



The University of the State of New York

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

No. 24-176

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

Appearances:

Liz Vladeck, General Counsel, attorneys for petitioner, by Tristan LaPointe, Esq.

Barger & Gaines, LLP, attorneys for respondent, by Giulia Frasca, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to provide the student with a bank of compensatory educational services, consisting, in part, of one-to-one special education teacher support services (SETSS). The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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

In this case, the student transferred into a district elementary school for second grade (2017-18 school year) in October 2017, after attending a parochial, nonpublic school for preschool through a portion of second grade (see Parent Exs. D at pp. 1-2; Z at p. 3; see also Dist. Ex. 1 at p. 1). The hearing record includes a "Teacher Progress Report," dated January 22, 2018, prepared by the student's second grade teachers (Dist. Ex. 1). At that time, the teachers indicated that the student responded "most positively" to one-on-one instruction with the teacher and small group instruction (id.). According to the progress report, the student worked hard and got along well with his peers, but had difficulty with understanding "all sounds or sight words," as well as with decoding (id.). In mathematics, the student reportedly had difficulty with "word problems" and "adding [and] subtracting numbers to 100s" and understanding place value; in writing, he left off the correct "middle [and] end sounds" (id.). The student had been receiving "extra time on

assessment[s] and questions read aloud," and the student was also "pulled for small groups and one-on-one to support understanding of content," which reportedly, was beneficial to the student (id.).

Evidence reflects that, during second grade at the district, the parent referred the student to the CSE for an evaluation "due to concerns with his academic delays" (Parent Ex. D at p. 1).¹ As part of the initial evaluation process, the parent served as the informant for a social history completed on April 21, 2018 (April 2018 social history); she indicated that the student "had been doing fine" at his previous parochial, nonpublic school, but, due to difficulties with the student's teacher, the parent removed him and enrolled the student at the district public school (id. at pp. 1-2).² The parent also reported that the student "made a good transition" into the district and had "made friends" (id. at p. 2). However, while the student had made "huge strides in reading, he [wa]s still noted to be about a year and a half below grade level" (id. at p. 1). In addition, the parent indicated that, although the student received "better grades on test[s]," he had received a "promotion in doubt letter due to his low reading skills" (id. at pp. 1-2).

When the student transferred into the district in October 2017, he attended a general education classroom with integrated co-teaching (ICT) services (see Parent Ex. D at p. 2). At that time, he was reading at a "level D" and received "pull out supports at school"; the evidence also reflects that the parent reported having obtained private services for the student at "Sylvan Learning Center twice a week" (id.).³ In April 2018, when the social history was completed, the student was then-currently reading at a "level I," which was "still below grade level for a second grader at th[at] time of year" (id.).

According to the April 2018 social history, "[d]ue process rights were fully discussed with [the parent] and [the grandparent]" and "links to 'The Procedural Safeguards Notice' and the

¹ By letter dated February 12, 2018, the district informed the parent that the student required an evaluation to assess his "educational needs," and that, prior to assessing the student, the district required her consent (Dist. Ex. 2 at p. 1). The letter noted that the parent, pursuant to law, had "certain rights, including procedural safeguards, in connection with this evaluation" (id.). The letter referred the parent to a "booklet," entitled "A Parent's Guide to Special Education for Children, 3-21," for a "full description of [her] rights" (id.). In addition, the letter indicated that if the parent did not have a booklet, she could get a copy from the district (id.). Thereafter, the letter provided the parent with dates for the upcoming evaluations scheduled on April 21, 2018 (id. at pp. 1-2). At the impartial hearing, the parent testified that she did not recall seeing this document, but nonetheless, she did provide consent to evaluate the student (see Tr. pp. 128-29; see generally Dist. Ex. 2).

² On the same day, April 21, 2018, the parent consented to the use of electronic mail (email) to receive communications from the district, including "notices of recommendations, procedural safeguards notices and notices related to due process complaints" (Dist. Ex. 3). At the impartial hearing, the parent confirmed that she had signed the consent form and that the email address listed continued to remain her current, and correct, email address (see Tr. pp. 129-30).

³ Other than this statement reported in the April 2018 social history, the hearing record does not include any evidence that the student participated in a program at Sylvan Learning Center (see generally Tr. pp. 1-204; Parent Exs. A-Z; AA-DD; Dist. Exs. 1-38). The hearing record does include an invoice from Huntington Learning Center, which reflects the student's participation from August 1, 2018 through April 18, 2019 (see Parent Ex. V at pp. 1-2).

'Family Guide to Special Education Services for School-Age Children: A shared path to success' were emailed subsequent to the meeting" (Parent Ex. D at p. 2).

After completing the student's initial evaluation—which, in addition to the April 2018 social history, included a classroom observation on May 31, 2018 (May 2018 classroom observation) and a psychoeducational evaluation conducted on June 2, 2018 (June 2018 psychoeducational evaluation)—a CSE convened on June 19, 2018, and found the student eligible to receive special education as a student with a learning disability (see Parent Exs. D at p. 1; E at p. 1; F at p. 1; L at pp. 1, 15; Dist. Exs. 4 at pp. 1-2; 8 at pp. 1-2).^{4,5} As reflected in the June 2018 IEP, the student was reading at a "level J (end of first grade) which [wa]s well below [f]or a [seco]nd grade student [at] th[at] time of the year" (Parent Ex. L at p. 1). The IEP also reflected that the student was performing below grade level in writing (end of first grade/beginning of second grade level) and mathematics (*id.*). To address the student's needs, the June 2018 CSE recommended a general education placement with ICT services for instruction in English language arts (ELA) (15 periods per week) and mathematics (10 periods per week), as well as testing accommodations (*id.* at pp. 8-9). The June 2018 CSE developed annual goals targeting the student's needs in the areas of reading, writing, and mathematics (*id.* at pp. 4-7).⁶ The June 2018 CSE also recommended strategies to address the student's management needs, including the use of check lists, graphic organizers, visual charts, and preferential seating (*id.* at p. 3).

As part of the evidence in the hearing record, the parent submitted a copy of a prior written notice, dated June 25, 2018, which summarized the special education program recommended for the student for the 2018-19 school year (see Parent Ex. M at p. 1).⁷ The prior written notice included a section advising the parent that she had "PROTECTION UNDER THE PROCEDURAL SAFEGUARDS OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION," and noted that she could "download a copy of the Procedural Safeguards Notice from the [district] website or request a copy" from an individual identified therein (providing a contact number) (*id.* at p. 2 [emphasis in original]). In a separate notice dated June 25, 2018, the district sent the parent a consent form for the initial provision of special education to the student, which the parent executed on September 5, 2018 (see Dist. Ex. 9 at p. 1). The consent form indicated that if the parent "did not consent to this recommendation, [she] ha[d] the right to request mediation or an impartial hearing," with further instructions that a request for mediation or an

⁴ The parent attended the June 2018 CSE meeting in person; in addition, the grandparent who accompanied the parent to the April 2018 social history also attended the June 2018 CSE meeting in person (compare Parent Ex. L at p. 15, with Parent Ex. D at p. 2).

⁵ The hearing record contains multiple duplicative exhibits. 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 his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

⁶ According to the June 2018 psychoeducational evaluation report, an administration of the Wechsler Scale of Intelligence—Fifth Edition (WISC-V) to the student revealed a full-scale intelligence quotient (IQ) of 84, which fell within the low average range (see Parent Ex. F at p. 2).

⁷ In the upper right hand corner of the first page of the June 2018 prior written notice, the document notes the following: "Printed on: 6/25/2018" (Parent Ex. M at p. 1). On the bottom right corner of the prior written notice, the document notes the following: "Scanned by CamScanner" (*id.* at pp. 1-3).

impartial hearing must be in writing and providing the address for either a mediation request or a request for an impartial hearing (id. [emphasis in original]).

A final report card for the 2017-18 school year reflects that the student was assessed as "Proficient" ("3") with regard to his academic and personal behaviors, but as "Below standards" ("2") or "Well below standards" ("1") in reading, writing, listening speaking and language, mathematics, and social studies (Parent Ex. Q at pp. 1-2). In the areas of science, physical education, health, visual art, music, and theater, the student's report card reflected "P" ("Pass") (id.). The teacher comments noted that the student had "met the standards of [seco]nd grade and [wa]s promoted to [thi]rd grade" (id. at p. 2).

During the 2018-19 school year, the student attended the same district elementary school for third grade and received ICT services in a general education setting, consistent with his June 2018 IEP (see, e.g., Parent Ex. G at p. 1; compare Parent Ex. U, with Dist. Ex. 1). In a letter dated October 4, 2018, the parent submitted a request to the district for a speech-language evaluation of the student; in response, the district sent the parent a letter, dated October 9, 2018, seeking the parent's consent for the requested evaluation, which the parent signed on October 15, 2018 (see Dist. Exs. 12-13).

In the meantime, the evidence reflects that the student's third grade teachers prepared a "Teacher Progress Report," dated October 15, 2018 (Parent Ex. S). The progress report indicated that the student made friends easily and was helpful and respectful to the teachers and adults in the classroom (id.). At that time, the student reportedly enjoyed "reading historical fiction and biographies," and it was noted that he was "able to read for long periods of time," he understood "grade level texts," and he demonstrated "[g]ood fluency of [thi]rd grade texts" (id.). In writing, the student could "write independently" when he had his "writing planned in his head" and he understood "spelling patterns" (id.). In mathematics, the student struggled with "solving addition and subtraction word problems when they [w]ere multistep and multidigit"; however, it was also noted that the student could "unpack the word problems and figure out the operation" (id.). The progress report also reflected areas of concern, which included "difficulty retelling the events of a text he just read," with out-of-order details and mixed up actions of characters (id.). In writing, the student's teachers noted his "[l]ow stamina" and lack of detail; however, graphic organizers helped the student "organize his thoughts before transferring it on paper" (id.). In mathematics, the student struggled with "transferring what he ha[d] been taught to his independent work" and was having difficulty finding an "addition strategy that he [wa]s comfortable using to solve equations" (id.). The teachers noted that the student had received one-on-one instruction, reteaching, small group instruction, and the use of visuals; notably, the student "work[ed] best with refocusing prompts, one-on-one instruction or clarification, [and] visuals" (id.). The student's learning preferences were listed as "small group instruction, [and] s[itting] close to [the] teacher and rug during instruction" (id.). According to the student's teachers, the "current placement [wa]s appropriate" to meet the student's needs (id.).

On October 30, 2018, the speech-language evaluation of the student was conducted, as requested by the parent (see Parent Ex. G at p. 1). Based on the student's evaluation results, the evaluator concluded that the student did not require speech-language therapy services at that time (id. at pp. 1-4).

On November 30, 2018, a CSE convened and reviewed the student's October 2018 speech-language evaluation, as well as his then-current program (see Parent Ex. N at pp. 1-2, 16; Dist. Ex. 16 at pp. 1-2). The parent and the student's grandparent attended the CSE meeting and reported that the student was attending "Huntington Learning Center" for support in "reading, writing, and math subject areas," and he received additional support in reading through an "intensive multi-sensory reading intervention for struggling readers" (Parent Ex. N at p. 2; see Parent Ex. V at pp. 1-2).⁸ By the time of the November 2018 CSE meeting, the student's reading level had improved from a "level J" in September to a "level L," but still remained "below grade level" (Parent Ex. N at pp. 1-2). The student was "working to read more accurately and to self-correct" while increasing the pace of his reading (*id.* at p. 2). The student provided correct responses when asked questions about the reading, but struggled in his abilities to retell the story on his own and with inferential questioning (*id.*). The IEP reflected that the student enjoyed mathematics, and he "even volunteer[ed] to show errors" in order to "help him correct them" (*id.* at p. 1). The student continued to struggle with "place value and regrouping," and he was familiar with "different types of strategies," which he attempted to use to solve word problems or mathematics equations (*id.*). In writing, the student was working on elaboration of details and used a graphic organizer to "brainstorm his ideas before writing them down" (*id.* at p. 2).

Finding that the student remained eligible to receive special education as a student with a learning disability, the November 2018 CSE recommended that the student attend a general education placement with the support of ICT services for instruction in ELA (15 periods per week) and mathematics (10 periods per week) (see Parent Ex. N at pp. 1, 10-11). Within the November 2018 IEP, it was noted that the student was making progress on the majority of his annual goals and had already met two annual goals (one mathematics annual goal and one writing annual goal) (*id.* at pp. 5-10). The November 2018 CSE recommended strategies to address the student's management needs, including providing the student with simplified directions as needed; refocusing prompts; extended time; repeated instructions, directions, and reminders; graphic organizers; small group instruction or one-on-one attention; frequent one-on-one check-ins; visuals, such as charts and images corresponding to vocabulary; and book support and models for writing (*id.* at p. 4). As noted in the IEP, the student required these strategies because he had a "difficult time staying focused throughout each lesson, getting started with tasks given, and transferring what he learned to his independent work" (*id.*). Testing accommodations included extended time, breaks as needed, on-task refocusing prompts, separate location, and having the tests read (*id.* at p. 13).

As part of the evidence in the hearing record, the parent submitted a copy of a prior written notice, dated December 12, 2018, which summarized the special education program recommended for the student for the 2018-19 school year and which indicated that a CSE reviewed and considered the student's speech-language evaluation (see Parent Ex. O at pp. 1-2).⁹ The prior

⁸ Other than reporting concerns about the student's academic struggles, neither the parent nor the grandparent expressed any concerns with the student's social or physical development (see Parent Ex. N at pp. 2-3). The November 2018 IEP did note, however, that the student sometimes experienced "conflict at lunch time that require[d] adult intervention" (*id.* at p. 3).

⁹ In the upper right hand corner of the first page of the December 2018 prior written notice, the document notes the following: "Printed on: 12/12/2018" (Parent Ex. O at p. 1). On the bottom right corner of the prior written notice, the document notes the following: "Scanned by CamScanner" (*id.* at pp. 1-2).

written notice included a section advising the parent that she had "PROTECTION UNDER THE PROCEDURAL SAFEGUARDS OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION," and noted that she could "download a copy of the Procedural Safeguards Notice from the [district] website or request a copy" from an individual identified therein (providing a contact number) (id. at p. 2 [emphasis in original]).

The hearing record includes a "Student Progress Report Grades K-5," dated January 24, 2019, prepared by the student's third grade teachers (Parent Ex. U). At that time, the teachers indicated that the student was currently reading at a level "M," with an "Expected Year End Reading Level" of "P"; therefore, the student was rated as "Below Standards (2)" in reading, but was also found to be "Proficient" with his reading homework (id.). In writing, the student was then-currently writing "Below Standards (2)," with an "Expected Year End Writing Level" of "3"; the student was rated as "Proficient" with his writing homework (id.). In mathematics, the student progress reported indicated that he was "Below Standards (2)" to "Well below standards (1)," with an "Expected Year End Math Level" of "3"; the teachers rated the student as "Proficient" in his mathematics homework (id.). With regard to his behavior, the teachers noted that he was "Proficient" in his ability to ask for help, respect school rules, and work in the school community; however, the teachers noted that the student was "Below Standard" in his abilities to work in an organized manner and persist through challenges to complete a task (id.).

The parent—through her attorney—sent the district a letter, dated May 16, 2019, which indicated that the attorney's law firm represented both the parent and grandparent with respect to the "provision of a free, appropriate public education" (FAPE) to the student, and as such, requested copies of "ALL" of the student's school records (Parent Ex. B at p. 2 [emphasis in original]).¹⁰ The May 16, 2019 letter was accompanied with an authorization to release the student's school records to the law firm, which the parent had signed on May 5, 2019 (id. at p. 3).¹¹

A final report card for the 2018-19 school year reflects that the student was assessed as "Below standards" ("2") or as "Well below standards" ("1") in the areas of reading, writing, listening speaking and language, mathematics, and social studies and history across all four quarters (Parent Ex. T at pp. 1-2). With regard to science, physical education, health, music, and theater, the student consistently received a "P" ("Pass") for all four quarters (id. at p. 2). With respect to his academic and personal behaviors, the student consistently received ratings of "Below standards" ("2") or "Proficient" ("3") (id.). The teacher comments noted that, "[w]ith consideration for his IEP goals and summer school performance," the student would be "promoted" to fourth grade (id.).

Evidence in the hearing record reflects that, at the start of fourth grade during the 2019-20 school year, the parent submitted a request to the district for an auditory processing evaluation of the student, dated September 9, 2019; in response, the district sent the parent a letter, dated

¹⁰ The attorney representing the parent in May 2019 is the same attorney representing the parent in the instant administrative proceeding (see Parent Ex. B at p. 2).

¹¹ Evidence in the hearing record reflects that, according to the parent, the district finally provided copies of the student's school records on October 30, 2019—after submitting repeated requests for the school records in May, June, July, August, and September 2019 (see Sept. 21, 2021 Due Process Compl. Notice at p. 2). The parent did not believe, however, that she had received a "complete record for a student with significant disabilities" (id.).

September 13, 2019, seeking the parent's consent for the requested evaluation, which the parent signed on September 16, 2019 (see Dist. Exs. 18-19).

The hearing record includes a "Teacher Progress Report," dated September 13, 2019, prepared by the student's fourth grade teachers (Dist. Ex. 20). At that time, the teachers indicated that the student was "friendly and kind," but also "naïve," in that he would often do what others told him to do (id.). However, the teachers noted further that the student was "very respectful and kind to all adults" (id.). According to the progress report, the student had "great fluency" and "expression" in reading (id.). In writing, the student demonstrated "great stamina" and "volume" (id.). In mathematics, the student exhibited an "understanding of the standard algorithm in addition [and] subtraction" (id.). Areas of difficulty were noted in decoding, substituting "unfamiliar words with familiar ones," remaining focused in writing and organized in his thinking, and designating "place value" and "number sense" (id.). To support the student, the teachers had provided him with several interventions, including "one to one teaching, small group for all subjects, [and] strategy groups in reading" (id.). As a result, the supports "helped [the student] with his organization in writing" and had produced "some success in decoding" (id.). The teachers noted the student's learning style and preference was for "one to one teaching" and "math"; in addition, the teachers indicated that the student's current placement was appropriate (id.).

On September 30, 2019, the student underwent an audiology assessment (see Parent Ex. H at p. 1). The report indicated that the student's hearing was "within normal limits bilaterally" (id. at p. 2).

Over the course of two testing dates in October 2019, the district conducted a psychoeducational evaluation of the student (see Parent Ex. I at p. 1). In the October 2019 psychoeducational evaluation report, it was noted that the parent had referred the student for an auditory processing evaluation, and that a "new psychoeducational evaluation . . . was needed to determine his most current cognitive status" (id.). An administration of the WISC-V to the student resulted in a full-scale IQ of 88, within the low average range (id. at pp. 2-3, 7). An administration of the Wechsler Individual Achievement Test—Third Edition (WIAT-III) to the student reflected that his scores fell within the below average range in the areas of total reading, basic reading, and mathematics (id. at pp. 7-8). However, the student performed in the average range on certain subtests, including reading comprehension, numerical operations, and math fluency addition (id. at pp. 6, 8).

On November 8, 2019, a CSE convened to conduct the student's annual review and to develop an IEP for the remainder of the 2019-20 school year (see Dist. Ex. 24 at pp. 1, 19). The November 2019 IEP reflected the results of the student's most recent evaluations (id. at p. 1). At that time, the CSE noted the student was "reading independently at a level K," which was "significantly below [four]th grade November benchmark level Q" (id.). The student could "comprehend auditorily using a human reader at a level M," which was the equivalent of a "[thi]rd grade September reading level" (id.). The CSE also noted that the student's writing and mathematics performance, based on teacher assessments, remained below fourth grade levels (id.). Overall, the CSE indicated that the student often "perform[ed] a lot of the skills that [they we]re working on with him on during small group or conference work but ha[d] difficulty with transferring those skills to his independent work" (id. at p. 2). In reading, the student was observed to replace unfamiliar words with more familiar words; these errors, when uncorrected, affected the student's ability to fully comprehend the stories and further affected his ability to make inferences

about characters and themes (id. at p. 2). In mathematics, the student continued to struggle with place value and regrouping (id.). The student was also having difficulty with rounding, which required a "high level of understanding of all of the place values as well as the value of each digit" (id. at pp. 2-3). In writing, the CSE noted the student's ability to produce voluminous pages of work; however, the student had difficulty with revising his work and could get overwhelmed with the amount of corrections to be made (id. at p. 2).¹²

Finding that the student remained eligible to receive special education as a student with a learning disability, the November 2019 CSE recommended that the student attend a general education placement with ICT services for instruction in ELA (15 periods per week) and mathematics (10 periods per week) (see Dist. Ex. 24 at pp. 1, 13). Within the November 2019 IEP, it was noted that the student was making progress on the majority of his annual goals, but on approximately half of the annual goals, the CSE noted that "[I]ittle progress" had been made and more time was needed to meet the annual goal (id. at pp. 6-12). The November 2019 CSE recommended strategies to address the student's management needs, including providing the student with simplified directions as needed; refocusing prompts; extended time; repeated instructions, directions, and reminders; graphic organizers; small group instruction or one-on-one attention; frequent one-on-one check-ins; visuals, such as charts and images corresponding to vocabulary; book support and models for writing; explicit and repeated modeling; noise canceling headphones; and dividers for independent work (id. at p. 4). As noted in the IEP, the student required these strategies because he had a "difficult time staying focused throughout each lesson, getting started with tasks given, and transferring what he learned to his independent work" (id.). Testing accommodations included extended time, breaks as needed, on-task refocusing prompts, separate location, and having the tests read (by a human), and a revised test format (id. at pp. 15-16).

In March 2020, as a result of the COVID-19 pandemic, the district began delivering instruction remotely (see generally Dist. Exs. 25-26). As part of the evidence in the hearing record, the district submitted a document, dated April 3, 2020, explaining the special education supports that would be provided to the student during the COVID-19 school closures (see Dist. Ex. 25 at pp. 1-2). The district also submitted a document, dated October 9, 2020, explaining how the student's special education program would be "adapted for the learning environments available" in fall 2020 (Dist. Ex. 26 at pp. 1-2).¹³

During fifth grade, a CSE convened on November 4, 2020, to conduct the student's annual review and to develop an IEP for the remainder of the 2020-21 school year (see Dist. Ex. 28 at pp. 1, 17). The IEP reflected that, based on teacher assessments, the student performed "significantly below grade level" in mathematics and writing; in the area of reading, the student was "currently

¹² The parent attended the November 2020 CSE meeting and reported concerns with the student's attention to task (see Dist. Ex. 24 at pp. 3, 20). In addition, the CSE noted that the student continued to have "conflict during recess and lunch that require[d] adult interventions" (id. at p. 3). The parent indicated that the student appeared to have the "same conflict repetitively with specific peers" (id.).

¹³ At the impartial hearing, the parent testified that she did not recall seeing either document concerning the district's special education plan during the COVID-19 school closures (see Tr. pp. 138-40). She also testified that, although she had been told that the student would be pulled-out to receive SETSS, "that never happen[ed]" (Tr. p. 138).

reading at a level Q," which was a "mid-[four]th grade level" (*id.* at p. 1). The CSE indicated that the student was attending an "ICT classroom" for fifth grade and during remote instruction, he attended the "class morning meetings" and "sometimes struggle[d] to submit independent work" (*id.*). The CSE also indicated that, as a result, the teachers reviewed assignments with the student and met with him in "small groups to reteach lessons" (*id.*). The student's teachers "encourage[d] him to complete the assignments right after [their] meetings so that the information [wa]s fresh in his mind, however, he d[id not] follow through with turning them in"; it was also noted that the student could "navigate google classroom" (*id.*).

In reading, the November 2020 IEP noted that the student could "read words within a text, but struggle[d] with the comprehension portion of it" (Dist. Ex. 28 at p. 2). The student's distractibility prevented him from remaining focused long enough on a text to "process what [wa]s happening in the text" (*id.*). During remote instruction, the teachers "incorporated [the use] of I Ready and Epic" to improve the student's comprehension skills (books could be read to him) and they continued to work with the student to "slow down" and "pay attention to punctuation" so he could "process what he [wa]s reading more efficiently" (*id.*). In addition, the student attended "all Live meeting[s]" during remote instruction, and he continued to "work on [his ability to] inference and synthesiz[e] ideas from different texts" (*id.*).

In writing, the November 2020 IEP reflected that the student had "great ideas but struggle[d] getting his ideas on paper" (Dist. Ex. 28 at p. 1). The student required "a lot of support to brainstorm, get started and continue to work through his writing piece" (*id.*). Due to the student's distractibility, he often fell "off track" and he could not complete his work (*id.*). During remote instruction, the student received support in writing by sitting with a teacher, who "guide[d] him through the writing process" (*id.*). At that time, the student needed "support with structure," visuals to properly organize information, and he "benefit[ed] from interactive writing with a teacher in order for him to understand what [wa]s to be written" (*id.* at pp. 1-2).

In mathematics, the November 2020 IEP indicated that the student had a "good sense of his multiplication facts" (Dist. Ex. 28 at p. 2). Although he tried to complete his assignments, the student could become distracted (*id.*). The student was "often pulled to work in a small group to reteach concepts and to help guide him through is work" (*id.*). According to the IEP, the student required "concepts taught and retaught several times in order to understand," and he worked "well with a teacher to support him" (*id.*). At that time, the student needed to slow down when reading mathematics problems in order to understand "what the problem [wa]s asking" and then "come up with a plan to solve the problem" (*id.*). The student was "working on being independent and trying his best to complete problems, even if he trie[d] and still need[ed] support" (*id.*).

Finding that the student remained eligible to receive special education as a student with a learning disability, the November 2020 CSE recommended that the student attend a general education placement with the support of ICT services for instruction in ELA (15 periods per week) and mathematics (10 periods per week) (*see* Dist. Ex. 24 at pp. 1, 11-12). Within the November 2020 IEP, it was noted that the student was making progress toward his annual goals, but on slightly more than half of the annual goals, the CSE noted that "[l]ittle progress" had been made and more time was needed to meet the annual goal (*id.* at pp. 5-11). The November 2020 CSE recommended strategies to address the student's management needs, including providing the student with simplified directions as needed; refocusing prompts; extended time; repeated instructions, directions, and reminders; graphic organizers; small group instruction or one-on-one

attention; frequent one-on-one check-ins; visuals, such as charts and images corresponding to vocabulary; book support and models for writing; explicit and repeated modeling; noise canceling headphones; and dividers for independent work (id. at pp. 3-4). As noted in the IEP, the student required these strategies because he had a "difficult time staying focused throughout each lesson, getting started with tasks given, and transferring what he learned to his independent work" (id.). Testing accommodations included extended time, breaks as needed, on-task refocusing prompts, separate location, and having the tests read (by a human), and a revised test format (id. at pp. 13-14).

Evidence in the hearing record reflects that the student graduated from fifth grade in June 2021 and then began attending a district middle school for sixth grade during the 2021-22 school year (see Tr. p. 127). Evidence in the hearing record also reflects that the 2021-22 school year was the "first year [students] ha[d] been back to in person school in a few years," including this student (Dist. Ex. 30 at p. 2).

By due process complaint notice, dated September 21, 2021, the parent—through her attorney—alleged that the district failed to offer the student a FAPE for the 2017-18, 2018-19, 2019-20, and 2020-21 school years based on various procedural and substantive violations (see Sept. 21, 2021 Due Process Compl. Notice at pp. 10-13, 16-17). The parent specifically alleged that the statute of limitations did not apply to this matter because the district failed to provide the parent with the Procedural Safeguards Notices and prior written notices for each school year claimed therein (id. at pp. 10-11, 13). As relief, the parent requested, in part, an order directing the district to fund independent educational evaluations (IEEs), including a neuropsychological evaluation, a speech-language evaluation, an assistive technology evaluation, and occupational therapy (OT) evaluation, and a functional behavioral assessment (FBA) (id. at pp. 17-18). In addition, the parent requested an unspecified amount of compensatory educational services consisting of "1:1 education services for reading, writing, and math"; speech-language therapy, OT, and related services; and applied behavior analysis (ABA) services (id. at p. 19).

On October 26, 2021, a CSE convened to conduct the student's annual review and to develop an IEP for the remainder of the 2021-22 school year (see Dist. Ex. 30 at pp. 1, 13).¹⁴ The October 2021 IEP reported the student's performance in all academic areas, including mathematics, science, social studies, and ELA (id. at pp. 1-2). In mathematics, teacher assessments indicated that the student had shown mastery (or met the outcomes) in two areas: estimating and dividing fractions (id. at p. 1). In the remaining areas assessed, the student's received scores indicating that he was "approaching [] the other five learning outcomes" (id.). The CSE noted that the student demonstrated "mixed progress in math" and had shown "some multiplication and division fluency, but ha[d] struggled to adapt that to decimal computations" (id.). At that time, the CSE noted that the student "could improve on all of his foundational operation skills (multiplication and multi-digit division), so working on both of these strategies to build fluency [wa]s a great way he c[ould]

¹⁴ All of the October 2021 CSE participants attended the meeting via telephone, including the parent (see Dist. Ex. 30 at p. 15). With respect to concerns, the parent asked that the student receive "AIS to support his development, primarily in literacy" and she reported that the student "began school as a non-reader and ha[d] persistently been below grade level" (id. at p. 3). The parent also reported that the student had received "pull-out and after school" services (id.). In addition, the parent indicated that the student, at times, reported his experiences at school with her (id. at p. 4). The parent also indicated that the student had been "sheltered and fe[lt] frightened"; the parent encouraged the student to "speak to a teacher or a trusted adult" (id.).

work on his growth at home" (id. at pp. 1-2). It was also noted that building the student's mathematics fluency would allow him to "focus on the process and conceptual understanding of the problem rather than the computations" and build the student's "math stamina" (id. at p. 2).

In ELA, the October 2021 CSE noted the student's engagement in the class and his adjustment to "academic routines and supports" upon returning to school in person (Dist. Ex. 30 at p. 2). However, the student had been "involved in social incidents with other students involving name calling and other verbal exchanges," which the CSE attributed to the "classroom scenario" being "much different this year" (id.). The student required assistance to understand "social cues and others perspectives," and in the classroom, it was "beneficial to place [the student] in a setting where the other students [we]re productive and not easily distracted" (id.). The student also benefited from frequent teacher check-ins and "specifically planned out teacher led small group activities" (id.). The student actively participated in "whole class read alouds as well as discussions," and on an administration of the Dynamic Indicator of Basic Early Literacy Skills (DIBELS) to the student, which "measure[d] his ability to read aloud and understand word sound relationships," the student read "93 words correct[ly] per minute and his accuracy [wa]s 83.3 [percent]" (id. at pp. 2-3). The CSE indicated that, for that time of the school year, the "benchmark goals for words correct per minute [wa]s 123 [to] 151 [plus] and for accuracy should [have] be[en] 96 [plus percent]" (id.). On an assessment to measure the student's reading comprehension skills, the "MAZE" was administered and the student's performance fell "below grade level" ("1.5") (id. at p. 3). The CSE also indicated that, for that time of the school year, the student's comprehension skills "should be at 14.5 [to] 22.5" (id.). Based on the assessment results, the CSE noted that the student's "decoding skills may [have] be[en] interfering with his ability to read and comprehend texts at grade level," and the student appeared to benefit from "having texts read to him, so that the effort he t[ook] to read and understand a text [wa]s taken out and [he wa]s able to participate in answering questions and digging deeper into the text" (id.). In writing, the October 2021 CSE noted that, although the student demonstrated an understanding of basic sentence structure and grammar, he continued to struggle with "organization of ideas and using grade appropriate vocabulary" (id.). In a recent writing assignment, the student used "appropriate sentence structure, but did not separate his ideas into body paragraphs" and omitted details (id.). The CSE noted that the student benefited from "small group instruction and teacher check-ins throughout writing periods," as well as the use of "graphic organizers, sentence starters and opportunities to express his thinking verbally instead of writing" (id.).

Next, the October 2021 IEP reflected that, prior to the student's annual review, he participated in a "student interview" (Dist. Ex. 30 at p. 3). The student expressed that ELA was his "favorite class," he enjoyed writing, and his "teachers [we]re able to make difficult things seem easy by providing a lot of details" (id.). The student did not identify "any modality [that] support[ed] his learning best" but described himself as "easy-going about whether he w[ould] work alone, with a partner, or in a group" (id.).

Finding that the student remained eligible to receive special education as a student with a learning disability, the October 2021 CSE recommended that the student attend a general education placement with ICT services for instruction in ELA (six periods per week), mathematics (six periods per week), sciences (five periods per week), and social studies (three periods per week) (see Dist. Ex. 30 at pp. 1, 8-9). Within the October 2021 IEP, it was noted that the student was making progress on his ELA annual goals, but the CSE did not report on the student's progress on his annual goals in the area of mathematics (id. at pp. 6-8). The October 2021 CSE recommended

strategies to address the student's management needs, including remediation of mathematics foundations (operations), check-ins to support task initiation, restating and repeating directions, preferential seating to minimize distractions, the use of word banks and sentence starters to improve variety and elaboration, providing the student with step-by-step instructions for complex tasks, small group instruction, the use of chunked texts and visual aids to support comprehension and retention, calendars for assignment due dates, supports for the organization of his tasks and materials, use of graphic organizers and templates for writing assignments, on-task focusing prompts, and explicit instruction in decoding (id. at p. 4). Testing accommodations included extended time, separate location, on-task refocusing prompts, breaks as needed, and having the tests read (id. at p. 10).

As part of the evidence in the hearing record, the district submitted a letter, dated October 29, 2021, which informed the parent that the student was entitled to received "additional supports and programs connected to daily instruction as part of the [district's] Academic Recovery Plan" (Dist. Ex. 31 at p. 1). The district offered "Special Education Recovery Services" to the student, which consisted of 20 hours of small group instruction that was scheduled to begin on or about November 15, 2021 and was scheduled to conclude on or about February 11, 2022 (id. at pp. 1-2). According to the letter, the additional services were "intended to address needs arising from learning disruption caused by the pandemic" (id. at p. 1).¹⁵

During the 2021-22 school year, on March 30, 2022, the parties appeared before the IHO appointed to conduct the impartial hearing related to the parent's September 2021 due process complaint notice (see Interim IHO Decision at pp. 1, 3).¹⁶ At that time, the IHO conducted an impartial hearing with respect to the parent's request for IEEs; however, prior to the scheduled impartial hearing date, the parties reached an agreement to conduct the following evaluations at district expense, which the IHO set forth in his interim decision, dated March 30, 2022: a neuropsychological evaluation, an FBA (and the creation of a behavioral intervention plan (BIP), if necessary), a speech-language evaluation, an updated assistive technology evaluation, and an OT evaluation (id. at pp. 4-5). The IHO also ordered a CSE to convene within 15 days of the completion of the evaluations, to determine what, if any, modifications were needed with respect to the student's IEP and to consider what, if any, compensatory educational services the student required (id. at p. 5).

For the 2022-23 school year, the student continued to attend the district middle school for seventh grade (see, e.g., Parent Ex. A at p. 1). As part of the evidence in the hearing record, the district submitted a letter, dated October 4, 2022, notifying the parent of the student's upcoming reevaluation (i.e., mandated three-year reevaluation) (see Dist. Ex. 32 at pp. 1-2).¹⁷ Consistent

¹⁵ At the impartial hearing when the parent was asked to review district exhibit 31, she testified that she was told that the school would provide services, but it did not happen (see Tr. pp. 140-41; Dist. Ex. 31).

¹⁶ The IHO appointed to conduct the impartial hearing related to the parent's September 2021 due process complaint notice was the same IHO appointed to the conduct the impartial hearing in the instant matter (see Interim IHO Decision at p. 1).

¹⁷ The district's notice of reevaluation indicated that the parent would receive a "'Consent for Additional Assessment' form" that the parent was required to sign and return to the district (Dist. Ex. 32 at p. 2). In addition, the reevaluation notice informed the parent that she had rights protected under the Procedural Safeguards Notice,

with the district's notice, the district completed an "Educational Evaluation" of the student on October 24, 2022, by administering the Wechsler Individual Achievement Test—Fourth Edition (WIAT- 4) to the student to assess him in the areas of reading, mathematics, and writing (Dist. Ex. 34 at pp. 1-2).

On October 25, 2022, a CSE convened to conduct the student's annual review and to develop an IEP for the remainder of the 2022-23 school year (see Dist. Ex. 35 at pp. 1, 15). The October 2022 IEP reflected the student's most recent evaluation results obtained from the WIAT-4 (id. at p. 1).¹⁸ As noted in the IEP, the student's overall academic skills fell within the "Very Low to Low Average range" (id. at p. 2). In reading, the student's scores fell within the low average range on subtests assessing word reading, pseudoword decoding, decoding, and reading comprehension; on the spelling subtest (written language), the student's score fell within the very low range (id.). The IEP reflected that the student's scores in mathematics subtests fell within the very low range (id.).

In addition to reporting the testing results obtained from the WIAT-4, the October 2022 IEP indicated that on a "recent MAP ELA assessment," the student's "RIT score of 205 . . . plac[ed] him in the 29th percentile for achievement on this assessment" (Dist. Ex. 35 at p. 1).¹⁹ According to the IEP, the student's score "indicate[d] that [the student] should continue to receive supports to boost his performance in reading and [to] better match his U.S. national peers" (id.). The student's scores reflected a "strength in Understanding key Ideas, Details and Connections, with a score of 207" (id.). The IEP further noted that, in "Language, Craft, and Structure and Vocabulary Acquisition and Use," the student's score was "204" (id.).

Next, the October 2022 CSE reported the student's levels of performance in the seventh grade curriculum, including social studies, science, mathematics, and ELA, as well as the supports provided to the student to access the curriculum (see Dist. Ex. 35 at pp. 2-4). Finding that the student remained eligible to receive special education as a student with a learning disability, the October 2022 CSE recommended that the student attend a general education placement with the support of ICT services for instruction in ELA (six periods per week), mathematics (six periods per week), sciences (five periods per week), and social studies (four periods per week) (see Dist. Ex. 35 at pp. 1, 9-10). Within the October 2022 IEP, it was noted that the student was making progress on his mathematics annual goals, but the IEP did not report on the student's progress on his annual goals in ELA (id. at pp. 6-9). The October 2022 CSE recommended strategies to address

which, according to the notice, had been enclosed with the notice but could otherwise be obtained from the district website address listed (id.). The hearing record does not include a signed consent form from the parent (see generally Tr. pp. 1-204; Parent Exs. A-Z; AA-DD; Dist. Exs. 1-38). However, the evidence indicates that the district reached out to the parent on two occasions to obtain consent (see Dist. Exs. 36 at p. 1; 38 at p. 2).

¹⁸ The parent attended the October 2022 CSE meeting and participated via telephone (as did all CSE members) (see Dist. Ex. 35 at p. 17). At the CSE meeting, the parent asked "about after school help as well as homework"; the CSE informed the parent that the student could get "help with his homework" during afterschool hours on Tuesdays (id. at p. 4). The CSE "guided [the parent] on how she c[ould] access [the student's] homework to make sure he [wa]s doing his work at home" (id.). The parent did not express any concerns with respect to the student's social or physical development (id.).

¹⁹ The hearing record does not explain the "MAP ELA" assessment or the "RIT" score (see generally Tr. pp. 1-204; Parent Exs. A-Z; AA-DD; Dist. Exs. 1-38).

the student's management needs, including remediation of mathematics foundations (operations), check-ins to support task initiation, restating and repeating directions, preferential seating to minimize distractions, the use of word banks and sentence starters to improve variety and elaboration, providing the student with step-by-step instructions for complex tasks, small group instruction, the use of chunked texts and visual aids to support comprehension and retention, calendars for assignment due dates, supports for the organization of tasks and materials, use of graphic organizers and templates for writing assignments, on-task focusing prompts, and explicit instruction in decoding (*id.* at pp. 4-5). Testing accommodations included extended time, breaks, separate location, on-task refocusing prompts, and having tests read (*id.* at pp. 12-13). In addition, the October 2022 IEP included a recommendation for the student to receive SETSS in reading (six hours total) and in mathematics (six hours total) beginning on or about October 31, 2022, as compensatory services for the student's failure to "make expected progress toward IEP goals during blended and remote learning and the return to in-person learning" (*id.* at pp. 11-12).

Later during the 2022-23 school year, the IHO assigned to the parent's claims in the September 2021 due process complaint notice issued a decision, dated April 18, 2023, dismissing the parent's case without prejudice (*see* Apr. 18, 2023 IHO Decision at pp. 3-4).²⁰ The IHO noted in the decision that, following the issuance of the interim decision ordering the completion of several IEEs of the student, the parties resumed the impartial hearing on June 7, 2022 and August 5, 2022; on those dates, the IHO was informed that the IEEs had not been completed (*id.* at p. 2).²¹ When the impartial hearing resumed on two subsequent dates—October 4, 2022 and November 17, 2022—the IHO indicated that neither party appeared (*id.*). On January 4, 2023, the parent appeared and indicated that "two of the IEEs were still outstanding"; on February 27, 2023, the parent failed to appear at the scheduled impartial hearing (*id.*). The IHO then scheduled an impartial hearing for the presentation of opening statements and evidence on April 18, 2023—a date the IHO noted was confirmed by the parent's attorney as available when it was scheduled—but at which the parent failed to appear (*id.*). In addition, the IHO found that the parent had "not responded to any request for an update on this matter and ha[d] failed to prosecute her own case and had failed to comply with the [IHO's] directives"; as a result, the IHO dismissed the September 2021 due process complaint notice without prejudice and noted that the parent could refile the case if, and when, she was ready (*id.* at p. 3).

A. Due Process Complaint Notice

By due process complaint notice dated May 5, 2023, the parent alleged that the district failed to offer the student a FAPE for the 2017-18, 2018-19, 2019-20, 2020-21, 2021-22, and 2022-

²⁰ In her answer, the parent asserts that, "for reasons which remain unclear to the parent, that case was subsequently unilaterally dismissed without prejudice following a status conference for which she and her counsel did not receive notice" (Answer ¶ 1). As a result, the parent "promptly refiled the claim under the current case number" (*id.*). Upon review, the parent's May 2023 due process complaint notice does not include a recitation of any information concerning the previous administrative proceeding, or its ultimate conclusion (*see generally* Parent Ex. A).

²¹ At the time of the August 2022 impartial hearing date, the following evaluations had been completed as part of the awarded IEE: the speech-language therapy evaluation (conducted on July 11, 2022) and the assistive technology evaluation (conducted on July 11, 2022) (*see* Parent Exs. W at p. 1; X at p. 1). The OT evaluation was completed on August 10, 2022 (*see* Parent Ex. Y at p. 1).

23 school years based on various procedural and substantive violations (see Parent Ex. A at pp. 1, 11-14, 17-18).²² As relevant to this appeal, the parent requested the following as relief: an unspecified amount of compensatory educational services consisting of individual education services for reading, writing, and mathematics (id. at p. 21).

B. Impartial Hearing Officer Decision

On June 21, 2023, the parties proceeded to an impartial hearing, which concluded on March 5, 2024, after 10 total days of proceedings (see Tr. pp. 1-204). Midway through the administrative proceeding, the district moved to dismiss the parent's claims related to the 2017-18, 2018-19, 2019-20, and 2020-21 school years as barred by the statute of limitations; the parent filed response papers, and on November 2, 2023, the parties presented their respective arguments with respect to the district's motion to dismiss (see Tr. pp. 2-3, 19, 21, 25, 28, 33-46). At the next impartial hearing date held on November 8, 2023, the IHO indicated that, having reviewed all of the motion papers, it would be more efficient to proceed with a single impartial hearing at the next scheduled date, rather than bifurcate the matter to separately address the district's motion to dismiss and thereafter, to address the merits of the case (see Tr. pp. 50, 59-61). As a result, the impartial hearing resumed on December 7, 2023, and concluded on March 5, 2024 (see Tr. pp. 67-204).

In a decision dated March 29, 2024, the IHO initially summarized the issues presented, the procedural history, and then, in a more lengthy recitation, explained the findings of fact (see IHO Decision at pp. 3-8). Thereafter, the IHO addressed the district's motion to dismiss and the statute of limitations claims (id. at pp. 9-10). The IHO noted that, regardless of whether or not the district prevailed on its motion to dismiss the first four school years at issue, the student's "needs, at present, [we]re so significant that even considering the absence of a FAPE for the past two school years [wa]s sufficient to award the [s]tudent significant compensatory education" (id. at p. 9). The IHO, nonetheless, examined the district's evidence, which consisted of a "number" of prior written notices; however, the IHO indicated that the district did not present any witness who "could testify as to whether those [prior written notices] were actually sent to the [p]arent" especially when the parent had specifically testified that she "never received those [prior written notices] until they were turned over to her attorney during the course of this proceeding" (id.). Accordingly, the IHO determined that the parent's "testimony remained unchallenged" (id.).

Next, the IHO found that the hearing record lacked evidence to demonstrate that the district "ever provided [the parent] with any Procedural Safeguards Notices" (IHO Decision at p. 9). The IHO noted that the hearing record also lacked any evidence to establish that the parent was otherwise "aware of her due process rights," such as having an attorney present at prior IEP meetings, or having engaged in prior impartial hearings (id. at pp. 9-10, citing R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694 [S.D.N.Y. 2011]).²³ The IHO also found that

²² To be clear, when the parent filed her May 2023 due process complaint notice, the only outstanding IEE was the neuropsychological evaluation, which was later completed over the course of two consecutive dates in July 2023 (see Parent Ex. Z at p. 1).

²³ To be clear, the IHO's statement that the hearing record lacked evidence to establish that the parent had been involved in any prior impartial hearings is not accurate (see IHO Decision at p. 10). The IHO in this matter was the same IHO assigned to the parent's prior administrative proceeding, initiated by the September 2021 due process complaint notice.

the district's failure to provide the parent with the Procedural Safeguards Notice resulted in "substantive harm," noting that the district continued to recommend the same special education program for the student "year after year despite the fact that the [s]tudent was not making progress, and if anything, was falling farther behind his peers" (IHO Decision at p. 10). The IHO concluded that the hearing record contained sufficient information upon which to toll the statute of limitations to include the parent's allegations concerning the 2017-18, 2018-19, 2019-20, and 2020-21 school years, because the parent was "never apprised of her right to challenge the [d]istrict's program recommendations, and was not made aware of the full extent of the [s]tudent's challenges until she received the results of various IEEs" (*id.*). Consequently, the IHO denied the district's motion to dismiss.

Thereafter, the IHO turned to an examination of what relief the student was entitled to receive (*see* IHO Decision at pp. 10-14). First, the IHO indicated that, since the district failed to present any witnesses to demonstrate that the student had been provided with the "education or services" he had been entitled to receive, the IHO concluded that the district had conceded that it failed to offer the student a FAPE for the 2017-18, 2018-19, 2019-20, 2020-21, 2021-22, and 2022-23 school years at issue (*id.* at p. 13). Nevertheless, the IHO found that the student was not entitled to compensatory educational services consisting of OT because "an independent evaluator" determined that the student did not require OT "at all" upon evaluation in August 2022 (*id.* at p. 14). With respect to compensatory educational services consisting of speech-language therapy, the IHO found that the student was entitled to 108 hours to "catch up to peers, rather than the 276 [hours] requested by the parent" (*id.*). Next, the IHO found that the hearing record lacked any evidence to support the parent's request for extended school year services, "other than for the 2023-2024 school year" (*id.*). With regard to the parent's request for 8280 hours of compensatory educational services in the form of SETSS or "tutoring," the IHO adjusted this down to an award of 5000 hours of "compensatory 1:1 tutoring and/or SETSS" for the district's failure to develop an appropriate program for the student for six school years (*id.*).²⁴

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by denying its motion to dismiss the parent's claims related to the 2017-18, 2018-19, 2019-20, and 2020-21 school years. In addition, the district contends that, if the parent only timely raised concerns regarding the 2021-22 and 2022-23 school year, the IHO erred by awarding the student with 5000 hours of compensatory educational services consisting of SETSS and/or tutoring services, as the evidence in the hearing record indicates that the student made progress and thus, the award was excessive. As relief, the district seeks a minimum downward modification of the compensatory educational services awarded to approximately two-thirds of the 5000 hours awarded.

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision and the relief awarded in its entirety.

²⁴ In addition to the relief mentioned, the IHO also awarded 250 hours of parent counseling and training services, reimbursement for the costs of tutoring expended by the parent (\$7161.00), and for the CSE to convene to develop a special education program for the student for the 2023-24 school year upon consideration of the completed IEE of the student (neuropsychological, assistive technology, speech-language therapy, and OT), as well as consideration of the student's need for an extended school year (*see* IHO Decision at p. 15).

V. Discussion

A. Motion to Dismiss—Statute of Limitations

The district argues that the IHO erred by failing to find that the parent's claims regarding the 2017-18, 2018-19, 2019-20, and 2020-21 school years were barred by the statute of limitations, even applying any Executive Orders issued by the former Governor of the State of New York due to COVID-19 considerations. The district notes that, in the decision, the IHO faulted the district for not producing a witness to testify about whether the prior written notices had actually been sent to the parent and to rebut the parent's testimony denying that she had ever received the documents. The IHO also found that the hearing record lacked evidence demonstrating that the district provided the parent with any Procedural Safeguards Notices. The district contends, however, that the IHO did not analyze which school years were time-barred and the parent failed to establish whether any exception to the statute of limitations applied.

The parent contends that the IHO properly dismissed the district's motion, arguing that even if the district provided the parent with the required documentation in 2019, the statute of limitations did not begin to run until after the completion of the IEEs in July and August 2022. The parent asserts that she was not aware of the full extent of the student's challenges until the IEEs were conducted, and therefore, the May 2023 due process complaint notice was timely filed within the two years of when she knew or should have known of the action forming the basis of the complaint. The parent seeks to uphold the IHO's dismissal of the district's motion to dismiss.

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).²⁵ Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had

²⁵ New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).²⁶

The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. School Dist., 744 Fed Appx at 11; R.B., 2011 WL 4375694, at *4, *6; see D.K., 696 F.3d at 246; C.H., 815 F. Supp. 2d at 986; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7). Such safeguards include the requirement to provide parents with prior written notices and procedural safeguards notices containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3]; [d]; 34 CFR 300.503; 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

Generally, claims related to the conduct of a CSE meeting or the contents of an IEP accrue at the time of the CSE meeting or, at the latest, upon the parent's receipt of the IEP (see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 3d 94, 113-14 [E.D.N.Y. 2017], aff'd, 2018 WL 4049074 [2d Cir. Aug. 24, 2018]; Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *7-*9 [S.D.N.Y. June 20, 2017], aff'd, 2018 WL 3650185 [2d Cir. Aug. 1, 2018]).

Assuming for the sake of argument that the district did not provide the parent with any prior written notices or a Procedural Safeguards Notice, the evidence in the hearing record does not support the IHO's decision denying the district's motion to dismiss the parent's claims related to the 2017-18, 2018-19, 2019-20, and 2020-21 school years, as set forth in the May 2023 due process complaint notice.²⁷ Here, a review of the IHO's decision reveals that, while correctly

²⁶ Neither party asserts that the second exception to the statute of limitations applies in this matter; as a result, the discussion herein will focus on the first exception (see generally Req. for Rev.; Answer).

²⁷ To be clear, the district submitted a 54-page document into the hearing record as evidence, which consisted of prior written notices to the parent the district downloaded and/or printed from its SESIS system on or about November 2, 2023 (see generally Dist. Ex. 37). Although the IHO noted that the district had submitted a number of prior written notices as evidence, the IHO appeared to afford that evidence little, if any, weight because the district did not present any witness to establish a presumption of mailing (see IHO Decision at p. 9). The IHO gave more weight to the parent's testimony that she never received any prior written notices, but at the same time, the IHO failed to indicate during the impartial hearing that he, himself, had pointed out that the parent's testimony included "some inconsistencies" and that, based on the parent's own testimony, she received "notices for IEP

reciting the two-year statute of limitations applicable to this matter, the IHO did not reference either the tolling exceptions or thoroughly analyze the evidence relevant to this inquiry (see IHO Decision at pp. 9-10). For example, the IHO did not affix an accrual date for the parent's claims in the May 2023 due process complaint notice, but instead, found that the district failed to present sufficient evidence to essentially establish a presumption of mailing with regard to the prior written notices submitted into the hearing record as evidence or to otherwise establish that the district provided the parent with a Procedural Safeguards Notice (id.).

With regard to accrual dates, the due process complaint notice specifically references the parent's requests for copies of the student's educational records, which were produced by the district on October 19, 2019 (Parent Ex. A at p. 2). With respect to the 2017-18 school year, the parent's due process complaint notice indicates that she "expressed concern throughout the school year" and "referred [the student] for an evaluation" because he was exhibiting difficulty in reading and was reading below grade level (id.). Accordingly, the due process complaint notice indicates that the parent was aware of the issues underlying her complaint regarding the 2017-18 school year as they occurred during the 2017-18 school year and therefore they accrued at that time. Turning to the 2018-19 school year, the parent challenged the June 2018 and November 2018 IEPs and her claims regarding those IEPs accrued, at the latest, when she was provided with them.

Notably absent from the IHO's analysis is the fact that the parent—as early as May 16, 2019—was represented by the same attorney acting on her behalf in this matter with respect to the provision of a FAPE to the student (see Parent Ex. B at pp. 1-2). Based on the consent signed by the parent allowing the release of his educational records, the parent could have been represented by her attorney as early as May 5, 2019 (id. at p. 3). Consequently, one would be hard-pressed to conclude that the parent was not aware of her due process rights any later than May 16, 2019; as such, the parent either knew or should have known of her rights that formed the basis of a portion of her claims in this matter as early as May 16, 2019, and any withholding of information by the district no longer prevented her from filing a due process complaint notice within two years of that time. Using October 19, 2019 as the latest possible accrual date—when the parent was provided copies of the student's educational record, the two-year statute of limitations expired on or about October 19, 2021, and therefore, the parent's allegations concerning the 2017-18 and 2018-19 school years, as set forth in the May 5, 2023 due process complaint notice, were untimely and barred by the statute of limitations.

In addition, the parent's allegations related to the 2019-20 and 2020-21 school years, as set forth in the May 5, 2023 due process complaint notice, were also time barred. Having found that the parent was represented by counsel and, therefore, could be construed to be aware of her due process rights no later than May 16, 2019, the parent knew or should have known the basis for her claims concerning the 2019-20 school year on or about November 8, 2019, when the student's IEP was developed for the remainder of the 2019-20 school year. However, during the 2019-20 and

meetings by email," "IEPs themselves" by email, "notices for a social history," "notices for a classroom observation," and presumably received "notice for the consent for services" via email—yet, "when it c[ame] to the prior written notices, all of a sudden there[was] nothing" (Tr. pp. 178-79). The IHO had further noted that there was "something disconcerting about that, that all of these notices and things g[o]t to [the parent] . . . except this very pivotal thing upon which the whole statute of limitations issue hinge[d]" (Tr. p. 179). The IHO also noted the difficulty the district would encounter attempting to locate a witness to testify about whether or not documents were mailed or emailed six to seven years ago (see Tr. p. 179).

2020-21 school years as a result of the COVID-19 pandemic, the former Governor of the State of New York issued several executive orders; within one such order, Executive Order 202.8 ("Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency)," the former Governor "temporarily suspend[ed] or modif[ied] any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency" (9 NYCRR 8.202.8). More specifically, the former Governor, via Executive Order 202.8, "temporarily suspend[ed] or modif[ied], . . . the following:"

In accordance with the directive of the Chief Judge of the State to limit court operations to essential matter during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, or notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules,, the court of claims act, the surrogate's court procedural act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020

(9 NYCRR 8.202.8). The former Governor repeated the same language in subsequent executive orders until the issuance of Executive Order 202.67 on October 4, 2020, which specifically terminated these tolling provisions as of November 3, 2020 (9 NYCRR 8.202.167).²⁸

Thus, although the parent's claims related to the 2019-20 school year would have been time barred upon the expiration of the typical two-year statute of limitations on or about November 8, 2021, the executive orders between March 2020 and November 2020 tolled the statute of limitations, which extended the viability of the parent's claims for an additional 238 days. Here, even if the COVID-19 pandemic executive orders added a full year to the statute of limitations, i.e., 365 days, the parent had until on or about November 8, 2022 to timely file claims regarding the 2019-20 school year; therefore, the parent's claims related to the 2019-20 school year, as set forth in the May 5, 2023 due process complaint notice, were time barred.

Next, the parent's allegations concerning the 2020-21 school year accrued on or about November 4, 2020, when the student's IEP for the 2020-21 school year was developed. Here, the accrual date related to the 2020-21 school year claims occurred the day after the termination of the executive orders tolling period on November 3, 2020; therefore, the two-year statute of limitations expired on or about November 4, 2022, without any additional time attributable to the tolling period provided under the executive orders, and the parent's claims related to the 2020-21 school year, as set forth in the May 5, 2023 due process complaint notice, were time barred.

²⁸ The New York State Appellate Division, Second Department, discussed the Governor's authority to alter or modify a statute by tolling the time limitations and found that the executive orders constituted a tolling of the statute of limitations, as opposed to a suspension of the statute of limitations (Brash v. Richards, 195 A.D.3d 582, 585 [2d Dep't 2021]).

Finally, the evidence in the hearing record does not support the parent's argument that the statute of limitations did not begin to run until after the completion of the student's IEEs in July and August 2022 because she was not aware of the full extent of the student's challenges until the IEEs were conducted, and therefore, the May 2023 due process complaint notice was timely filed within the two years of when she knew or should have known of the action forming the basis of the complaint. This argument is belied, in part, by the parent's failure to reference any specific information learned in the IEE that changed her perception of how the student was performing in the district during the prior school years. More importantly, the parent's own action of filing the previous September 2021 due process complaint notice shows that she was aware of the actions that formed the basis of the latter complaint in this matter.

Initially, a review and comparison of the parent's September 2021 due process complaint notice with the May 2023 due process complaint notice reveals that the parent reasserted and realleged the same procedural and substantive violations within both complaints with regard to the 2017-18, 2018-19, 2019-20, and 2020-21 school years (compare Sept. 21, 2021 Due Process Compl. Notice, with Parent Ex. A). In the May 2023 due process complaint notice, the parent added paragraphs 44 through 49 with respect to the student's fifth grade (2020-21 school year), sixth grade (2021-22), and seventh grade (2022-23) special education programs; otherwise, the September 2021 and May 2023 due process complaint notices include identical allegations and include the same requested relief (id.).

The IDEA requires that a due process complaint notice must contain, at a minimum, (i) the name of the student; (ii) the address of the residence of the student; (iii) the name of the school the student is attending; (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and (v) a proposed resolution of the problem to the extent known and available to the party at the time (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). The nature of the problem—that is, the alleged violations of the IDEA—are very clearly stated as having occurred during the 2017-18, 2018-19, 2019-20, and 2020-21 school years and thus relate to past events. It is only the parent's proposed relief—here, an unspecified amount of compensatory education—that was not fully known or articulated at the time the parent filed either the September 2021 or the May 2023 due process complaint notice, but as indicated above, the IDEA does not strictly require all relief be fully known at the time a due process complaint notice is filed. The IHO in this case erroneously conflated the alleged violations of the IDEA with the proposed relief when concluding that the parent's claims had not yet accrued until after the completion of the July and August 2022 IEEs. While the completion of IEEs may help shed further light on appropriate relief that the IHO should grant after a full hearing, the parent set forth the same detailed allegations of deficiencies in the student's evaluations within the May 2023 due process complaint notice—after the completion of the IEEs—as the parent had asserted in the September 2021 due process complaint notice, which was prepared before completion of the IEEs (compare Sept. 21, 2021 Due Process Compl. Notice, with Parent Ex. A). However, with regard to determining whether the district adequately evaluated the student, the relevant facts are those present at the time the evaluations were conducted in April through June 2018, October 2018, and in September and

October 2019.²⁹ As a result, the IHO's determination as to the statute of limitations must be reversed and the parent's argument must be dismissed.

B. Compensatory Educational Services

Having determined that the IHO improperly denied the district's motion to dismiss the parent's claims related to the 2017-18, 2018-19, 2019-20, and 2020-21 school years, the next inquiry focuses on what relief, if any, the parent may be entitled to for the district's failure to offer the student a FAPE for the remaining two school years at issue, namely, the 2021-22 and 2022-23 school years. The district contends that the IHO's award of 5000 hours of compensatory educational services was excessive, especially where, as here, the student made progress in reading and language arts. The district argues that the IHO erred by using a rote hour for hour approach when calculating the compensatory educational services award, and that the IHO should have considered how many hours the student required in order to place the student in the position he would have been in but for the district's failure to offer the student a FAPE. As a part of its argument, the district asserts that, since the first four school years should have been dismissed as time-barred, the compensatory educational services award must be reduced proportionally and should take into consideration the progress the student made during the school years at issue.

In seeking to uphold the IHO's award of 5000 hours of compensatory educational services, the parent argues that courts routinely order awards to remedy violations occurring more than two years prior to the date of filing of the due process complaint notice. The parent asserts that the egregiousness of the district's violations warrant upholding the IHO's award in its entirety.

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

²⁹ In most instances, a new evaluation conducted in July and August 2022 or later is not going to identify the student's educational performance, academic achievement, social, emotional, and behavioral characteristics, and physical characteristics as they existed at the time of the alleged violations. All of the evaluative information available and relevant to the 2017-18, 2018-19, 2019-20, and 2020-21 school years in particular should be entered into evidence, and the parties should look to other educational records, information, and testimony to argue facts related to past events. But factual determinations related to the student's performance in later school years would be of little relevance to determining facts in preceding school years and would seriously undermine the prospective analysis called for in the Second Circuit's holding in R.E. (R.E.), 694 F.3d at 188). That said, once again more recent evaluations may help in fashioning appropriate equitable relief going forward if the evidence shows that relief is indeed warranted.

services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

With respect to the IHO's award of 5000 hours of compensatory 1:1 tutoring and/or SETSS, the IHO's decision does not include any analysis or fact-specific inquiry demonstrating how the IHO arrived at this award, other than noting that the parent's request for 8280 hours of SETSS and/or tutoring had included hours correlated to the student receiving 12-month programming, which the IHO found the student was not entitled to receive and which the parent does not now appeal (see IHO Decision at pp. 10-14). Similarly, the district's suggestion that the compensatory educational services award must be reduced proportionally in light of the dismissal of the parent's claims for four school years does not equate to a fact-specific inquiry or analysis of the evidence in the hearing record. The parent's position on appeal is equally untenable because, contrary to the parent's assertion, the evidence in the hearing record reflects that the student made progress, albeit perhaps not at the rate desired by the parent. Nonetheless, both parties appear to agree that some amount of compensatory educational services is warranted as a remedy, and therefore, it is necessary to review the evidence in the hearing record to determine an equitable award under the circumstances of this case.³⁰

Upon a review of the evidence in the hearing record, specific recommendations for compensatory tutoring services appear in three separate affidavits submitted by the parent in lieu of direct testimony: an affidavit by the clinical neuropsychologist who completed the student's neuropsychological IEE in July 2023 (July 2023 neuropsychological IEE), an affidavit by the speech-language pathologist who completed the student's speech-language IEE (July 2022 speech-language IEE) and assistive technology IEE in July 2022 (July 2022 assistive technology IEE), and an affidavit by the parent (see Parent Exs. BB ¶¶ 1, 6, 15-16; CC ¶¶ 1, 55; DD ¶¶ 1, 3, 6, 35-36). In contrast, however, neither the clinical psychologist nor the speech-language pathologist included any recommendations for compensatory tutoring services within their respective IEE

³⁰ Given that the parent has not challenged or appealed the IHO's award of 5000 hours of compensatory 1:1 SETSS and/or tutoring, it appears that the parent agrees that the student does not require more than 5000 hours of compensatory educational services; therefore, any compensatory educational services awarded herein need not exceed the amount already awarded by the IHO.

reports (see generally Parent Exs. W-X; Z). Both the parent and the speech-language pathologist recommended that the student receive 6900 hours of compensatory tutoring services in their respective affidavits, while the clinical neuropsychologist recommended 8280 hours of compensatory tutoring services in his affidavit (see Parent Exs. BB ¶ 15; CC ¶ 55; DD ¶ 36).³¹ Notwithstanding the differing total hours recommended, each total award was calculated in the same fashion: "by multiplying the number of academic hours [the student] should have received per week during one (1) school year (thirty (30)) by the number of weeks in a twelve (12) month academic year (forty-six (46))" for a total of 1380 hours per year and then multiplying 1380 hours by six for the number of school years the district failed to offer the student a FAPE (total of 8280 hours) (Parent Ex. DD ¶ 36). The parent and the speech-language pathologist used the same calculation, but arrived at a total of 6900 hours, rather than 8280 hours, because each individual's affidavit indicated that they multiplied the total of 1380 hours per year by five for the number of school years the district failed to offer the student a FAPE, rather than for six school years (see Parent Exs. BB ¶15; CC ¶ 55).

In addition to the recommendations for compensatory tutoring services found solely within the affidavits submitted by the parent, the hearing record also includes a recommendation for services the parent obtained from Huntington Learning Center (HLC) in June 2022 (see generally Parent Exs. J-K). Here, the student was assessed in reading, writing, and mathematics, and based on those results, HLC recommend that the student receive 216 hours of instruction in verbal skills; 60 hours of instruction in vocabulary, word attack, and spelling skills; 75 hours of instruction in writing and language arts; 75 hours of instruction in study skills; and 165 hours of instruction in mathematics, for an overall total of 591 hours of instruction (see Parent Exs. J at pp. 1-4; K).

According to the clinical psychologist's affidavit, he recommended compensatory educational services for the student "because [the student] received no educational benefit from the programs offered" by the district for six school years (Parent Ex. DD ¶ 35). However, such a broad, generalized statement of the student's educational programs and progress is not supported by the evidence in the hearing record. For example, the July 2023 neuropsychological IEE report itself indicates within the background information section that, although the student had demonstrated difficulty in math, "he ha[d] made improvements," and later noted that the student's performance in "reading and math" had "improved over time" (Parent Ex. Z at pp. 1, 3).

In addition to the information included in the July 2023 neuropsychological IEE report, the hearing record includes teacher progress reports issued during the 2017-18 and 2018-19 school years, as well as report cards (see generally Parent Exs. Q-U; Dist. Exs. 1; 20). According to the progress reports and report cards, the student continued to have difficulty with reading, writing, and mathematics skills, particularly related to his ability to decode, organize his writing, and understand place value (see Parent Exs. Q-U; Dist. Exs. 1, 20). The January 2018 progress report reflected the student's difficulty with addition and subtraction (see Dist. Ex. 1). The January 2019 progress report indicated the student demonstrated "an understanding of the standard algorithm in addition [and] subtraction," along with reading fluency, the ability to retell a story, and stamina and volume in writing (Dist. Ex. 20). Furthermore, the January 2019 progress report noted that

³¹ The parent's affidavit and the speech-language pathologist's affidavit use the same language, verbatim, to recommend that the student receive 6900 hours of compensatory tutoring services (compare Parent Ex. BB ¶ 15, with Parent Ex. CC ¶ 55).

the student had "some success in decoding" skills, whereas in the January 2018 progress report, the student's teacher indicated he "d[id] [not] know all sounds or sight words" and had "difficulty decoding" (compare Dist. Ex. 1, with Dist. Ex. 20).

A review of the student's IEPs also supports a finding that the student made some progress. The student's June 2018 IEP indicated the student arrived at the district in second grade and was "reading on a level D," and by the end of second grade, he was reading "on a level J," which was equivalent to an "end of first grade" level (Parent Ex. L at p. 1). Further, the November 2018 IEP indicated the student was reading "at a level L," the November 2019 IEP indicated the student was reading "independently at a level K," and the November 2020 IEP indicated the student was able to read "at a level Q," which was equivalent to the mid-fourth grade level (Parent Exs. N at p. 1; Dist. Exs. 24 at p. 1; 28 at p. 1).

Similarly, in the area of mathematics, although the student's November 2018, November 2019, and November 2020 IEPs primarily described the student's skills as "level 1," the IEPs reported the student's mathematics skills at a second-grade functional level in the November 2018 IEP and at a third-grade functional level in the November 2020 IEP (see Parent Exs. N at pp. 1, 16; Dist. Exs. 24 at pp. 1, 19; 28 at pp. 1-2, 17). Moreover, while noting, in the June 2018 IEP, that student had difficulty with addition and subtraction, the November 2020 IEP indicated that he "ha[d] a good sense of his multiplication facts" (Parent Ex. L at p. 2; Dist. Ex. 28 at p. 2).

With respect to the 2021-22 and 2022-23 school years, the student's IEPs also reflect the progress he made notwithstanding that the metrics of progress appeared to have changed when the student entered sixth grade (2021-22 school year). For example, the student's October 2021 IEP indicated that he had made "mixed progress in math," including demonstration of "some multiplication and division fluency" (Dist. Ex. 30 at p. 1). According to the October 2021 IEP, the student demonstrated an understanding of "basic sentence structure and grammar" (id. at p. 2). The October 2021 IEP also indicated that the student had "shown mastery" in two of "seven learning outcomes in [m]ath" within the "five weeks" he had been in the class (id. at p. 1). At that time, the IEP reflected that in the remaining "five learning outcomes," the student's skills were "approaching" mastery (id.). In ELA, the October 2021 IEP indicated that the student read "93 words correct per minute," with 83.3 percent accuracy (id. at pp. 2-3). While the student continued to exhibit decoding difficulties, the October 2021 IEP reported that the student demonstrated better comprehension when texts were read to him (id. at p. 3).

As reported in the student's October 2022 IEP, in ELA the student had achieved a score at the "29th percentile" on a "MAP ELA assessment" (Dist. Ex. 35 at p. 1). In addition, the October 2022 IEP indicated that the student had "complet[ed] [a] narrative story" that included meaningful dialogue and an appropriate introduction "[w]ith some small group instruction," although the student demonstrated difficulty with the addition of details and a conclusion (id. at p. 3). On a mathematics assessment, the October 2022 IEP indicated that the student had obtained two "Approaching" scores and two scores identified as "Not Yets" (id.).

Similar to the student's previous IEPs, the October 2021 and the October 2022 IEPs included reports of the student's functional level in both reading and mathematics, which had both improved from a third-grade level as reflected in the October 2021 IEP to a fourth-grade level as reflected in the October 2022 IEP (compare Dist. Ex. 30 at p. 13, with Dist. Ex. 35 at p. 15). The student's annual goal in mathematics in the October 2021 IEP addressed his ability to multiply

two-digit numbers and "add, subtract, multiply, and divide decimals," while the student's annual goal in the October 2022 IEP addressed his ability to "add and subtract negative and positive decimals, fractions[,] and integers" as well as accurately determine the "terms in a word problem that indicate[d] a negative or positive number" or other math operation (Dist. Exs. 30 at p. 6; 35 at pp. 7-8). In terms of ELA, the student's annual goal in the October 2021 IEP addressed his ability to read grade-level text at 123 words per minute, and in the October 2022 IEP, the student's annual goal in ELA addressed his ability to obtain a score of 209 on the MAP assessment (see Dist. Exs. 30 at p. 7; 35 at p. 9).

The evidence in the hearing record also reveals that the student's cognitive deficits and demonstrated difficulties with mathematics, reading, and writing, and thus, his performance at school, was consistent with the testing results obtained from the student's June 2018 psychoeducational evaluation and the July 2023 neuropsychological IEE. Here, a review and comparison of the testing results from the June 2018 psychoeducational evaluation with the testing results obtained from the July 2023 neuropsychological IEE reveals that the student's performance on the WISC-V was consistent across both evaluations (compare Parent Ex. F at pp. 2-5, 7-9, with Parent Ex. Z at pp. 5-8, 12). Although the evaluators respectively administered different tests to measure the student's academic achievement, the student obtained scores on both the psychoeducational evaluation and the neuropsychological IEE demonstrating similar difficulties in the areas of reading, writing, and mathematics skills (compare Parent Ex. F at pp. 5-9 with Parent Ex. Z at pp. 6-8, 14-15).

More specifically, the June 2018 psychoeducational report indicated that the student's full-scale IQ "score fell in the [l]ow [a]verage range," and further indicated that "[a]lthough this ability level [was] considered average, [students] with this level of functioning m[ight] experience academic difficulty when compared to same-age peers" (Parent Ex. F at p. 8). The June 2018 psychoeducational report further indicated that the student "m[ight] learn new information at a rate that [was] somewhat slower than other children his age" (id.). In the June 2018 psychoeducational report, the student demonstrated difficulty with tasks that involved retrieval of information from short-term memory (id. at p. 1). The evaluation report also indicated the student could "read simple sentences but had difficulty reading and understanding complex sentences or holding chunk[s] of information from memory" (id. at p. 5). Further, the evaluation report indicated that the student "was adept at recognizing high frequency words," but he demonstrated more difficulty with "low frequency multi[-]syllabic words" in both reading and writing (id. at pp. 5-6).

In the July 2023 neuropsychological IEE report, the clinical psychologist described the student as demonstrating a "pattern of cognitive, behavioral, adaptive, social[/]emotional, and academic impairments/weakness that [were] consistent with Borderline Intellectual Functioning" (Parent Ex. Z at p. 7). According to the neuropsychological IEE report, the student "demonstrated variable performances across all cognitive domains," with borderline receptive language and phonological processing skills (id.). Based on the student's performance, the clinical psychologist diagnosed the student as having borderline intellectual functioning; a language disorder; and specific learning disorders in reading, written expression, and mathematics (id. at p. 8).

According to the July 2023 neuropsychological IEE report, the student's "low scores m[ight] have been in part due to poor comprehension abilities and lower overall cognitive abilities" (Parent Ex. Z at p. 5). In addition, it was noted that the student's "sustained and divided attention performances" were "[e]xtremely [l]ow," and the clinical psychologist opined that it was unclear

"as to whether [the student] fully engaged in the task and/or understood the directions of the task" (id. at p. 7).

Based on the testing results obtained from the June 2018 psychoeducational evaluation, the evaluator indicated that the student would benefit from "multiple interventions," including "additional exposure to new concepts," "[p]re-teaching and re-teaching lessons," the "present[ation] [of] new content material in multiple modalities," the use of "relatively simple vocabulary and sentence structure," and participation in "enjoyable hobbies and extracurricular activities . . . to build his competency in a variety of areas" (Parent Ex. F at p. 8). Similarly, in July 2023 neuropsychological IEE report, the clinical psychologist recommended that the student participate in "daily exercise that he f[ound] enjoyable" as well as speech-language therapy and OT (Parent Ex. Z at pp. 8, 10). Along with related services, the clinical psychologist recommended that the student either remain in his current classroom where he received ICT services with the addition of SETSS to address his areas of need, or the student could attend a classroom with a low student-to-teacher ratio (id. at p. 8). The clinical psychologist also recommended evidence-based instruction in literacy, reading, and writing, as well as a variety of classroom and testing accommodations that included preferential seating, extended time for assignments and tests, tests read, an environment for testing with limited distractions, repetition of information, and supports for organization (id. at pp. 8-9). Upon review, many of the clinical psychologist's recommendations were already present in the student's October 2022 IEP (see Dist. Ex. 35 at pp. 3-5, 12-13).

In light of the evidence describing the student's overall cognitive abilities as measured in the June 2018 psychoeducational evaluation and the student's July 2023 neuropsychological IEE, it appears that, to date, the student had been making progress, albeit at a slow and steady rate, but nonetheless, progress appropriate in light of the child's circumstances. As a result, the IHO's decision to award what appears to be an hour-for-hour compensatory educational services award of 5000 hours is not supported by the evidence in the hearing record, due in part, because the IHO's award did not consider the student's progress and, due in part, because the IHO's award attempts to replace the instruction the student received—i.e., six hours per day or 30 hours per week—rather than attempting to equitably place the student in the position he would have been in but for the district's failure to offer the student a FAPE for the 2021-22 and 2022-23 school years.

Therefore, in crafting a remedy that accounts for the student's progress and his ability to make progress appropriate in light of his circumstances, as well as to allow the student to receive the benefits of such an award, the HLC recommendations for the student serve as a guidepost for such award where, as here, the student has already received instruction from HLC in the past and the HLC recommendations target specific skills the student needs to support progress in his areas of difficulty, namely, reading, writing, and mathematics. Consequently, the IHO's award of 5000 hours of compensatory 1:1 SETSS or tutoring services is modified, and the district is ordered to provide the student with a total of 1200 hours of compensatory 1:1 SETSS or tutoring services for the district's failure to offer the student a FAPE.

VI. Conclusion

Having determined that the hearing record contains sufficient evidence to modify the IHO's decision awarding 5000 hours of compensatory 1:1 SETSS or tutoring services to the student, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is not necessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 29, 2024, is modified by reversing the IHO's finding that the parent's claims related to the 2017-18, 2018-19, 2019-20, and 2020-21 school years were not time-barred under the two-year statute of limitations; and,

IT IS FURTHER ORDERED that the IHO's decision, dated March 29, 2024, is modified by reducing the amount of compensatory 1:1 SETSS or tutoring services awarded to the student from 5000 hours to 1200 hours for the district's failure to offer the student a FAPE for the 2021-22 and 2022-23 school years; and,

IT IS FURTHER ORDERED that the compensatory educational services awarded to the student will expire within three years after the date of this decision, if not used.

Dated: **Albany, New York**
 July 1, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER