The University of the State of New York

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

No. 24-273

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

Appearances:
Gottlieb & Wang LLP, attorneys for petitioners, by Qian Julie Wang, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition at the Lang School for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found that equitable considerations would have supported the parents' requested relief. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, the student has received the diagnoses of autism spectrum disorder (ASD) level 1, attention deficit hyperactivity disorder (ADHD) – combined type, and specific learning disorder with impairment in writing, mild (Parent Ex. B at p. 15). He presents with difficulties related to social/emotional development, academic skills, pragmatic language, activities of daily living,

sensory processing, and executive function skills (Parent Ex. B at pp. 10, 14-15; Dist. Ex. 4 at pp. 1-6).

For the 2022-23 school year (fifth grade) the student attended an ASD Nest program in a district public school (Parent Ex. B at p. 1).

A CSE convened on February 8, 2023 and, finding the student eligible for special education as a student with autism, developed an IEP with a projected implementation date of March 2, 2023 (Dist. Ex. 4 at pp. 1, 28).[1, 2] The CSE recommended the student be placed in a general education classroom and receive integrated co-teaching (ICT) services in English-language arts (ELA), math, social studies, sciences, technology, and music with related services of one 30-minute session per week of counseling services in a group of three, one 40-minute session per week of counseling services in a group of three, one 30-minute session per week of occupational therapy (OT) in a group of two, one 30-minute session per week of OT in a group of five, one 40-minute session per week of OT in a group of five, three 45-minute sessions per week of speech-language therapy in a group of five, and parent counseling and training three times a year in a group (id. at pp. 18-19). The CSE also recommended 12-month extended school year services consisting of one 30-minute session per week of counseling services in a group, one 30-minute session per week of OT in a group of five, and three 45-minute sessions per week of speech-language therapy in a group of five (id. at pp. 20-21). Additionally, as compensatory services to address regression the student experienced during the periods of remote and blended learning beginning in March 2020, the CSE recommended ten 50-minute sessions of direct group special education teacher support services (SETSS) in ELA, five 30-minute sessions of group counseling services, and five 30-minute session of group speech-language therapy (id. at pp. 21-22).

On February 10 and 13, 2023, the parents entered a contract with the Lang School for the student's attendance for the 2023-24 school year (Parent Ex. E).[3]

In a prior written notice dated February 17, 2023, the district summarized the special education and related services recommended by the February 2023 CSE (see Dist. Ex. 5).[4]

In a combined "Ten Day Notice and Due Process Complaint" dated August 15, 2023 (due process complaint notice), the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year based on various procedural and substantive violations, including that the February 2023 CSE was improperly composed, the district denied

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] According to the February 2023 IEP, the February 8, 2023 CSE meeting was a reconvene of a prior CSE meeting; it is unclear from the hearing record when such prior meeting took place (see Dist. Ex. 4 at p. 25).

[3] The Commissioner of Education has not approved the Lang School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

[4] Included in the hearing record is a second prior written notice dated March 21, 2023 which is similar to the February 17, 2023 prior written notice, but describes different factors relevant to the proposed or refused action (compare Dist. Ex. 2, with Dist. Ex. 5).

the parents meaningful participation and predetermined the student's program, the district did not conduct timely or sufficient evaluations of the student, the IEP included an inappropriate statement of the student's needs and inappropriate annual goals, the recommendation for ICT services was inappropriate and the CSE did not consider other supports, the CSE did not reconvene to consider a private neuropsychiatric evaluation of the student, and the assigned public school site was not appropriate due to its incapacity to provide the program and services mandated by the IEP and the peer grouping (see Parent Ex. A).[5] The parents also alleged that the student continued to be the victim of harassment and bullying, and the student's IEP did not "ensure the [s]tudent ha[d] an opportunity to learn free from violence" (id. at p. 3). As relief, the parents sought tuition reimbursement and/or prospective funding for the student's tuition at the Lang School (id.).

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on December 7, 2023 and concluded on March 18, 2024 after five days of proceedings (Tr. pp. 1-533). In a decision dated May 22, 2024, the IHO found that the district offered the student a FAPE for the 2023-24 school year by creating an IEP that was procedurally and substantively appropriate (IHO Decision at p. 36). In particular, the IHO found the CSE was properly constituted and had sufficient evaluative information, the IEP included a thorough and accurate statement of the student's needs and included measurable annual goals targeting the students' needs, the recommendation for ICT services in the district's ASD Nest program was reasonably calculated to enable the student to make progress in the LRE, the district provided the parent with notice of the assigned public school site, and the CSE did not have a duty to reconvene to consider a private evaluation as the evaluation was not provided to the district (id. at pp. 24-29). The IHO also determined that the parents' allegations regarding bullying did not rise to a level of a deprivation of FAPE; that there was no evidence that assigned public school for the 2023-24 school year could not implement the student's IEP; and that the placement was not overly restrictive as alleged by the parents (id. at pp. 29-36). Although the IHO found the district offered the student a FAPE, he went on address the appropriateness of the parents' unilateral placement of the student at the Lang School and determined that the parents met their burden to prove that Lang School offered an educational program which met the student's needs (id. at pp. 36-38). The IHO also determined that, if the parents had prevailed, no equitable considerations would have warranted a reduction or denial of relief (id. at pp. 38-39). Because the IHO found that the district offered the student a FAPE, the IHO denied the parents' request for tuition reimbursement (id. at p. 39).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review, the district's answer with cross-appeal, and the parent's reply and answer to the cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited here.[6]

[5] The district also submitted a copy of the parents' August 15, 2023 due process complaint notice into the hearing record (compare Parent Ex. A, with Dist. Ex. 1). For purposes of this decision only the parents' exhibit will be cited.

[6] The parents submit additional evidence to be considered with their request for review consisting of two documents: a copy of a letter from the student's psychiatrist dated June 25, 2024, and a copy of the student's

The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether the IHO erroneously granted the district's adjournment requests over the parents' objections;

2. Whether the IHO erroneously allowed the testimony of two district witnesses who were not disclosed properly according to the five-day disclosure rule;

3. Whether the IHO erred in determining that the district witnesses were credible;

4. Whether the IHO erred in determining that the February 2023 CSE was properly composed;

5. Whether the IHO erred in determining that the program recommended in the February 2023 IEP was not predetermined;

6. Whether the IHO erred in determining that the evaluations of the student before the CSE was/were sufficient;

7. Whether the IHO erred in determining that the district's failure to reconvene the CSE did not rise to the level of a denial of a FAPE;

8. Whether the IHO erred in determining that the bullying allegations did not rise to a level of a deprival of a FAPE; and

9. Whether the IHO erred in determining that the assigned public school location could implement the February 2023 IEP;

10. Whether the IHO erred in determining that the equitable considerations favored the parents claim for tuition reimbursement.

---

transcript and spring semester report that covered the time period from January 29, 2024 to June 14, 2024 (see Proposed Parent Exs. 1A-1B). The parents argue that such documents were "newly available" and offer relevant information how the student's autism interacts with his academic environment and also shows how the unilateral placement helped reduce the student's "stressors" (Req. for Rev. p. 5 n. 2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). While the additional evidence proposed by the parents could not have been offered as evidence at the time of the impartial hearing because they were not yet created, after a review of the issues before me on appeal, the additional evidence is not necessary to render a decision in this matter. The proposed documents were not available to be considered by the February 2023 CSE and thus do not directly relate to whether the February 2023 IEP offered the student a FAPE. Additionally, the district has not appealed the IHO's finding that the Lang School was an appropriate unilateral placement for the student. Accordingly, the documents are unnecessary and will not be considered further on appeal.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

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

VI. Discussion

A. Preliminary Matters

1. Conduct of the Impartial Hearing

The parents allege that the IHO made procedural errors during the impartial hearing. Specifically, the parents allege the IHO improperly granted the district's adjournment requests delaying the impartial hearing and that the IHO allowed testimony of two district witnesses who were not disclosed timely under the five-day disclosure rule. The district argues that the impartial hearing was sound and free from procedural violations; more specifically that the IHO allowed both parties to present their cases and neither party suffered prejudice as a result of the IHO's rulings.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

It is also well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

a. Adjournment Determinations

Turning first to the parents' argument that the IHO erred by granting the district's adjournment requests, State regulations provide that an IHO may grant an extension to the hearing

timelines subject to certain constraints. For example, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Before granting a request for an extension, the IHO is required to consider the cumulative impact of: whether the delay will adversely affect the student's educational interest; whether each party has been afforded a fair opportunity to present its case in accordance with the requirements of due process; any adverse consequences likely to be suffered by a party in the event of delay; and whether there has been a delay caused by the actions of one of the parties (8 NYCRR 200.5[j][5][ii]). "Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.).[8]

With respect to scheduling impartial hearings, State regulation requires that the hearing "be conducted at a time and place which is reasonably convenient to the parent and student involved" (8 NYCRR 200.5[j][3][x]). Furthermore, as noted above, each party "shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable" (8 NYCRR 200.5[j][3][xiii]).

The parents claim that the IHO impermissibly granted the district's adjournment requests over their attorney's objects which delayed the matter from December 2023 until mid-March 2024. The hearing record indicates that the first adjournment requested by the district was consented to by the parents' attorney during the December 7, 2023 impartial hearing (Tr. pp. 2-3).[9]

Regarding the district's second adjournment request made during the January 18, 2024 impartial hearing date due to witness availability, the IHO allowed both parties to make arguments regarding the request and ultimately agreed with the district that, because the parties were already in agreement to convene for another impartial hearing in February 2024 for the parents' case and for another district witness to testify, the parents would not be prejudiced (Tr. pp. 184-85). Moreover, during the January 18, 2024 appearance, the district representative indicated that she had time on February 26, 2024 and February 28, 2024 from about 11:00 a.m. to 12:30 p.m. (see Tr. pp. 193-97). The parents' attorney indicated she was available on February 26, 2024 (Tr. p. 198). The IHO stated that he believed the parties needed an entire day to present the remaining

[8] The hearing record includes six orders of extension issued by the IHO, indicating that the IHO granted extension of the timelines on the following dates: October 30, 2023, December 4, 2023, and January 5, 2024 for settlement negotiations, and three issued on March 18, 2024 for extensive testimony and issues and for post-hearing briefs (IHO Extension Orders).

[9] According to the hearing record, prior to the December 7, 2023 impartial hearing date, a district representative sent an email requesting an adjournment because of witness availability and also indicated certain dates on which she would be available for an impartial hearing (Tr. p. 2). The district representative was not at the December 7, 2023 impartial hearing (Tr. pp. 1-5). On December 7, 2023 the IHO and parents' attorney had an off-the-record conversation during which they agreed to schedule the next impartial hearing date for February 18, 2024 (Tr. p. 2).

witness and the parents' case-in-chief (Tr. pp. 193-99). The IHO then began proposing dates in March 2024; the district representative made the statement "wow," "[w]e're out there pretty good" (Tr. p. 200). It appears the district representative, given her schedule, was attempting to her best efforts to accommodate the wishes of IHO to have an entire day dedicated to this matter while also not delaying the matter further (see Tr. pp. 192-202). The IHO also noted that holding an impartial hearing in March 2024 was "a significant delay"; ultimately, the parents' attorney consented to the March dates stating "[t]hose dates work for the [p]arent" but also reiterated her objection to the adjournment (Tr. pp. 202-03). The IHO granted the district's adjournment with the warning that, if the district witnesses did not finish their testimony during the March 4, 2024 impartial hearing, the district would not be given another day to introduce witness testimony because regulations only afford a party one day for testimony (Tr. pp. 204-05). The hearing record shows that one district witness testified on February 26, 2024 and one district witness testified on March 4, 2024 with the parents being able to present their case-in-chief beginning on March 4, 2024 and concluding on March 18, 2024 – the last day of the impartial hearing (see Tr. pp. 222-306, 317-437, 448-529). On that date, there were no other adjournment requests by either party but rather a request for extensions of the compliance date by the parents in order to submit their closing brief on April 15, 2024 (see Mar. 18, 2024 Extension Order; IHO Exs. I-II).

Although the parent accuses the district's attorney of "rank unprofessionalism," each side sought extensions of the decision timeline at different points to accommodate the development of their cases or arguments to the IHO and the foregoing demonstrates that the IHO carefully considered both of the parties' arguments and was fair and impartial with his decision to grant adjournments and did not abuse his discretion.

b. Discovery Issues

I turn next to the parents' claim that the IHO should have excluded testimony from the student's school counselor and the student's special education teacher because they were not disclosed as witnesses pursuant to the five-day disclosure rule. Federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

Additionally, the United States Department of Education has opined "that names of witnesses to be called and the general thrust of their testimony should be disclosed" (Letter to Bell, 211 IDELR 166 [OSEP 1979]). State regulations also expressly contemplate the "exchange of witness lists" (8 NYCRR 200.5[j][3][xvii]).

Here, during the January 18, 2024 impartial hearing date, the district requested an adjournment due to the special education teacher's availability and requested the ability to amend its witness list to include the student's school counselor arguing the parents introduced "new claims" regarding bullying during the impartial hearing that were not raised in the parents' August 2023 due process complaint notice and thus the district should be given the opportunity to respond to (Tr. pp. 178-79). The IHO indicated that he was not inclined to allow amendment of the witness list stating the district "had every opportunity to name anybody on the IEP plan" (Tr. p. 178). The district responded that the school counselor was not named on the IEP plan (Tr. pp. 178-79). The parents through their attorney objected to the district's request to amend the witness list arguing that the parents properly raised claims regarding bullying in their due process complaint notice (Tr. p. 180). The IHO responded that because the parents were making the bullying claims "a seminal issue" he did not see an issue with allowing the school counselor to testify (Tr. p. 180).

After hearing the parents' argument on why it was prejudicial to allow either the student's school counselor or the special education teacher to testify at the next impartial hearing, the IHO agreed with the parents that neither witnesses were disclosed properly but that he was also more inclined to have a "full record" and that it was within his discretion to allow such testimonies in order to have an adequate record upon which to base his decision (see Tr. pp. 177-85).

Upon review of the hearing record, there is insufficient basis to find the IHO abused his discretion in allowing testimony from the student's school counselor and the student's special education teacher between one and two months after the disclosure. While the district's disclosure of the two witnesses may have been belated, ultimately the IHO accorded each party a meaningful opportunity to exercise their rights during the impartial hearing and the parents on appeal do not allege otherwise (see generally Letter to Anonymous, 23 IDELR 1073). Accordingly, the IHO's ruling to allow the district's witnesses to testify is not a basis for reversal.

2. Credibility Determinations

With respect to the parents' allegations that the IHO made credibility determinations unsupported by the hearing record and that all of the district's witness were impeached, generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Here, after 10-pages of the IHO thoroughly describing the testimony of each witness, including a description of their testimony upon cross-examinations, the IHO determined that all of the parties' witnesses were credible (IHO Decision at pp. 7-17, 24).

A review of the hearing record, including the specific examples cited by the parents, does not support the parents' contention that the IHO's credibility determinations should be overturned based on the documentary evidence or the hearing record read in its entirety. Some of the examples cited by the parent could have been interpreted by the IHO as explainable by confusion, mistake, or lapse in memory rather than a lack of credibility, and such findings are exactly the type of

determinations entitled to deference. Accordingly, the parent does not present a sufficient basis on appeal to overturn the IHO's finding of credibility or to disregard the testimony of the district's witnesses in their entirety.

3. Scope of Impartial Hearing

Next, I will address the parents' argument that IHO erred in determining that the February 2023 CSE was properly composed arguing that the CSE lacked a school psychologist.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, the parents' argument that the February 2023 CSE was improperly composed because it lacked a school psychologist was not raised in the due process complaint notice nor did the parents make a request during the impartial hearing to amend their due process complaint to include such claim (see Tr. pp. 1-533; Parent Ex. A). Rather, the parents in their due process complaint notice specifically alleged that the February 2023 CSE was not properly composed because it lacked qualified special education and regular education teachers (Parent Ex. A at p. 2). This allegation did not put the district on notice that it would be called upon to defend against the lack of a school psychologist at the February 2023 CSE meeting.

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

After a review of the hearing record the evidence shows that it was during the parents' attorney's cross-examination of the student's reading special education teacher that the question of required members of a CSE and whether a school psychologist was a necessary member was raised

(see Tr. p. 337). The parents' attorney also asked the reading special education teacher when a school psychologist would participate in a CSE meeting (Tr. p. 339). Moreover, the first time that the parents asserted that the February 2023 CSE lacked a school psychologist was in their post-hearing brief (IHO Ex. II at pp. 8-9). The district in its post-hearing brief did not directly address whether a school psychologist was a necessary member of the February 2023 CSE but rather argued that generally that the CSE was properly comprised of the requisite members (IHO Ex. I at p. 4). Moreover, the district's post-hearing brief contained a subsection titled "Team Constitution" under the section titled "Other Claims in the [due process complaint notice]" and argued "[the p]arent complain[ed] that the special education teacher did not speak during the [February 2023 CSE] meeting" (citing Parent Ex. A at p. 2) and then argued that "[e]ven if true, [it did] not rise to level of FAPE deprivation" (IHO Ex. I at p. 12). Based on the foregoing, the district did not open the door to such issue of the lack of a school psychology during the impartial hearing.

Accordingly, the issue of lack of a school psychologist at the February 2023 CSE was not properly raised within the due process complaint notice and, as such, was beyond the scope of the impartial hearing (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]).

Additionally, as the district argues, even if there was a procedural violation regarding the composition of the CSE, it did not rise to the level of a denial of FAPE in this instance given that, as discussed below, the parent was not denied meaningful participation in the student's educational planning. The parent was an active member of the February 2023 CSE, the parent's concerns at the CSE meeting were noted in the February 2023 IEP, and the district sent a prior written notice indicating the February 2023 CSE's recommendations (see Dist. Exs. 2; 4 at pp. 3-6, 27). Accordingly, the issue of whether the February 2023 CSE was composed properly will not be further addressed herein.

B. February 2023 CSE Process

1. Predetermination

The parents allege that the February 2023 IEP recommendations were predetermined because the IEP was "nearly identical" to the IEP for the 2022-23 school year as it contained the same standard promotion criteria (Req. for Rev. ¶ 18).

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best

course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

Here, the parent is correct that when revising the student's IEP, the February 2023 IEP contained the same promotional criteria as indicated in the prior January 2022 IEP (compare Dist. Ex. 4 at p. 27, with Parent Ex. Q at p. 24). Both IEPs indicate in check boxes that student was going to be promoted using the standard promotional criteria to advance during the current school year and for the next school year, and the latter IEP continued to reflect parent's desire that the student "continue to maintain grade level work" as in the earlier document (id.). The parents cite to J.E. v. New York City Dep't of Educ., to support this argument, however such case found that the parents were denied a meaningful opportunity to participate in the IEP process because the CSE failed to consider the parent's request for a more restrictive placement in a 2:1 classroom as opposed to the 6:1+1 class recommended in the IEP (see J.E. v. New York City Dep't of Educ., 229 F. Supp. 3d 223, 235-237 [S.D.N.Y. 2017]). As far as the parent's allegation regarding promotional criteria, there is also no federal or State statutory or regulatory requirement regarding promotional criteria on an IEP under IDEA. Further, the hearing record shows that the parents took part in developing the student's February 2023 IEP and that the CSE listened to the parents' concerns (see Dist. Ex. 4 at pp. 3-6; 27).

The hearing record shows that, in addition to the parent attending the meeting via telephone, district attendees via telephone included a related service provider/special education teacher who also served as the district representative, a general education teacher, an occupational therapist, counselor, speech therapist, and special education teacher (Dist. Ex. 4 at p. 28).

The February 2023 IEP present levels of performance reflect that the parents shared their concerns regarding the student's academics and handwriting and also opined that with regard to academics the student worked hard on areas when he was motivated to improve (Dist. Ex. 4 at p. 4). The IEP also noted that the student's mother stated she wanted the student to be evaluated to determine if he would benefit from physical therapy (id. at p. 6). The parent testified that an evaluation took place "really soon after the meeting" (Tr. p. 482). The parent also testified that she attended the February 2023 CSE meeting and that the CSE went through the IEP (Tr. pp. 482-83).

The February 2023 IEP indicates that the CSE considered two other placement options which were rejected as inappropriate (Dist. Ex. 4 at pp. 27-28). First, a general education class with related services only was rejected as providing insufficient support to meet the student's academic and social needs (id. at p. 27). Second, a 12:1+1 special class in a community school was considered and rejected as being too restrictive (id. at p. 28).

Further, a comparison between the January 2022 IEP and the February 2023 IEP shows that the February 2023 CSE updated the student's present levels of performance and recommended modifications to the student's program, specifically the addition of ICT services in music and

technology, and one 40-minute sessions per week of OT in a group of five (compare Dist. Ex. 4 at pp. 1-6, 27, with Parent Ex. Q at pp. 1-6, 24). Additionally, the February CSE created eleven new annual goals for the student (compare Dist. Ex. 4 at pp. 8-18, with Parent Ex. Q at pp. 8-16).

The foregoing evidence demonstrates the type of active and meaningful participation that defeats a claim of predetermination. The parent raised concerns about the student's physical needs and requested a physical therapy evaluation which was conducted soon after the meeting. The February CSE also revised the student's IEP by adding more ICT services and an additional OT session per week to assist the student for his transition from elementary school to middle school (see generally Dist. Ex. 4). Therefore, the evidence in the hearing record does not support the parent's claims that the district predetermined its recommendations.

2. Sufficiency of Evaluative Information

The parents allege that the student did not undergo a triennial evaluation and thus the February 2023 IEP contained no empirical data. Additionally, the parents allege that the IHO erroneously determined that the empirical evidence contained in the April 2023 private neuropsychological report was known by the February 2023 CSE despite the CSE never receiving a copy of such report.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Here, the IHO in his decision stated:

> Parent argues that the record is devoid of evidence as to the last triennial evaluation. Parent is correct that [the district] failed to provide any information as to the last neuropsychological evaluation, and thus it is a violation. In fact, the Prior Written Notice lists only an Occupational Therapy Assessment from 2021 as being used. That said, the record contains relevant evidence as to the last evaluations of [the s]tudent. According to the April 2023 neuropsychological evaluation, [the s]tudent underwent a diagnostic psychiatric evaluation by the NYU Child Study Center in September 2020. A subsequent evaluation occurred between November 2020 and January 2021 by the NYU Child Study Center. In June/July 2021, a cognitive and academic evaluation was conducted by the NYU Child Study Center, which assessed [the student's] intellectual abilities, using the DAS-II and WIAT-III assessments. Parent confirms this through her testimony that at the time of the 2023 evaluation, their old evaluation "was just about to be past the two-year mark." In fact, Parent testified that as an employee of NYU she is afforded free re-evaluations of her kids and she takes advantage of that. I find that these evaluations provided detailed information regarding the [the s]tudent's needs.
>
> The IEP, which was an annual review, lists additional evaluations that the CSE relied on, including classroom observations, Fountas and Pinnell reading levels, Acadience Benchmark, and i-ready diagnostics.

(IHO Decision at p. 25). While the IHO correctly noted that the September 2020 and January 2021 evaluations by the NYU Child Study Center were referenced in the April 2023 private neuropsychological report, the same evaluations were also referenced in the student's January 2022 IEP (compare Parent Ex. B at pp. 2-3, with Parent Ex. Q at p. 4). Contrary to the parents' argument, it does not appear that the IHO was indicating that the February 2023 CSE knew the information contained in the April 2023 private neuropsychological report but rather sought to highlight prior evaluations that were not over three years old that the February 2023 CSE relied on.

Further, as correctly noted by the IHO, the February 2023 IEP included additional evaluation results considered by the CSE when making its determinations (IHO Decision at p. 25; see Dist. Ex. 4 at pp. 1-6). Specifically, the February 2023 IEP reflected the student's reading level as measured by a Fountas and Pinnell reading assessment, his current grade level in writing, the student's oral reading fluency as assessed by the Acadience Benchmark for oral reading fluency, the student's scores on i-Ready diagnostics, classroom reading comprehension assessments, and grades from classroom tests and quizzes in math (Dist. Ex. 4 at pp. 1-2). The February 2023 prior written notice indicated the February 2023 CSE considered an October 2021 OT assessment (Dist. Ex. 5). Furthermore, the student's then-current teachers and related service providers attended the February 2023 CSE meeting and were therefore available to discuss their observations and assessments of the student (Tr. pp. 32-34, 102-04, 150-51, 269-70, 324-27; Dist. Ex. 4 at p. 28).

Moreover, the IHO determined that while a procedural evaluation did exist because the February 2023 prior written notice failed to list all the evaluative information on which the CSE relied, such procedural violation did not deprive the student a FAPE because the CSE had sufficient evaluative information regarding the student's needs and the parent was provided an opportunity to participate in the decision making process (IHO Decision at p. 26).

Based on the forgoing evidence, contrary to the parents' argument, the February 2023 IEP contained relevant data which the CSE relied upon to develop the IEP (see Dist. Ex. 4 at pp. 1-6). The evidence in the hearing record also supports the IHO's determination that any procedural violation regarding the sufficiency of evaluative information did not deprive the student a FAPE and there is no basis in the hearing record to disturb the IHO's determination on the issue.

3. Request to Reconvene

Turning now to the parents' allegation that the district denied the student a FAPE by failing to reconvene the CSE in April 2024, in addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]).

Here, the evidence shows that on January 26, 2023, before the February 8, 2023 CSE meeting, the parents sent an email to the student's teachers and CSE explaining their concerns with the student's academic progress and "other challenges at school" and also indicated that they had scheduled a neuropsychiatric evaluation for the student in March (Parent Ex. C). The parents indicated that they would receive the results of the evaluation on April 7th and suggested that the CSE "plan to meet again" between April 10, 2023 and April 21, 2023 to revise the student's IEP in accordance with the evaluation (id.). The parent testified she never shared the results of the private April 2023 neuropsychological evaluation with the CSE, nor did she request for a CSE reconvene after the January 26, 2023 email to the district (Tr. pp. 496-97).

Moreover, the parent testified that she did meet with all the members of the CSE in addition to the district speech therapist and other district staff after the February 2023 CSE meeting, but it was not an official CSE meeting rather a parent-teacher conference (Tr. pp. 497-98). The parent testified "basically, [the parent-teacher conference] was a repeat of [the student's] IEP meeting" where she raised concerns about the student transitioning to middle school, questioned why PT was denied and inquired as to what other resources the district could provide to the student (Tr. p. 498). The student's math special education teacher, who was a member of the February 2023 CSE, testified that, although the results of the parent's private neuropsychological evaluation may have been available in April 2023, they were not shared with the teachers (Tr. pp. 108-09). The math special education teacher also testified that she did not receive correspondence from the parent after the April 2023 neuropsychological evaluation was completed (Tr. pp. 109-10, 112).

Although the parents indicated they wanted the CSE to reconvene to discuss an upcoming neuropsychological evaluation in their January 26, 2023 email to the district, the evidence shows that the parents did not communicate to the district that the neuropsychological evaluation had

been completed nor requested the CSE to reconvene after April 7, 2023 (see Tr pp. 109-10, 112, 496-97; Parent Ex. C). As such, the IHO was correct in his determination that there was no violation in failing to reconvene the CSE (see IHO Decision at p. 27).

3. Bullying

Turning now to the parents' claims that the failure of the February 2023 CSE to discuss the bullying the student experienced denied the student a FAPE, under certain circumstances, if a student with a disability is the target of bullying, such bullying may form the basis for a finding that a district denied the student a FAPE (Dear Colleague Letter: Bullying of Students with Disabilities, 61 IDELR 263 [OSERS 2013] [stating that bullying that results in a student with a disability not receiving meaningful educational benefit constitutes a denial of a FAPE and that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive a FAPE pursuant to their IEPs]; see Smith v. Guilford Bd. of Educ., 226 Fed. App'x 58, 63-64 [2d Cir. June 14, 2007] [indicating that bullying might, under some circumstances, implicate IDEA considerations]; M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634, 650-51 [9th Cir. 2005] [finding that "[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE"]; Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199-201 [3d Cir. 2004] [reviewing whether the district offered the student "an education that was sufficiently free from the threat of harassment to constitute a FAPE"]; Dear Colleague Letter: Responding to Bullying of Students with Disabilities, 64 IDELR 115 [OCR 2014]; Dear Colleague Letter: Harassment and Bullying, 55 IDELR 174 [OCR 2010] [stating that "a school is responsible for addressing harassment incidents about which it knows or reasonably should have known"]; Dear Colleague Letter: Prohibited Disability Harassment, 111 LRP 45106 [OCR/OSERS 2000]).[10] In determining whether allegations related to bullying rise to the level of a denial of FAPE, the United States Department of Education has clarified that:

> A school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly.

(Dear Colleague Letter, 61 IDELR 263).

Additionally, in determining whether allegations related to bullying and harassment rise to the level of a denial of FAPE, one district court in New York has found that "students have a right

[10] New York State has addressed bullying in schools through the Dignity for All Students Act, which imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18). The law defines bullying as "the creation of a hostile environment by conduct or by threats, intimidation or abuse" that, among other things, interferes with a student's educational performance, mental, emotional, or physical well-being, causes a student to fear for his or her physical safety, or causes physical or emotional harm (Educ. Law § 11[7]).

to be secure in school" under the IDEA and that bullying may constitute the denial of a FAPE if "it is likely to affect the opportunity of the student for an appropriate education" (T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 308, 316-17 [E.D.N.Y. 2011]). The District Court in T.K. developed a test to determine whether bullying resulted in the denial of a FAPE as follows: "(1) was the student a victim of bullying; (2) did the school have notice of substantial bullying of the student; (3) was the school 'deliberately indifferent' to the bullying, or did it fail to take reasonable steps to prevent the bullying; and (4) did the bullying 'substantially restrict' the student's 'educational opportunities'" (T.K., 779 F. Supp. 3d at 316, 318; see also T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405, 417-18 [E.D.N.Y. 2014], aff'd, 810 F.3d 869 [2d Cir. 2016]). Moreover, the court in T.K. found that "where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities . . . an anti-bullying program is required to be included in the IEP" (T.K., 779 F. Supp. at 421-22). Accordingly, if a student requires the supports related to bullying in order to receive a FAPE, the plans or supports should be described or at the very least referenced in the IEP, else a district may be hard-pressed to defend an IEP with evidence outside of its four-corners (see R.E., 694 F.3d at 185-86). In addition, with respect to additional steps that a district might take to address bullying about which it is on notice, the United States Department of Education has identified the following nonexclusive actions: "separating the accused harasser and the target; providing counseling for the target and/or harasser, or taking disciplinary action against the harasser" (Dear Colleague Letter, 55 IDELR 174 [OCR Oct. 26, 2010]). However, when assessing a district's response to allegations of bullying, it is also useful to recognize the general principle that while "[s]chools are under a duty to adequately supervise the students in their charge . . . [s]chools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students" (Mirand v. City of New York, 84 N.Y.2d 44, 49-50 [1994]; see Stephenson v. City of New York, 19 N.Y.3d 1031, 1033-034 [2012]).

Here, the IHO correctly determined that the district's response to alleged bullying did not support a finding of a denial of a FAPE (IHO Decision at pp. 29-35). The IHO accurately recounted the facts of the case, addressed each specific event of bullying identified by the parents, set forth the proper legal standard to determine whether the incidents described by parents rose to the level of a deprivation of FAPE, and applied that standard to the facts at hand (id. at pp. 23, 29-35). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions (id.).

First, the IHO identified each email between the parties regarding bullying that was introduced into evidence by the parents (IHO Decision at pp. 29-34; see Parent Exs. C; J; K-O). Then the IHO noted the parent's testimony regarding the student and the alleged bullying incidents (IHO Decision at pp. 34-35; see Tr. pp. 465, 471-74, 477-78). Notably, the parent testified that the student had challenges keeping his body safe when others or objects were moving around him (Tr. p. 465). When asked if the student experienced bullying, his mother replied that the student "experienced a lot of things everything from just running into people or objects to certain kids just going after him, day after day" (Tr. p. 471). The student's mother explained that there were some instances in which the student would allude to something and the parents "would tease out of him something that sounded like bullying" (Tr. pp. 471-72). In addition, the student's mother reported that there was a student who told her son that he was going to make his day miserable and would trip him when he was moving around the classroom (Tr. p. 472). The IHO noted that the parent

also gave examples of the student being "reseated" in classes where he was having problems focusing because the students around him were "making him miserable" (IHO Decision at p. 34; see Tr. pp. 472, 510). The parent testified that once the student's seat was moved his grades improved (Tr. p. 472). The IHO noted the parent testified that the follow-up by the district regarding the alleged incidents was a "real mixed bag," stating that the parents would sometimes get a note home from the nurse in the student's backpack without any details and sometimes would get a phone call from the nurse with "some of the story" " (IHO Decision at p. 34; see Tr. pp, 473-74). The parents reported that there were a couple of incidents where the school "made much more of an effort" (IHO Decision at p. 34; Tr. p. 473). The IHO stated the parent testified about two incidents that the district responded to –the first when the student was punched in the chest and the second when a group of students poured water on the student's head in the lunchroom (IHO Decision at p. 34; Tr. pp. 473-74). The IHO also noted that the parents testified that the district pulled the group of students who poured water on the student aside, had a talk with them, and that they apologized to the student (IHO Decision at p. 35; see Tr. p. 474). The IHO stated that "[p]otentially, as a result of these incidents, [the s]tudent did not want to go to school, and his grades slid and he shut down in class" (IHO Decision at p. 35; see Tr. pp. 477-78). The IHO further determined:

> At the outset, I have no reason to doubt the credibility and sincerity of [the p]arents' concerns regarding their son's safety. The safety of one's child is paramount to a [p]arent. However, even while crediting the assertions made by the [p]arents, I find that the preponderance of the evidence fails to establish that school personnel were deliberately indifferent to [the s]tudent's safety or there were active incidents of bullying as opposed to age appropriate interactions.

(IHO Decision at p. 35). The IHO further determined that in the incidents where the student was "caught in the cross-fire" or where the injury was a clear accident, these were isolated incidents" that could not be fully prevented (id.; see generally Parent Ex. J). The IHO went on to further state that:

> While any physical altercation [wa]s concerning, the record before me simply does not support a finding that the incidents [were] so severe, persistent, or pervasive so that it create[d] a hostile environment. Quite to the contrary, I find the e-mails demonstrate[d] that school staff were attentive and responsive to [the p]arents' concerns. The testimony of the teachers and providers demonstrate that while the program may not have been perfect for [the s]tudent, the teachers and providers worked diligently to try to make it work. Thus, I find that the incidents described by [the] parents do not rise to the level of a deprivation of FAPE.

(IHO Decision at p. 35). Here, there is no evidence in the hearing record that would warrant disturbing the IHO's well-reasoned determination on this issue. Further, after an independent review of the hearing record, it does not appear that any of the incidents alleged by the parents would pass the test established in T.K. as indicated above. Simply, there is no evidence that the district was 'deliberately indifferent' to the allegations of bullying or failed to take reasonable steps to prevent bullying; nor is there evidence that the incidents substantially restricted the student's educational opportunities (Tr. pp. 1-533; Parent Exs. A-R; Dist. Exs. 3-6; IHO Ex. I-II; see generally T.K., 779 F. Supp. 3d at 316, 318).

4. Implementation and Assigned Public School Site

The parents contend that the district did not produce evidence or testimony that the district identified a school location for the student to attend for the 2023-24 school year or that the assigned school could have implemented the student's February 2023 IEP. The district argues that the parents knew the student's placement within the NEST program would continue to middle school and that, although there was no school location letter, the parents toured four separate district middle school NEST program in anticipation of the student's attendance.

The IHO determined that the record was clear that the parents knew the student had a placement in a middle school with an ASD NEST program for the 2023-24 school and thus there was no violation by the district (IHO Decision at pp. 26-27).

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 3012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see also Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420).

Although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] [noting that "a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [finding that a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply

with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented. This analysis also fits with the competing notions that, while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

In this instance, the evidence shows that a "brick and mortar" location for the February 2023 IEP to be implemented was identified prior to the start of the 2023-24 school year. The parent testified and explained that the student's NEST elementary school would matriculate to four or five different middle schools that had a NEST program and thus she made sure the student visited those schools (Tr. p. 515). The parent testified she and the student visited four different middle schools with NEST programs, and that she attended open houses for public schools in the district and spoke with other NEST parents and students (Tr. pp. 486, 488, 513-15). The parent also testified that she received a letter of admission from a NEST middle school program in the spring of 2023 after the February 2023 CSE meeting and that she knew the student had a spot at such middle school for the 2023-24 school year (Tr. pp. 490, 515-16, 528-29). Therefore, there is no basis for departing from the IHO's determination that the parent knew the student had a placement in a middle school with an ASD NEST program for the 2023-24 school and thus was no violation by the district (see IHO Decision at pp. 26-27).[11]

With respect to the assigned school's capacity to implement the February 2023 IEP, the Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v.

[11] The February 2023 CSE recommended a 12-month program for the student, and it is unclear if the district assigned a school to provide the student's 12-month services (see generally Dist. Exs. 4 at p. 20; 5). The parents argue that the district does not operate a NEST program during the summer and thus by its own representation could not have implemented the student's 12-month services. However, the record is undeveloped on this issue and, moreover, the parents did not raise an allegation in their due process complaint notice regarding 12-month services or claim that the district failed to assign a public school site to provide such services (see generally Tr. pp. 1-533; Parent Exs. A-R; Dist. Exs. 3-6; IHO Ex. I-II). Further, the parents' argument must fail because the February 2023 CSE did not recommend the NEST program as part of the student's 12-month program but rather recommended related services only consisting of one 30-minute session per week of group counseling, one 30-minute session per week of OT in a group of 5; and three 45-minute sessions per week of group speech language therapy (Dist. Ex. 4 at pp. 20-21).

New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F., 2016 WL 3981370, at *13; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

The parents allege that the student's general education math teacher testified that she did not know if the new district placement offered the NEST program which proves the assigned school could not have implemented the February 2023 IEP; however, the February 2023 IEP does not mandate that the student be placed in the NEST program, rather, it recommends that the student receive ICT services in a general education classroom for certain subjects in addition to related services (see Dist. Ex. 4 at pp. 18-19).

Further, the parent testified that, after she visited the potential middle schools, she became concerned that there were too many students in the school and that those students were physically bigger than the student (Tr. pp. 519-520); however, these concerns are not tied to the issue of whether the district middle schools could implement the student's IEP.

Moreover, there is nothing in the hearing record to contradict the IHO's determination that there were no allegations or evidence the NEST middle school program which the parents received an admission letter from prior to the start of the 2023-24 school year could not implement the student's February 2023 IEP and the parents' assertions with respect to such placement were "wholly speculative" (see IHO Decision at p. 36).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations would have supported an award of tuition reimbursement.[12]

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 16, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] As the district does not cross-appeal the IHO's determination that the Lang School was an appropriate unilateral placement for the 2023-24 school year, that finding is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).