the student (IHO Decision at p. 19). Specifically, the IHO held that "in preparation for the student's third birthday a timely and comprehensive initial evaluation was done for the student's transition to the CPSE" and that the manner of conduct the evaluations was appropriate in light of the COVID-19 pandemic (id. at pp. 19-20).

Review of the hearing record supports the IHO's determination. According to the hearing record, the student underwent several initial CPSE evaluations in February 2021 all of which were conducted remotely, including: a social history, a psychological evaluation, an educational evaluation, a clinical observation, a speech-language evaluation, an OT evaluation, and a PT evaluation (Parent Ex. M at p. 1; Dist. Ex. 2). As the evaluations were conducted during the 2020-21 school year, amidst the circumstances surrounding the COVID-19 crisis, regulations permitted the committee to make a determination as to whether an observation would be a required component of the initial evaluation (see 8 NYCRR 200.4[b][1][iv]). Further, in a question and answer guidance regarding the provision of services to students with disabilities during school closures related to the COVID-19 pandemic, the State Education Department indicated that "if an evaluation . . . requires a face-to-face in-person assessment or observation, the evaluation would need to be delayed until school reopens" but that, on a case-by-case basis a remote observation of the student could be considered ("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at pp. 3-4, Office of Special Educ. Mem. [Apr. 2020], available at https://www.nysed.gov/sites/default/files/ programs/coronavirus/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf).

Comparison of the March 2021 IEP with the February 2021 preschool evaluation packet indicates that the CPSE considered the information contained in the evaluations and used it to develop the student's IEP (compare Parent Ex. M at pp. 1-4, with Dist. Ex. 2 at pp. 2-7, 13-15, 18-22, 29-31, 38, 40-41).

The parent alleges that the March 2021 IEP denied the student a FAPE because the CSE failed to perform an FBA or to create a BIP. The IHO determined that because the student's behavioral and academic needs were being met by his SEIT, and because the student's academics were in the average range, no FBA or BIP were necessary as the student's behaviors were not affecting his academic progress (IHO Decision at p. 20). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.). Likewise, the district's failure to develop a BIP in conformity with State

regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

With regard to the student's behavior, the February 2021 preschool student evaluation summary report indicated that the student was overactive, impulsive and impatient, which interfered with his ability to focus on tasks and display his knowledge to others (Dist. Ex. 2 at p. 2).[12] Additionally, the summary report stated that he had a short attention span and difficulty focusing on tasks (id.). The evaluator who completed the educational evaluation reported that the student "struggled greatly with self-regulating himself and was defiant and difficult to manage as he refused tasks" and that he "was also self-directed and had trouble completing tasks" (id.at pp. 2, 19). The evaluator also observed high levels of frustration and noted that the student could not sit still (id.). Furthermore, the social/emotional section of the February 2021 preschool student evaluation summary report indicated that the student could get along well with peers and be socially adequate at times but that he had a very short attention span unless very engaged in a particular task or activity (id. at p. 3). Additionally, it was reported that the student had difficulty sharing toys, was "emotionally sensitive," would tantrum, push others, and sometimes bite if upset or frustrated (id.). Furthermore, the summary report stated that the student was impulsive and may grab toys from others and noted that he had a "marked difficulty with transitions" (id.).

The February 2021 preschool student evaluation summary report contained the results of parent responses on the Vineland Adaptive Behavior Scales – Third Edition (Vineland-3) which indicated that the student's skills in the socialization domain fell in the moderately low range (Dist. Ex. 2 at pp. 3, 13). The parent's responses on the Achenbach Child Behavior Checklist yielded scores in the clinical range for attention problems, aggressive behaviors, emotional reactivity, and oppositional/defiant problems (id. at pp. 3, 15). The parent reported that the student "often" exhibited the following behaviors at home: "'can't concentrate, can't sit still, demands must be met immediately, chews on things that aren't edible, can't stand waiting, destroys own things, disobedient, disturbed by any changes in routine, easily frustrated, gets hurt a lot, hurts others, hits others without meaning to, overtired, quickly shifts from one activity to another, screams a lot, selfish or won't share, speech problems, worries, wants a lot of attention, temper tantrums, stubborn, and sudden changes in mood or feelings'" (id.).

The student's socialization skills as measured by the Developmental Assessment of Young Children – Second Edition (DAYC-2) were within the poor range, and the student's behaviors were described as frustrating and challenging (Dist. Ex. 2 at p. 3). The preschool summary evaluation report noted that the student engaged in tantrums, lacked empathy, denied things and said "no" all the time; did not transition from one activity to another when required by a parent or teacher; did not interact appropriately with others during group games or activities; grabbed items from other children and at times hit other children when frustrated (id.).

[12] The February 2021 preschool student evaluation summary report is a summary of the findings of the individual evaluations completed as part of the initial evaluation, which appear verbatim in the summary report (compare Dist. Ex. 2 at p. 1-7 with Dist. Ex. 2 at pp. 8-41).

The occupational therapist who completed the February 2021 OT evaluation indicated, based on parent report, that the student moved around a lot, did not tolerate loud noises, "puts everything in his mouth and bites children," and "touches children and feels and pulls their hair" (Dist. Ex. 2 at pp. 4, 34, 37). According to the speech language pathologist who completed the February 2021 speech-language evaluation, the student inconsistently followed a variety of directions, which she opined might be related to his inability to consistently focus on tasks (id. at pp. 5, 29). She further reported from the parent and therapist that the student often had "difficulty expressing himself, at times relying on saying 'uh-uh-uh' combined with pointing and gesturing rather than words to communicate with those around him" (id.). The speech language pathologist also noted "of additional and very significant note are attentional difficulties which adversely affect [the student's] ability to function to potential in all settings," reporting that "[b]oth peer interactions and classroom functioning [we]are adversely affected as a result of his significant speech delays combined with his significant attentional deficits" (id. at pp. 6, 31).

Based on the foregoing information, even though the district did not conduct an FBA, the committee had information that identified the student's problem behaviors, defined the behaviors, identified contextual factors that contributed to the behavior, and formulated hypotheses regarding the conditions under which the behaviors occurred and the probable consequences that served to maintain it (8 NYCRR 200.1[r]). Further, although the district did not conduct an FBA or develop a BIP, review of the IEP reflects that the CSE recommended supports to address the student's interfering behaviors. The March 2021 CSE recommended the student receive five hours per week of direct SEIT services, two 30-minute sessions of individual speech-language therapy, two 30-minute sessions of individual OT, and two 30-minute sessions of individual PT (Parent Ex M at p. 16). In order to further address the student's identified behavioral needs, the March 2021 CSE developed seven annual goals with corresponding short term objectives designed to: decrease the student's impulsivity and develop self-control; engage in cooperative play skills; transition from one activity to another; improve his attention span for classroom activities in a group setting; communicate and interact in a positive way with peers; maintain attention to task during class lessons and assignments; and identify and comply with teacher directives, classroom rules and expectations and school rules (id. at pp. 6-9). Additionally, the March 2021 IEP recommended the following strategies and resources to support the student's management needs: multi-media and multi-sensory approaches; modeling; repetition; encouragement; motivational techniques; refocusing and redirection; appropriate reinforcement; and an environment rich in language (id. at p. 4).

Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's decision that the district offered the student a FAPE for the 2021-22 school year.

2. 2022-23 School Year

In addition to requirements summarized above, regulations require 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]). In addition, a CSE may

direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

Turning to the March 2022 IEP, the parent argues that the CPSE did not have available to it appropriate evaluative information because it did not complete any updated evaluations and instead relied on the remote evaluations completed in February 2021. The parent further argues that the IHO erred in her determination that the CPSE's use of progress reports, regression tools and educational evaluations to develop the March 2022 IEP compensated for the CPSE's failure to conduct updated, in-person evaluations of the student (IHO Decision at p. 19). An independent review of the hearing record supports the IHO's determination. Specifically, the hearing record reflects that the March 2022 CPSE had available and included verbatim sections of the following in the March 2022 IEP: a February 2022 12-month statement of need regression tool (regression tool), a February 2022 annual report (SEIT services), a February 2022 document "reporting progress towards physical therapy goals," a March 2022 preschool PT clinical guide, a March 2022 rationale for summer services, a March 2022 OT annual student progress report, and a March 2022 speech-language therapy annual report (Parent Exs. D; E; Dist. Exs. 12-13, 15, 17-18; compare Dist. Ex. 19 at pp. 3-6, with Dist. Exs. 13 at pp. 1-2; 15 at pp. 1-2; 17 at p. 1; 18 at pp. 1-2). Review of the information before the CPSE reflects that it was sufficient for the CPSE to identify the student's present levels of performance.

The parent also alleges that the district again failed to conduct an FBA or develop a BIP and failed to provide sufficient 1:1 support to address the student's behavioral needs. With regard to the student's behavior, the SEIT's February 2022 annual report indicated that the student continued to "face challenges in the areas of social emotional development, physical development and communication" (Dist. Ex. 13 at p. 1). The SEIT reported that while the student enjoyed learning and could focus and learn at circle time, he could also be defiant and disruptive at times when sitting with the group which affected his learning (id.). Additionally, the SEIT reported that while the student was friendly and enjoyed socializing, he often had difficulty socializing appropriately, and noted that he sometimes grabbed, had a hard time sharing, broke what peers had built, became argumentative or physical, became silly at play, and used toys inappropriately (bang with blocks) (id.). She further indicated that the student would copy others' negative behaviors, could be defiant and uncooperative, that he did not always follow the rules or teacher directions which was disruptive to the group, and would sing too loudly "in order to bother others" (id.). The annual report indicated that an administration of the DAYC-2 placed the student's scores in the social-emotional domain within the below average range (id. at p. 2).

According to the February 2022 regression tool, prior to a treatment interruption (a 10-day vacation in January 2022), the student engaged in behaviors such as impulsively touching others, running around when asked to sit, leaving the room without permission, inconsistently participating in circle time with disruptive behavior, and not playing with toys appropriately and becoming upset with others when he couldn't share or becoming physical (Parent Ex. D at p. 1). The regression tool indicated that the student made progress as the year progressed and that with support the student was better able to follow teacher directions and classroom rules (id.). The SEIT indicated that after the 10-day vacation the student regressed and the frequency of defiant episodes (i.e., screaming when asked to be quiet) increased and occurred throughout the day which created disturbances for the group (id.). The student also engaged in "more dangerous behavior

(i.e., throwing a book at another child) and had difficulty following rules throughout the day (id.). The SEIT indicated that it took 26 days for the student's behavior to return to the baseline (id.).

The foregoing information reflects shows that the CPSE had information about the student's interfering behaviors and, as with the 2021-22 school year, the CPSE included supports for the student's behavioral needs. For the 10-month school year, the CSE recommended that the student receive five hours per week of direct SEIT services (ultimately increased to 7.5 hours after the August 2022 CSE meeting), one 30-minute session of individual speech-language therapy and one 30-minute session in a group, two 30-minute sessions of individual OT, and one 30-minute session of individual PT (Dist. Ex. 19 at p. 13; Parent Ex. B at p. 12). In order to further support the student, the CPSE recommended the following strategies and resources to address the student's management needs: visual sequenced directions for challenging tasks; time reminders for transitions; and pre-planning before transitions (Dist. Ex. 19 at p. 6). The March 2022 CPSE developed three annual goals with corresponding short-term objectives designed to improve the student's social skills, ability to participate, and ability to cooperate (id. at pp. 8-9). In addition, as summarized above, the regression tool indicated that the student's behaviors would regress following prolonged school breaks (Parent Ex. D; see Dist. Ex. 16). In response, the March 2022 CPSE recommended the student receive five hours of direct SETSS services during the summer portion of the 2022-23 school year (Dist. Ex. 19 at p. 14). Based on the foregoing, even if the district's failure to conduct an FBA and a BIP amounted to a procedural violation, the hearing record supports the IHO's ultimate conclusion that the lack of an FBA and BIP did not result in a denial of a FAPE.

The IHO noted that "[i]n August 2022, [the] parent sent a letter requesting additional SEIT hours" (IHO Decision at p. 19; Dist. Ex. 38). The IHO found that "[a]n IEP meeting was held for the student September 2022 and again [the district] granted the student additional SEIT hours by increasing the student's SEIT to 7.5 hours per week from 5 hours per week, for the 2022-23 school year (IHO Decision at p. 19; Dist. Ex. 24 at p. 12). Specifically, the CSE direct that the student receive 7.5 SEIT hours per week along with one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy; two 30-minute sessions per week of individual OT, and one 30-minute session per week of individual PT (Parent Ex. B at p. 12). Based on the foregoing, the evidence in the hearing record supports the IHO's determination that "each time the parent raised a concern it was addressed" (IHO Decision at p. 19), and there is no basis in the hearing record to disturb the IHO's determination that the March 2022 and September 2022 IEPs offered the student a FAPE for the 2022-23 school year.

3. 2023-24 School Year

For the 2023-24 school year, the parent again alleges that the IEP was deficient due to the lack of sufficient evaluative information before the CSE and because the IEP failed to address the student's behavioral needs.

As summarized above, the CSE met on May 8, 2023, for the student's "turning five" meeting and to develop an IESP for the 2023-24 school year (Tr. pp. 163-65; Dist. Ex. 33). According to the May 16, 2023, prior written notice, the CSE considered a March 2023 educational evaluation report (Dist. Ex. 34 at p. 1; see Parent Ex. J). A review of the hearing record shows that the May 2023 CSE also considered evaluative information from a December 2022 preschool

progress report form – speech; a December 2022 annual student progress report – OT; and a January 2023 turning five progress report for SEIT (Dist. Exs. 28; 29; 30). Comparison of these reports with the May 2023 IESP indicated that sections were memorialized almost verbatim in the present levels of performance (compare Dist. Ex. 33 at pp. 1-5, with Dist. Ex. 28; 29; 30 at p. 1). Review of the hearing record does not reflect that the information before the CSE was insufficient.

Regarding the student's behaviors, the May 2023 IESP described the student as a "friendly, social and active young boy who c[ould] be somewhat cooperative and compliant when working with an adult" (Dist. Ex. 33 at p. 3). The IESP indicated that the student struggled with maintaining personal space and interacting appropriately with others (id.). Furthermore, the IESP indicated that the student "may have a possible preoccupation with playing, being happy, engaging in activities that he enjoys and finds interesting, being active, moving around, receiving attention from others and feeling confident and comfortable in his environment so he is able to demonstrate his strengths and abilities to those around him" (id.). The IESP reflected the student's responses to projective testing, conducted as part of the March 2023 educational evaluation, that revealed the student was willing to participate in all activities asked of him but could become easily distracted and would go off task and engage in activities he thought were funny or entertaining (compare Dist. Ex. 33 at p. 3, with Parent Ex. J at p. 3). Additionally, the IESP reported that projective drawing suggested that the student was imaginative and creative and was very close to his family and seemed to enjoy spending time with them (Dist. Ex. 33 at p. 3). The May 2023 IESP stated that the student continued to struggle with behavior and social/emotional development and indicated that, while he knew the rules and routines of the class, he would inconsistently follow them (id.). The IESP suggested that the student's behavior could be a reaction to sensory overload (id.). The IESP indicated that, lately, the student had been able to respond more quickly and calmly to prompts and teacher intervention and that the "incidences of negative behavior ha[d] begun to slowly decrease in frequency" and noted that the student was able to focus for learning and stories, enjoy[ed] learning and retain[ed] most information taught at circle (id.). Finally, the IESP indicated that the student could "usually accurately answer questions when learning or after a story" but that he could still be fidgety, noisy, touch others and speak out of turn (id.).

The IESP indicated that the student loved to socialize with peers but that he tended to become "loud, wild, and physical at play which c[ould] make other children shy away from him (Dist. Ex. 33 at p. 2). The IESP noted that with support the student was beginning to choose calmer play or to switch play when he was beginning to feel out of control and was able to sustain appropriate and calmer interactive play for longer periods of time and with less support (id.). The IESP further noted that the student tended to be loud and overpowering in conversations, but that he was able to add appropriate and interesting information when he is feeling calm (id.). The IESP also indicated that the student enjoyed drawing but had recently started to frustrate easily when he felt his work was imperfect (id.).

The school psychologist who completed the March 2023 educational evaluation testified that the behaviors she was aware of were able to be managed by the classroom teacher and/or SEIT, and that the student's behaviors were not a danger to himself or others and that she was not aware of any behaviors that would warrant an FBA or BIP (Tr. pp. 189-91).[13] She further

[13] The school psychologist who completed the March 2023 educational evaluation was also the district

explained that the CSE recommended counseling in order to address the student's behaviors and social emotional functioning which had not been done through the CPSE (Tr. p. 191).

Based on the foregoing, and similarly to the prior two school years, the CSE had information about the student's interfering behaviors and recommended supports to address those behaviors. The May 2023 CSE recommended that, beginning in September 2023, the student receive two periods per week of individual SETSS and three periods of SETSS in a group; two 30-minute sessions per week of individual OT, one 30-minute session per week of group PT; one 30-minute session per week of individual speech-language therapy and one 30-minute session per week of speech-language therapy in a group; and one 30-minute session per week of individual counseling (Dist. Ex. 33 at pp. 11-12). Additionally, the May 2023 IESP identified the following strategies and resources needed to address the student's management needs: repetition, redirection, prompting, extended time, movement breaks, positive reinforcement, praise, checklists, graphic organizers, breaks, encouragement, manipulatives, tasks broken down, and simplification of directions (id. at p. 5). Furthermore, the May CSE developed annual goals designed to improve the student's ability to carry on a conversation within a small group; improve his self-regulation skills; increase his ability to cope with conflict and frustration by using self-calming techniques; and to verbally and/or nonverbally express frustration in appropriate ways (id. at pp. 9-11). The IEP included additional goals that targeted basic reading and math skills, articulation, graphomotor and visual motor skills, fine motor skills, and gross motor skills (id. at p. 6-10). After the parent's request for an IEP, the CSE met and converted the students' IESP to an IEP, carrying over the services but recommending a district non-specialized school (see Parent Ex. G; compare Dist. Ex. 33, with Dist. Ex. 36).[14]

In arguing that the IHO erred, the parent points to the testimony of the student's regular education teacher at the student's nonpublic for the 2023-24 school year (see Parent Ex. X). The teacher testified that the student's impulsivity and hyperactivity significantly impact his engagement in the classroom and his ability to learn (id. at ¶ 6). She further reported that the student had "exhibited multiple incidents of maladaptive behaviors and in particular physical behaviors resulting in harm to other students" and opined that these occurrences disrupted the learning environment and the student's ability to learn in the classroom (id. at ¶ 7). The teacher opined that the student required specialized one-to-one support to completely address his academic and behavioral needs and stated that without this support the student would not be able to make meaningful academic progress (id. at ¶ 8). The teacher testified that the student required a specific reinforcement chart, similar to a token economy, and extra redirection including constant verbal and visual prompting that she and her two teaching assistants were unable to provide (Tr. pp. 534-36). She further testified that the student could not attend to tasks without someone there to provide constant reminders and noted that he could only sit for story time if it was "the most invigorating story for him" for approximately seven minutes (Tr. p. 540). Finally, the teacher indicated that the

representative and chaired the student's May 2023 CSE meeting (Parent Ex. J at p. 3; Dist. Ex. 33 at p. 15).

[14] The school psychologist who conducted the August 2023 CSE testified that "given the fact that this was very towards the end of the . . . summer, and we wanted to get this thing done ASAP for the parent, and the fact that this child was evaluated not too long ago, all we did that day was convert[] the IESP to an IEP" (Tr. pp. 601-02). She testified that the CSE "took all the information from the IESP to the IEP. And [the CSE] generate[d] an IEP with the addition of asking some questions just to update the IEP from the parent" (Tr. p. 602).

student could not express when he needed a break or needed the bathroom and would "act out a little bit" until an adult asked him what he needs (Tr. p. 549). She opined that this was due to an expressive language delay (Tr. p. 549).

While the teacher's description of the student might have supported a finding that the student required additional behavioral support, the CSE meetings for the 2023-24 school year occurred prior to the student's attendance at the nonpublic school, and the teacher's view of the student's needs was not available to the CSEs and, therefore, may not be relied upon to assess the March 2023 IESP or the August 2023 IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]).

Based on the foregoing, the IESP and IEP developed for the student included supports for the student's behavioral needs, and there is insufficient basis to disturb the IHO's finding that the district offered the student a FAPE for the 2023-24 school year.

4. Procedural Violations

The IHO determined that that the district failed to prove that it complied with the procedural requirements of the IDEA by failing to provide prior written notices after every CSE meeting and for failing to do a comprehensive evaluation after the initial evaluation was conducted remotely (IHO Decision at p. 18). However, the IHO held that the district's procedural violations did not substantively deny the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years (id. at p. 19). The parent alleges that that the district committed a myriad of procedural violations related to the 2021 evaluations and lack of reevaluation, composition of CPSEs and CSEs, the district's predetermination, the lack of FBA and BIP, the appropriateness of annual goals, and the lack of prior written notices and alleges the IHO erred in holding that the district's procedural violations did not substantively deny the student a FAPE for the 2021-22, 2022-23 and 2023-24 school years. In its cross-appeal, the district alleges the IHO erred in finding the district committed a procedural violation by failing to provide prior written notices.

As noted above, when 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). Under some circumstances, the cumulative impact of procedural violations may result in the denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541 [2d Cir. 2017] [noting that it will be a "rare case where the violations, when taken together," rise to the

level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

To the extent that the parent is arguing that the district's procedural violations resulted in the denial of a FAPE for the 2021-22, 2022-23 and 2023-24 school years, a review of the hearing record supports the IHO's finding that, although the district failed to comply with all the procedural requirements of the IDEA, any such violations were not substantive. The IHO correctly found that the district failed to prove that it provided the parent with prior written notices after each CSE meeting and did not perform a comprehensive evaluation before the student's August 25, 2023 CSE (IHO Decision at pp. 18-19). However, the hearing record reflects that the parent's concerns were reflected in the following IEPs and IESP: March 31, 2021; September 22, 2022; March 23, 2022; May 8, 2023 (IESP); and August 25, 2023 (Parent Exs. B at pp. 2, 3, 4, 5, M at pp. 2, 3, 4; Dist. Exs. 19 at pp. 2, 3, 4, 5; 33 at p. 3-5, 15; 36 at pp. 3, 4, 5, 28). The hearing record shows that the district sent the parent a final notice of recommendation/modification of IEP on October 4, 2022 regarding the September 22, 2022 IEP; a final notice of recommendation dated March 31, 2021 regarding the March 2021 IEP; an authorization of the IEP change and a final notice of recommendation/modification of IEP both dated April 12, 2022 regarding the March 2022 IEP; a prior written notice dated May 16, 2023 regarding the May 8, 2023 IESP; and a prior written notice dated August 25, 2023 regarding the August 25, 2023 CSE (Parent Ex. C; Dist. Exs. 10 at p. 1; 20; 21; 34 at p. 1; 37 at p. 1). IHO held that the district's procedural violations: "(a) did not impede the student's right to a FAPE, (b) did not significantly impede the parent's opportunity to participate in the decision-making process, and (c) did not cause a deprivation of the student's educational benefits" (id. at p. 19). My review of the hearing record supports the IHO's holding. I am therefore affirming the IHO's finding that the district's procedural violations do not individually or cumulatively rise to the level of a denial of a FAPE under these circumstances (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *18 [S.D.N.Y. Feb. 14, 2017]). I note that the district should follow proper procedural protocols and that notices of recommendations/modification of IEP and final notices of recommendations are not adequate substitutes for prior written notices.

C. Implementation

The IHO held that, during the 2022-23 school year, the district failed "to provide the student with PT services and [did] not provid[e] the student with any make-up sessions for those missed services" and determined as a result that the student was "entitled to compensatory services for these missed PT sessions" (IHO Decision at pp. 19-20). The IHO held that "[t]he PT [wa]s needed to place the student in a position in which he would have been had the district complied with its obligations" (id. at p. 20). The IHO ruled that the district "did not provide any evidence of related service delivery records to show how many sessions of PT the student missed during the 2022-23 S[chool] Y[ear]" and, therefore, ordered the district "to calculate the number of missed PT sessions, and fund make-up PT sessions using the quantitative approach to compensatory services" (id.).

On appeal, the parent argues that, in addition to the IHO's award of compensatory PT for the 2022-23 school year, the district "failed to prove it implemented . . . mandated sessions" of related services including OT and speech-language therapy during the 2021-22 and 2022-23 school years (Req. for Rev. ¶ 7). The parent asserts that the "IHO ignored the material failures" and "did

not analyze the issues under appliable law" (id.). However, review of the hearing record shows that the IHO addressed the issue of implementation consistent with the scope of the issue as it was raised in the amended due process complaint notice and during the impartial hearing.

In particular, in the parent's amended due process complaint, the parent alleged that "[d]espite being mandated to receive PT 1x30 the [s]tudent was not provided with approximately two months of PT services during the 2022-2023 school year due to a shortage of providers" (Parent Ex. T at p. 5). The amended due process complaint does not contain any similar allegations of a lack of provision of OT or speech-language services for any of the school years at issue (see Parent Ex. T). At the October 19, 2023 prehearing conference, the IHO asked the parent's attorney to provide her with a "summary of the DPC" including "the relief that is being sought (Tr. pp. 5-6). The parent's attorney reported that "during the '22/'23 school year, the student missed two months of physical therapy" that "were not provided as per the mandate" and that the parent was requesting "compensatory services for the missed related services" (Tr. pp. 6-7). During the parent's attorney's closing statement, the parent's attorney stated that the student was "entitled to a bank of makeup physical therapy services that were not provided by the [district] during the '22/'23 school year" and that "[t]he [district] . . . should be ordered to calculate a bank to address missed services" (Tr. p. 664). Following the parent's attorney's closing statement, the IHO reviewed her notes regarding the compensatory education sought by the parent "just so [she was] clear of what's being requested" (Tr. p. 667). The parent's attorney summarized the relief sought by the parent (Tr. pp. 670-71). In listing relief sought, the only compensatory related services the parent's attorney requested was "for the missed physical therapy during the '22/'23 school year" (Tr. p. 670). The parent's attorney noted that the parent was present and asked the parent "was there anything that you wanted to add in terms of relief being requested or anything that we missed" to which the parent replied "No. Thank you so much" (Tr. pp. 671-72).

From the beginning of the hearing to the end, the IHO took great care to identify all issues and relief sought (Tr. pp. 1-674). Based on the foregoing, the hearing record demonstrates that the parent did not allege that the student missed OT or speech-language therapy services in her due process complaint or amended due process complaint (see Parent Exs. A; T). Nor did the parent or the parent's attorney notify the IHO that they were seeking an award of compensatory OT or compensatory speech-language therapy when questioned by the IHO at the beginning and at the conclusion of the hearing. As such, the IHO did not err in limiting the inquiry into the district's implementation to the provision of PT during the 2023-24 school year.[15]

D. Independent Educational Evaluations (IEEs)

The parent appeals the IHO's denial of IEEs, arguing that the IHO erred in refusing to order interim IEEs, must have found that the district's evaluations were insufficient because the IHO

[15] The IHO did not engage in an analysis of whether the lapse in PT services was more than a de minimis failure to implement all elements of the IEP that rose to the level of a denial of a FAPE (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]). However, because the district does not cross-appeal the IHO's findings about its failure to implement PT services or the award of compensatory education, I find it unnecessary to further discuss.

ultimately ordered the district to conduct new evaluation as part of her final order, and should not have found that the district could defend its evaluations during the impartial hearing.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).[16]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]. If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

As for the parent's claim that the IHO should have issued an interim order for IEEs, it is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent

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

expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

While the IHO had the discretion to order interim IEEs, at no point did the parents' attorney articulate with any detail why the IEEs would be required to inform the hearing record (see Tr. pp. 7-8, 13-14; Parent Ex. T at pp. 13-14). Thus, I do not find that the IHO abused his discretion in declining to order IEEs on an interim basis.

As to the district's defense of its evaluations, the IHO determined that:

> [The] parent's evidence fails to show that parent disagreed with [the district]'s evaluations or that they notified [the district] of this disagreement, prior to filing the DPC. [The district] cannot grant something which has no notice. Once notified by the filing of the DPC, [the district] could have, but did not, grant the IEEs. [The district]'s other option was to initiate its own impartial hearing to defend its evaluations, but I do not find that, as a matter of judicial economy or legislative intent that [the district] was required to initiate its own impartial hearing to establish the appropriateness of its evaluation, when parent had already initiated a hearing. Rather, I find that [the district] can defend it evaluations in the hearing brought by parent, which it did here.

(IHO Decision at p. 21).

As noted above, in the parent's initial due process complaint, dated September 11, 2023, the parent requested an award of district funding for an IEE to include the following: a neuropsychological assessment; an OT evaluation; a speech-language evaluation; and a PT evaluation (Parent Ex. A at p. 12). The parent later sent the district a September 13, 2023 e-mail requesting that it fund IEEs and then, in the November 8, 2023 amended due process complaint, she requested district funding for an IEE to include the following: a neuropsychological assessment; an autism/ABA assessment; an OT evaluation; a speech-language evaluation; and a behavior assessment (Parent Exs. L; T at pp. 1, 13-14).[17] The IHO held that the "parent's evidence fail[ed] to show that parent disagreed with [the district's] evaluations or that they notified [the district] of this disagreement, prior to filing the D[ue] P[rocess] C[omplaint]" (IHO Decision at p. 21).

The parent's September 2023 email to the district after the original due process complaint notice may have been in reaction to recent decisions by SROs finding that a parent should not include a request for IEEs in the due process complaint notice in the first instance (see, e.g., Application of a Student with a Disability, Appeal No. 23-260; Application of a Student with a Disability, Appeal No. 23-081). The statute clearly indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]). The process

[17] While not included in the amended due process complaint notice, in the September 2023 email, the parent also requested an independent assistive technology evaluation (compare Parent Ex. L, with Parent Ex. T at pp. 13-14).

envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021] [discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at *2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at *14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at *18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether and granting IEE at public expense];[18] Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (Trumbull, 975 F.3d at 168-69).[19]

While the parent may have cured the initial failure to request the IEEs outside of a due process complaint notice, I agree with the IHO that, because an impartial hearing was already pending at which district funding for IEEs had been raised, to require the district to initiate its own impartial hearing in order to show its evaluations were appropriate would be an outcome that elevated form over substance (see Seth B. v. Oreans Parish Sch. Bd., 810 F.3d 961, 970 [5th Cir. 2016]; P.R. v Woodmore Local Sch. Dist., 256 Fed. App'x 751, 755 [6th Cir. 2007]; cf. Trumbull, 975 F.3d at 169 n.11).

The parent's final contention is that the IHO made contradictory findings in denying the IEEs at district expense but ordering the district to evaluate the student. However, in finding the district should evaluate the student, the IHO noted the passage of time since the preschool evaluation but did not determine the evaluations were insufficient (IHO Decision at p. 21). Turning to the district's related cross-appeal, I find no basis to disturb the IHO's order. As noted above, Federal and State regulations require 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

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

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

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]).

Because the February 2021 student evaluations are now over three years old the district should have already conducted new evaluations that would aid the CSE in identifying the student's unique needs. Therefore, I decline to overturn the IHO's directive ordering the district to perform a psychoeducational evaluation, a classroom observation, OT evaluation, a PT evaluation and a speech-language evaluation of the student. If they have already been conducted, then that issue is moot.

E. Relief

The IHO ordered the district to provide compensatory PT services to make up for services not delivered during the 2022-23 school year. The district has not appealed the IHO's order in this regard. Accordingly, the IHO's order for compensatory PT services has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). In addition, the IHO's order for the district to conduct evaluations of the student is discussed above and will not be disturbed.

The IHO also ordered the district to fund the student's SETSS, related services and counseling services for the entirety of the 2023-24 school year (IHO Decision at p. 22). As the IHO found no denial of a FAPE based on deficiencies in the May 2023 IESP or May 2023 IEP, it was error to order relief in the form of district funding for private services. For the 2023-24 school year, the student was parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the student's school tuition. Instead, the parent alleged that the CSE's recommendations for the student were not appropriate and, as a self-help remedy, she unilaterally obtained private services from EdZone for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts that fail to comply with their statutory mandates to offer appropriate special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay. Accordingly, the issue in this matter was whether the parent was entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

Thus, as noted above, a board of education may be required to reimburse parents for their expenditures for private educational services they obtained for a student 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 (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252).

Here, as the IHO found that the district offered the student a FAPE for the 2023-24 school year, he erred in ordering the district to fund private services.

VII. Conclusion

Having determined that the evidence in the hearing record supports: that IHO was correct in holding that the district offered the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years; that the IHO was correct in awarding the parent an award of compensatory services for the PT services that were not provided to the student during the 2022-23 school year; that the IHO correctly denied the parent's request for IEEs; and that the IHO correctly ordered the district to conduct a psychoeducational evaluation, a classroom observation, OT evaluation, a PT evaluation and a speech-language evaluation of the student, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 20, 2024, is modified by vacating the IHO's order for the district to fund SETSS and related services by private providers for the 2023-24 school year.

Dated: **Albany, New York**
July 12, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER