



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-288

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

Appearances:

Gutman Vasiliou, LLP, attorneys for petitioner, by Anthoula Vasiliou, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request for respondent (the district) to fund an independent educational evaluation (IEE) of her son. The 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 school psychologists; 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 this case and the IHO's decision will not be recited in detail here.

Briefly, the student received a diagnosis of autism spectrum disorder (ASD) in 2017, and during the 2021-22 school year, he attended fifth grade in a 12:1+1 special class at a district public school where he received the related services of counseling, occupational therapy (OT), physical therapy (PT), speech-language therapy, as well as 1:1 paraprofessional services (Parent Exs. C at pp. 4-5; E at pp. 2, 3, 9; Dist. Ex. 5 at p. 1).

Beginning in January 2022, the district conducted a reevaluation of the student (Dist. Exs. 3-5). Specifically, the district conducted a psychoeducational evaluation over three dates in January and February 2022, a classroom observation on February 2, 2022, and a social history update with the parent on March 17, 2022 (see generally Dist. Exs. 3-5). On May 11, 2022, the CSE convened, determined the student continued to be eligible for special education as a student with autism, and for the remainder of the 2021-22 and 2022-23 school years through the date of the annual review, recommended 12-month programming including a 12:1+1 special class placement in a district nonspecialized school, together with related and 1:1 behavior paraprofessional services (Parent Ex. E at pp. 1, 26-30, 34).¹

The student attended a district public school during the 2023-24 school year (see Parent Ex. A at p. 2). By letter dated December 21, 2023, sent to the district via email on January 3, 2024, the parent made a written request for a publicly funded IEE, as she disagreed with the results of the 2022 reevaluation alleging that it failed to "comprehensively evaluate [the student] in all his areas of need" (id. at pp. 1-3). The parent requested that the publicly funded IEE include the following: a neuropsychological evaluation, a speech-language evaluation, an assistive technology evaluation, an OT evaluation, a PT evaluation, an applied behavior analysis (ABA) skills assessment, and a functional behavioral assessment (FBA), to be conducted by independent licensed providers (id. at pp. 2-3). In her request the parent provided the rates she sought for each assessment (id.).

The district provided prior written notice to the parent dated February 1, 2024 (see generally District Ex. 2). The district explained that it was declining to grant the parent's request for a publicly funded IEE, because the district believed that the 2022 reevaluation was comprehensive and assessed the student in all areas of suspected need (id. at p. 1). The district also indicated that it intended to file a due process complaint notice to defend the 2022 reevaluation of the student (id.). The district additionally proposed a reevaluation of the student due to the parent's stated concerns (id. at pp. 1-7).²

A. Due Process Complaint Notice

In a due process complaint notice dated February 15, 2024, the district alleged that the February 24, 2022 reevaluation that it conducted for the student was appropriate, and that it comprehensively evaluated the student in all suspected areas of need (see generally District Ex. 1). The district noted that it denied the parent's January 3, 2024 request for an IEE by prior written notice dated February 1, 2024 and that it was requesting that an IHO determine that the district's February 2022 evaluation was appropriate and that the parent was not entitled to an IEE at public expense (id. at p. 4).

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 The parent did not consent to this newly proposed reevaluation (see Tr. pp. 43-44).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on May 6, 2024.

In a decision dated May 30, 2024, the IHO found, among other things, that the district demonstrated that the 2022 reevaluation of the student was comprehensive and appropriate, and assessed the student in his areas of suspected need (IHO Decision p. 12). The IHO found that the parent's request for a publicly funded IEE, and the arguments thereto, were without merit, and thereby were denied (id.).

The IHO noted that, per the 2020 IEP (see Parent Ex. D), formal evaluations were conducted for the student in 2020 (IHO Decision p. 10). The IHO noted that those evaluations included an independent neuropsychological evaluation (see Parent Ex. C), independent evaluations for speech and language, PT, OT, and an updated FBA (IHO Decision p. 10). At that time, "1:1 Applied Behavioral Analysis," a feeding evaluation and an assistive technology assessment were also considered but not ultimately recommended (id.).

The IHO noted that the student was receiving OT, PT, speech-language, and behavioral services since the implementation of the 2020 IEP (IHO Decision p. 11). He further noted that in both IEPs (2020 and 2022), the service providers gave information related to the student (id.). He remarked that the 2022 IEP included the results of the 2022 reevaluation, and that the related service providers did not recommend any modifications to the student's services, or any new evaluations or assessments due to any newly observed behaviors (id.). He noted the testimony of the district's school psychologist, which he deemed to be credible, in that evaluations were typically performed to determine whether a student initially qualified for a particular service, or when a student demonstrated a completely new behavior, and the IHO remarked that there was no evidence in the record to suggest those concerns were present with this student (id.).

The IHO found that the student had well-known and clearly established needs in certain areas, such as speech-language, OT, PT, counseling, and behavioral interventions, thus, reassessments of those areas were not required for the reevaluation, and such reassessments would have had little value in developing the student's IEP (IHO Decision at p. 12). The IHO stated that the 2022 reevaluation was done pursuant to the parent's request to apply to one of the district's autism programs, and not due to any changes in the student's performance or behavior, and nothing in the record suggested that those concerns were present (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging, among other things, that the IHO erred in finding that the 2022 evaluation was appropriate, and erred in failing to order a publicly funded IEE for the student, which should have been awarded at the uncontested rates provided by the parent in her letter. She alleges that the 2022 reevaluation only tested minimal areas and did not assess the student for multiple areas of need. She further points to some of the differences in programming and progress of the student between the information found in the 2020 IEP and neuropsychological assessment, and the 2022 IEP, and contends that further testing was required. She further alleges that the IHO

erred in finding the district's sole witness, the school psychologist, credible and erred by relying upon that school psychologist's testimony.

In an answer, the district alleges that it met its burden at the impartial hearing in establishing that the 2022 reevaluation was appropriate and comprehensive, and the IHO did not err in denying the parent a publicly funded IEE. The district alleges that the testimony demonstrated that the student very likely had already been evaluated for OT, PT, speech-language therapy, and behavioral services previously. The district also alleges that there is no evidence in the hearing record that the student required an assistive technology assessment, and the district's school psychologist testified that the student did not require an ABA skills assessment. The district further alleges that the evidence in the record indicates that a neuropsychological exam was unnecessary. The district also alleges that while the school psychologist who testified at the impartial hearing was not familiar with the student personally, she reviewed the reports related to the student, and she was used as an expert school psychologist to testify to the sufficiency of the reevaluation.

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" (Andrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).³

³ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

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

VI. Discussion-IEE

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).⁴

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

Federal and State regulations make clear 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]; 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

⁴ Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently 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).

In New York, State regulation specifies that an initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). However, when conducting a mandatory reevaluation, there is no specified assessments that must be conducted, and a CSE is not simply required to conduct all possible evaluations of a student. Instead federal and State regulations explain that the CSE is charged with reviewing existing evaluation data and, "[o]n the basis of that review, and input from the child's parents, identify[ing] what additional data, if any, are needed" to determine if the student remains eligible for special education as a student with a disability, the present levels of performance of the student, and whether any changes to the student's programming and annual goals are warranted to allow the student to access the general education curriculum (34 CFR 300.305[a][2]; 8 NYCRR 200.4[b][5][i]-[ii]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5).

Turning to the issue on appeal, the district conducted a reevaluation of the student over several dates from January through March 2022, that included administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), and the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4) (as part of the psychoeducational evaluation), a February 2022 classroom observation, and a March 2022 social history (see generally Dist. Exs. 3-5). According to the social history, the reevaluation was conducted "for [the student's] application to ASD programs" and to "gain a better understanding of his cognitive and academic functioning" (Dist. Exs. 4 at p. 5; 5 at p. 1).

At the time of the reevaluation, the student was in fifth grade in a 12:1+1 special class in a non-specialized district school, where he received adapted physical education, 1:1 "behavior support" paraprofessional services, and related services of speech-language therapy, OT, PT, and counseling (Dist. Ex. 4 at p. 1). The social history update included information about the student's early medical and educational history and his then-current routine at home (Dist. Ex. 5 at pp. 1-2).

Specifically, the student had a medical alert for a peanut allergy for which he had access to an EpiPen, and asthma which required nebulizer use as needed (id. at p. 1). The March 2022 social history update indicated that the student had received early intervention services from birth to three years old, had been enrolled in different public schools prior to third grade, and had received integrated co-teaching (ICT) services prior to his reevaluation and enrollment in a 12:1+1 special class (id. at p. 2).

Academically, the social history reflected the parent's belief that the student "should have made more progress, especially in reading" and that she wanted to see improvement in all academic areas (Dist. Ex. 5 at p. 2). The parent also noted that the student needed assistance in breaking down multi-step math problems (id.). According to the parent, the student needed "constant repetition" in order to learn a skill, and his then-current report card "had 1s and 2s" (id. at p. 2). The parent indicated that the student's reading level remained at level "M," and that she would have liked to see the student improve his reading comprehension (id.). The parent noted that she had applied for the student to attend one of the district's specialized middle school programs for students with autism spectrum disorder "next year," as it would be a "good fit," and although "still concerned" about the student's reading comprehension and need for repetition, the parent noted that the student had made "great improvement in behavior and academics" (id.).

The school psychologist who completed the psychoeducational evaluation ("evaluator") stated in her report that the student appeared eager and motivated to complete tasks and was cooperative during the assessment, but that he required frequent redirection and prompting due to distracted behavior (Dist. Ex. 4 at p. 1). The evaluator indicated that the results of the assessments were "deemed to be a valid assessment of [the student's then-] current level of functioning" (id. at p. 2).

According to the evaluator, the WISC-V was administered to assess the student's "general thinking and reasoning skills" (Dist. Ex. 5 at p. 2). The student's full-scale intelligence quotient (FSIQ) of 75 corresponded to the fifth percentile, which fell in the very low range (id.). The evaluator indicated that the student's WISC-V scores in each area "fell between the [v]ery [l]ow and [a]verage ranges of functioning, indicating significant variability among different abilities; therefore, it [wa]s better to interpret these results as patterns of [the student's] strengths and weaknesses" (id.). The student's verbal comprehension composite score of 81 (10th percentile) and processing speed composite score of 89 (23rd percentile) both fell within the low average range (id. at pp. 2, 3). On the visual spatial index, the student's score of 94 corresponded to the 34th percentile, indicating that his abilities of "generating, perceiving, analyzing visual patterns and visual information" fell within the average range (id.). The student's standard score of 79 (8th percentile) on the fluid reasoning index and 74 (4th percentile) on the working memory index were in the very low range; the evaluator stated the latter was an area of "relative weakness" for the student (id. at p. 3). The evaluator noted that the WISC-V results indicated "significant variability among different abilities," and that the student demonstrated some distraction on a timed task with the processing speed index, which may have impacted his performance (id. at p. 6).

The evaluator also administered the WIAT-4 to assess the student's academic functioning in reading, writing and mathematics (Dist. Ex. 4 at p. 4). The student performed within the average range on the reading and written expression composites, and in the low average range on the mathematics composite (id. at p. 7). In reading, the student demonstrated a strength in word

reading (letter recognition, letter-sound knowledge, and single word reading) and a score in the high average range (86th percentile) while comparatively, his reading comprehension score was in the low average range (16th percentile) (*id.* at pp. 4, 7). In writing, the student demonstrated strength in spelling and a score in the very high range (91st percentile), his essay composition skills fell in the low average range (21st percentile), and his sentence composition skills were in the average range (61st percentile) (*id.* at pp. 4-5, 6-7). In mathematics, the student demonstrated average calculation skills (39th percentile), but "significantly" weaker skills in applied problem solving (1st percentile) (*id.* at pp. 6-7).

A classroom observation of the student was conducted in February 2022, while the student was seated with two other students and the student's 1:1 paraprofessional (Dist. Ex. 3). The observer noted that the student watched an in-class video, and that he laughed at the funny part of the video (*id.*). The student demonstrated some restless movements for which he requested "squeezes" from the paraprofessional, who then gave him "pressure up and down his arm" (*id.*). The observer recorded that the student answered a question verbally when called on, worked on his work sheet with encouragement from his paraprofessional, and completed his work, stating "I'm done," and accepting a high five from his paraprofessional (*id.*).

A CSE convened on May 11, 2022 and formulated an IEP with a projected implementation date of May 12, 2022 and a projected annual review date of May 11, 2023 (Parent Ex. E at pp. 1, 36). The present levels of performance section of the May 2022 IEP described the student's classroom performance in reading, writing and mathematics, and incorporated results from classroom assessments and the psychoeducational evaluation (*id.* at pp. 2-3; *see* Dist. Ex. 4). The IEP also included a speech-language update, which described how the student performed when working on social inferencing, answering questions using text evidence, and maintaining topics during conversation (*id.* at p. 4). Additionally, the IEP reflected results of an administration of the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5), which indicated that the student demonstrated "difficulties with subtests and perform[ed] lower than age matched peers" (*id.*). According to a March 2022 counseling update included in the IEP, during the student's individual and group sessions he worked on remaining on task, participating in reciprocal conversations with peers, and managing feelings during certain situations (*id.* at p. 5). The IEP indicated that the student's PT sessions focused on his "ability to improve his coordination [and] motor planning in [the] school environment," and detailed his safety needs, specifically related to his "decreased core and gross motor strength, poor postural stability, decreased cardiovascular endurance, and decreased eccentric control" (*id.* at p. 6). Further, the IEP included information about the student's OT, that described in detail what he was then working on in remote sessions to improve his "self-regulating behaviors, fine motor skills, visual motor, perceptual motor, visual attention and graphomotor skills" (*id.* at pp. 7-8).

At the impartial hearing, a district school psychologist, who was not the same school psychologist who conducted the student's 2022 psychoeducational evaluation, testified that she was familiar with the evaluator and the student from reading his evaluations and reports, although she had not met with or worked with the student (Tr. pp. 53-54, 60-62, 65, 69-75; Dist. Ex. 7).

The school psychologist testified that in addition to the WISC-V and the WIAT-4, the evaluator completed a Gilliam Autism Rating Scale-Third Edition (GARS-3) as part of the packet to apply to the district's ASD program (Tr. p. 63). According to the school psychologist, the 2022

reevaluation was "comprehensive," as it was based on information from the student's teachers, the data collected during the evaluation, the social history that gathered medical and academic histories and included parent input, and the classroom observation that "gave insight on how [the student] function[ed] in the classroom" (Tr. pp. 63-64).

The school psychologist further testified that the district's psychoeducational assessments "fully identified the nature of [the student's] disability and educational needs" (District Ex. 7 ¶ 8). According to the school psychologist, the assessments provided adequate evaluative information about the student's cognitive, academic, communication, and social/emotional functioning (id.). She stated that the psychoeducational assessments, combined with the classroom observation and social history update, appropriately evaluated the student in all areas of suspected disability (id.; see Tr. pp. 64-66). Additionally, the school psychologist testified that "the information from the psychoeducational, social history, and the classroom observation were sufficient enough to make a determination about what program [the student] need[ed] to be in at that point" (Tr. p. 102; see Dist. Ex. 7 ¶ 10).

The school psychologist testified that, typically, evaluations were conducted when determining whether a student would initially qualify for special education services (Tr. pp. 73, 95, 98). Once the student was receiving services, during a reevaluation, the service providers at times conducted informal assessments, as well as gathered data, prepared progress reports about how the student was doing and updated the annual goals to meet the student's current needs (Tr. pp. 73, 98). She continued that "[t]here d[id not] necessarily need to be" a new assessment if the student was currently receiving a particular service, as usually the CSE got feedback from the service provider about how the student was performing (Tr. pp. 73, 83-84). Changes in frequency or types of services that the student was already receiving were based on any progress reports or data received from the service providers (Tr. p. 98). The school psychologist testified to her belief that if the student was receiving related services during the 2022 school year, then these providers contributed to the CSE meeting including through reports and data about how the student was doing throughout the year (Tr. pp. 83-84). Therefore, the 2022 reevaluation was appropriate, even though it did not include new OT, PT, or speech-language therapy assessments (Tr. pp. 83-84, 105-07).

The school psychologist further testified that "[a]t some point" an FBA had already been conducted, and the student's behavioral intervention plan (BIP) was updated "depending on what [wa]s happening with the student (Tr. p. 74). However, if the student exhibited "a completely new behavior," than an FBA could be conducted; however, the school psychologist testified that one was not required (Tr. pp. 74-75, 108). The school psychologist further indicated her belief that a neuropsychological evaluation was likely not conducted during the 2022 reevaluation because it was not going to contribute to any new program or service for the student, as the psychoeducational, social history and classroom observation were sufficient to determine his programming (Tr. p. 102). She also testified that she was not aware that the student required an assistive technology evaluation or an ABA skills assessment (Tr. pp. 106-08).

As discussed above, the May 12, 2022 IEP included thorough updates from the student's related services providers as he was receiving counseling, PT, OT, speech-language therapy, and individual behavioral support paraprofessional services (Parent Ex. E at pp. 2-8). In addition, the IEP indicated that the student had a BIP in place, and contained a narrative of how the BIP was

followed throughout each day, what role the paraprofessional played in supporting the student with behavioral strategies, and also that communication was occurring with the parent regarding the student's daily behavior status (*id.* at p. 9).

On appeal, the parent contends that the 2022 reevaluation was not comprehensive or appropriate because it only assessed "minimal areas" of the student's suspected needs. The parent contends that additional testing, such as measures of the student's expressive language, pragmatic language, fine motor functioning, sensory processing, gross-motor functioning, functional behavior, or the student's potential need for ABA supports was necessary.

Based on the above, I find no reason to disturb the IHO's findings that the district's 2022 reevaluation of the student was appropriate. The evidence in the hearing record shows that the district's 2022 reevaluation of the student, particularly the completion of the 2022 psychoeducational evaluation, included several assessments and strategies to gather relevant functional, developmental, and academic information about the student. Additionally, thorough updates from related service providers were available and referenced in the student's May 2022 IEP. The district's reevaluation was sufficiently comprehensive, and additional information was not required in order to develop an appropriate IEP. Further, the district was not required to show that it had exhaustively performed every assessment that the parent could point to in order to prevail. Accordingly, because I find the district's reevaluation was appropriate and comprehensive, the parent is not entitled to an IEE at public expense. Although it is understandable that the parent might generally desire further information about the student, I note that the parent still has the right to obtain an IEE, and ask the CSE to consider it, but not at public expense (34 CFR 300.502 [b][3]).

I further disagree with the parent's contention that the IHO erred in relying on the school psychologist's testimony. The parent generally alleges that the school psychologist lacked credibility because she was unfamiliar with the student and not able to readily recall all of the student's details and information without reviewing pertinent documents, and specifically because she was "evasive and untruthful" with respect to paragraph 11 of her testimonial affidavit (*see* Dist. Ex. 7 ¶ 11; *see also* Tr. pp. 81-83).

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]). However, in addressing credibility determinations made in other administrative settings, the Second Circuit Court of Appeals has pointed out that an assessment of a school psychologist's credibility should provide specific reasons for the adverse credibility determination (*see Zhang v. U.S. I.N.S.*, 386 F.3d 66, 74 [2d Cir. 2004] [2d Cir. 2007] [noting that court looks to see if the trial judge "provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding"]; *Williams v. Bowen*, 859 F.2d 255, 260-61 [2d Cir. 1988] ["A finding that the school psychologist is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record"]).

Here, while the school psychologist's testimony in paragraph 11 of her affidavit might be construed as lacking in clarity, any inconsistencies therein were properly evaluated by the IHO in the context of her complete testimony and the evidence in the hearing record overall, and it was within her purview to determine the credibility of the testimony and weigh it along with the other evidence in the hearing record. Moreover, the school psychologist's testimony in paragraph 11 could readily be construed as resulting from confusion, mistake, or a lapse in memory as to the content therein. I further note that paragraph 11 is but one discrete point in the school psychologist's ample testimony, which, in addition to the affidavit, included questioning by the district, the parent, and the IHO (see Tr. pp. 54-108; Dist. Ex. 7). Accordingly, the parent does not present a sufficient basis on appeal to find that the testimony of the school psychologist was not credible.

Additionally, the parent's contentions with respect to the school psychologist's testimony, while couched in terms of credibility, more accurately represent a disagreement with how much weight the IHO ultimately gave to the school psychologist's testimony in the context of the IHO's overall evaluation of the evidence in the hearing record. A review of the hearing record does not afford a basis to overturn the IHO's finding that the school psychologist was credible, and as discussed above, a review of the documentary evidence in the hearing record, along with the testimony of the school psychologist, supports the IHO's reasoning.

VII. Conclusion

Having found that the evidence in the hearing record supports the IHO's determination that the parent was not entitled to an IEE at public expense, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 13, 2024**

**CAROL H. HAUGE
STATE REVIEW OFFICER**