



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-345

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

Appearances:

Guercio & Guercio, LLP, attorneys for petitioner, by Douglas A. Spencer, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter during the 2021-22 and 2022-23 school years, ordered it to reimburse the parent for her daughter's tuition at the Vincent Smith School (Vincent Smith) for the 2022-23 school year, and ordered it to reimburse the parent for various independent educational evaluations (IEEs) and private vision therapy services. The appeal must be sustained.

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 student's educational history will not be recited here in detail.

Briefly, the student in this case has a history of developmental delays and learning disability and has received diagnoses of attention deficit/hyperactivity disorder (ADHD) - predominantly inattentive presentation; language disorder (receptive and expressive); and severe

binocular, oculomotor and accommodative vision deficits (Parent Exs. E at p. 2; J at pp. 14-15; V at p. 1; Dist. Exs. 19 at pp. 2-3; 20 at p. 1; 21 at pp. 1, 3). As a young child she experienced febrile seizures (Dist. Ex. 19 at p. 2).

During the 2020-21 school year the student attended a 12:1+1 special class with related services in a district public school (see generally Dist. Ex. 1 at p. 1).

A CSE convened on May 25, 2021 to formulate the student's IEP for the 2021-22 school year (see generally Dist. Ex. 2). According to the May 2021 IEP, the student was reevaluated prior to the CSE meeting; the CSE found the student eligible for special education as a student with a speech or language impairment and recommended a 12:1+1 special class with related services consisting of two 30-minute sessions per six day rotation of speech-language therapy in a group of three, two 30-minute sessions per six day rotation of occupational therapy (OT) in a group of three, one 30-minute sessions per six day rotation of individual speech-language therapy, one 30-minute sessions per week of physical therapy (PT) in a group of two, and one 30-minute session per week of individual PT (Dist. Ex. 2 at p. 10). The May 2021 CSE also recommended supplementary aids and services, program modifications, and accommodations, including specific reading instruction, checks for understanding, and refocusing and redirection (id.).

The student attended the district with the recommended programming for the 2021-22 school year (see Parent Ex. E at p. 1).

On May 2, 2022, a CSE convened for the student's annual review and to develop the student's IEP for the 2022-23 school year (Dist. Ex. 3 at p. 1). The May 2022 CSE continued to find the student eligible for special education as a student with a speech or language impairment and recommended the same educational programming with related services as the May 2021 CSE (compare Dist. Ex. 3 at pp. 1, 10, with Dist. Ex. 2 at pp. 1, 10). The May 2022 CSE also recommended numerous supplementary aids and services, program modifications, and accommodations, including specific reading instruction, checks for understanding, refocusing and redirection, modified curriculum, short breaks during extended work time, directions simplified, use of graphic organizer, visual prompts to use in the classroom, reteaching materials, positive reinforcement plan and flexible seating (Dist. Ex. 3 at pp. 10-11). On June 2, 2022, the May 2022 IEP was amended without a meeting to correct errors within the IEP, identified by the parent, regarding the student's reported test scores (Dist. Exs. 4 at p. 1; 15 at pp. 3-5; compare Dist. Ex. 4 at p. 4, with Dist. Ex. 3 at p. 4).¹

In a letter dated August 18, 2022, the parent notified the district of her disagreement with the student's IEP for the 2022-23 school year and of her intent to place the student at Vincent Smith and seek tuition reimbursement from the district for the 2022-23 school year (Parent Ex. G).

On August 31, 2022, the CSE reconvened to review of the student's IEP at the parent's request and made programming modifications to the student's IEP (see Dist. Ex. 5 at pp. 1-2). According to the IEP, the parent voiced that she wanted to place the student in a private school,

¹ In addressing the parent's concern regarding test score discrepancies, district staff identified an additional error with one of her "Speech subtests" (Dist. Ex. 15 at p. 4; compare Dist. Ex. 2 at p. 4, with Parent Ex. D at p. 2; see Dist. Exs. 3 at p. 5; 4 at p. 6).

the Vincent Smith School, because she felt the recommended program in the May 2022 IEP did not meet all of the student's needs and that the student continued to struggle (Dist. Ex. 5 at p. 1). In addition to the program recommended in the May 2022 IEP, the August 2022 CSE changed the student's OT group size from three to two, increased the frequency of her group PT from once weekly to twice, and modified the recommended specific reading instruction to be 30-minutes of daily individual specific reading instruction (compare Dist. Ex. 5 at pp. 1, 11, with Dist. Ex. 4 at pp. 1, 10). The August 2022 CSE also recommended two additional supplementary aids and services, program modifications, and accommodations consisting of a daily shared aide and bold lined paper, and assistive technology consisting of a daily access to an i-Pad/computer (Dist. Ex. 5 at p. 12).

On September 23, 2022, the parent signed an enrollment contract with Vincent Smith for the student's attendance for the 2022-23 school year (see Parent Ex. N).

A. Due Process Complaint Notice

In a due process complaint notice dated May 25, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years on procedural and substantive grounds (see Parent Ex. A). More specifically, the parent alleged that the district: failed to conduct appropriate evaluations of the student and, therefore, based the recommended program in the student's IEPs on insufficient evaluative data; failed to adequately identify the student's present levels of academic achievement and functional performance; failed to develop appropriate goals and objectives in her IEPs that were measurable; failed to place a special alert on the student's IEP regarding her seizures; failed to consider positive behavior interventions or a behavioral intervention plan (BIP); failed to recommend adequate special education supports and services tailored to meet the student's individual needs and enable her to make progress; failed to address the student's vision deficit in her IEPs; failed to recommend appropriate social skill interventions in her IEPs; failed to recommend appropriate writing support; failed to recommend sufficient executive function interventions; failed to offer methodologies or strategies based on peer-review research; failed to consider and recommend 12-month extended school year (ESY) services; and failed to offer an anti-bullying plan (Parent Ex. A ¶¶ 110-125). The parent also alleged that Vincent Smith was an appropriate unilateral placement and that the equitable considerations favored her requested relief (id. ¶¶ 129, 131).

As relief, the parent requested an order: finding the district denied the student a FAPE for the 2021-22 and 2022-23 school years; directing the district to reimburse her for the costs associated with IEEs she obtained; directing the district to fund IEEs consisting of a reading assessment, a math skills assessment, and a speech-language evaluation including pragmatic social speech measures with providers of the parent's choosing; directing the district to reimburse the parent for the student's tuition at Vincent Smith for the 2022-23 school year; directing the district to reimburse or directly pay for the student's transportation to and from Vincent Smith for the 2022-23 school year; directing the district to reimburse the parent for private tutoring expenses for reading; directing the district to reimburse the parent for the cost of a low gain noise reducing hearing aids; and for compensatory education services (Parent Ex. A at pp. 14-15).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 15, 2023 and concluded March 15, 2024 after twelve days of proceedings (Tr. pp. 1-1910). In a decision dated July 5, 2024, the IHO found that the district denied the student a FAPE for the 2021-22 and 2022-23 school years; that Vincent Smith was an appropriate unilateral placement; and that the equities favored the parent's request for tuition reimbursement (IHO Decision at pp. 8-30).

The IHO first addressed the evaluations before the May 2021 CSE and noted that the evaluations leading to the development of the May 2021 IEP included a speech and language evaluation dated September 25, 2020 and April, 29, 2021, an educational evaluation dated February 15, 2021, a psychological evaluation dated December 8, 2020, and an OT evaluation dated September 30, 2020 (IHO Decision at p. 8; see Dist. Exs. 12-14; 16).² The IHO noted some of the evaluations indicated the student may have rushed through the assessment which may have negatively impacted her scores (IHO Decision at p. 8; see Dist. Exs. 12 at p. 4; 14 at pp. 1-2). The IHO also noted that because a PT evaluation dated February 12, 2021 and a social history dated January 15, 2021 were not identified on the May 2021 IEP, she was uncertain if these evaluations were reviewed even though the scores of the Bruininks-Osersky Test of Motor Proficiency-2nd Edition (BOT-2) from the PT evaluation were identified on the May 2021 IEP (IHO Decision at p. 9; see Dist. Exs. 2 at pp. 3-5; 17 at pp. 2-5; 18).

The IHO also noted "[s]everal other discrepancies" in the evaluative information reported on the May 2021 IEP such as the April 2021 speech-language evaluation statement that the student was eligible for special education as a student with other health impairment, instead of a speech or language impairment, and the misrepresentation of Wechsler Intelligence Scale for Children-V (WISC-V) scores from the December 2020 psychological evaluation (IHO Decision at p. 9; see Dist. Ex. 13; compare Dist. Ex. 2 at p. 4, with Dist. Ex. 14 at p. 9). The IHO further reasoned that the misrepresentations were also carried over to the May 2022 IEP and that it was not until the parent notified the district that the December 2020 psychological evaluation and the IEPs contained the wrong scores that the district corrected the error in the June 2022 IEP (IHO Decision at p. 10; see Dist. Exs. 3 at p. 3; 4 at p. 4; 15). The IHO determined that, because the evaluations and the IEPs contained such errors, the CSE could not have develop appropriate IEPs for the student (see generally IHO Decision at p. 10). The IHO also determined that the hearing record showed the student reportedly presented as distracted, not engaged, inattentive, and needing prompting to remain on task, which required a functional behavioral assessment (FBA) and possibly a BIP that the district did not perform or develop (IHO Decision at pp. 8-9, 14, 17).

The IHO then addressed the annual goals developed for the 2021-22 school year, noting that, in reviewing the goals, one had to consider what the May 2021 CSE knew at that time, which included incorrect evaluation scores (IHO Decision at pp. 10-11). The IHO discussed each of the seventeen annual goals individually and concluded that the goals were not designed to meet the student's needs resulting from the student's disability or to enable her to make progress in accessing

² According to the speech and language evaluation, the student was reevaluated on April 29, 2021 as part of a re-evaluation (Dist. Ex. 12 at pp. 1, 3-4). For purposes of this decision the speech-language evaluation will be referred to as the "April 2021 speech-language evaluation".

the general education curriculum, and did not logically flow from the present levels of performance described in the May 2021 IEP (IHO Decision at pp. 11-12).

The IHO next addressed the recommended accommodations for the 2021-22 school year (IHO Decision at p. 14). The IHO first noted that the May 2021 CSE recommended "specific reading instruction daily x daily" and took issue with the fact that the CSE did not indicate what it meant by "specific reading instruction," who would provide the instruction, or for how long such service would take place (*id.*). The IHO then noted the May 2021 IEP did not recommend visual aids, graphic organizers, pre-teaching, or reteaching despite the student's noted struggles with focus and attention but also noted the student benefitted from her services, post-it notes, structured sessions and visual cueing to stay on task (*id.*).

Next, the IHO noted that the student progressed satisfactorily during the 2021-22 school year but determined such progress did not reflect the amount of prompting, cueing, and visual aids the student actually needed (IHO Decision at pp. 14-15; *see* Dist. Ex. 23). The IHO also noted the student was receiving private tutoring for reading but still had fluctuating progress in her Fountas and Pinnell reading levels (IHO Decision at p. 16). The IHO noted the district did not offer an individualized and specialized reading program and did not conduct a reading evaluation despite the May 2021 CSE recommending "specific reading instruction daily x daily" (*id.*; *see* Dist. Ex. 2 at p. 10). In conclusion, for the 2021-22 school year, the IHO determined that due to the student's significant deficits she required remediation, an FBA/BIP, and ESY services; that the annual goals recommended by the CSE were not measurable and did not accurately reflect the student's needs; and that, based on the foregoing, the district denied the student a FAPE (IHO Decision at pp. 16-17).

The IHO then addressed the 2022-23 school year (IHO Decision at pp. 17-21). The IHO noted the May 2022 CSE reviewed updated progress reports in OT, PT, special education, and speech-language therapy but determined that "regardless of the CSE professional staff members reviewing the evaluations, the [May 2022] IEP listed the same incorrect scores" (*id.* at p. 17). Regarding the recommended goals for the 2022-23 school year, the IHO noted that four goals noted use of visuals, one goal included the use of a graphic organizer, two goals were similar – one without prompts and one with prompts, and one goal included the use of a keyboard (*id.* at p. 18). The IHO then determined that the lack of a study skill annual goal on the May 2022 IEP was not appropriate as there was no evidence the student achieved her prior study skills goal of being able to attend for 10 minutes (*id.*).

The IHO noted the while the May 2022 CSE continued to recommend a 12:1+1 special class placement along with specific reading instruction for the student, the district did not offer any additional evaluations such as reading, assistive technology, FBA/BIP or an independent speech-language evaluation despite her gradual progress (IHO Decision at p. 18). The IHO further noted the May 2022 CSE did not recommend ESY services for the student (*id.*). The IHO also noted that the June 2022 IEP corrected the errant scores on the student's IEP but that the CSE did not convene to review what if any impact the scores had on the student's recommended program (*id.*).

The IHO then noted that the CSE reconvened in August 2022 after receiving the parent's 10-day notice letter (IHO Decision at p. 19). The IHO further noted that the parent raised concerns

during that CSE meeting about the student's class size and that the August 2022 CSE recommended a group aid to support the student but without performing an FBA/BIP first (id.). The IHO determined that, without an FBA/BIP before the CSE to review, the August 2022 CSE had no evidence regarding how a shared aid would "hinder" the student's dependence on adult prompts, redirection, and cues (id.).

Next, the IHO noted the August 2022 CSE recommended 30-minutes of daily individual reading instruction and, after identifying State regulations as they relate to specially designed reading instruction, further stated:

[The August 2022] IEP [did] not need to reflect a methodology[,] but I will note that in my opinion, the CSE had no clear consensus on what was working or not. It was expected that [reading services would] be provided by a reading teacher. Nothing in the [August 2022] IEP indicated a reading evaluation or any specialized reading to address the [s]tudent's needs and or particular goals.

(IHO Decision at p. 21). The IHO noted the district recommended an AT evaluation, but still did not offer the student ESY services for the 2022-23 school year (id.). Based on the foregoing, the IHO determined the district did not offer the student a FAPE for the 2022-23 school year (id.).

The IHO then addressed the parent's participation at the CSE meetings and determined "[t]he continued mis-scoring of the [s]tudent's test scores, along with the other aspects of the IEP[s] that were developed for the [s]tudent, did not provide the [p]arent meaningful participation at these CSE meetings . . . , which amounted to a denial of FAPE" (IHO Decision at p. 23).

The IHO then noted that the parent obtained private evaluations during the 2022-23 school year and provided them to the district for a June 2023 CSE meeting (IHO Decision at pp. 23-24). The IHO found that the June 2023 CSE used the evaluations to formulate the student's IEP for the 2023-24 school year (id. at p. 24). The IHO also noted that the June 2023 CSE recommended ESY services and a specialized reading program (id.). The IHO determined that, because the June 2023 CSE used the private evaluations, the district should be ordered to reimburse the parent for the costs of such evaluations (id.).

The IHO then addressed the student's need for vision services and noted that the district was aware of the student's vision needs and had concerns. She found that the district was providing services to the student to address her vision needs through OT, although the providers indicated they had limited training (IHO Decision at p. 24). The IHO then noted that the testimony of the private vision specialist showed the student had significant visual needs (id. at p. 25). The IHO determined the private vision therapy was addressing the student's "overall visual performance" and, therefore, found it was appropriate to order the district to reimburse the parent for out-of-pocket costs for the vision therapy (id.).

Regarding the appropriateness of Vincent Smith, the IHO determined that the program was reasonably calculated for the student to receive educational benefit and thus was appropriate (IHO Decision at pp. 26-28). The IHO noted Vincent Smith provided the student a small class comprised of four students and daily specialized reading (id. at p. 26). The IHO opined that the student's

biggest needs were language and attending and that Vincent Smith recognized these needs and provided specialized instruction to the student based on them (*id.* at p. 28).

Next, the IHO determined that equitable considerations weighed in favor of awarding the parent's requested relief despite noting the parent did not share a private evaluation with the CSE until over a year later and declined consent to allow the district to conduct an assistive technology evaluation (IHO Decision at pp. 28-29).

Lastly, as a separate issue, the IHO addressed ESY services again and stated that she agreed with the parent's experts that the student required ESY services (IHO Decision at p. 29). The IHO noted the student was receiving reading tutoring twice a week during the summer but that it was not addressing her reading regression and also noted that the parent did not elect to sign up the student for the private school's summer program despite the parent's argument that the student required ESY services (*id.*).³ The IHO also noted that the district's argument that the parent predetermined a private placement was without merit (*id.* at p. 30).

As relief for the district's two school year denial of FAPE, the IHO ordered the district to: reimburse the parent for the cost of tuition at Vincent Smith for the 2022-23 school year; reimburse the parent for the costs of the three privately obtained evaluations that were used by the CSE in the development of the June 2023 IEP; and reimburse the parent for the cost of the private vision therapy (IHO Decision at p. 31).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here.⁴

³ The IHO also opined regarding the 2023-24 school year notwithstanding that there was no claim relating to that school year raised in the parent's due process complaint notice. In particular, the IHO stated that, "[s]ince ESY was not offered by the [d]istrict until June 2023 . . . , in [her] opinion, [this would] impact[] an equity argument for the 2023-24 school year and reimbursement (IHO Decision at p. 30).

⁴ The parent raises an allegation that the district's request for review is untimely. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a notice of request for review and a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (*id.*). Here, the IHO's decision is dated July 5, 2024, which means the district had until August 14, 2024 to personally serve the parent (*see* IHO Decision). According to the district's affidavit of service, the parent was personally served on August 14, 2024, making the request for review timely (Aug. 14, 2024 Aff. of Service). The parent alleges that the IHO's decision was transmitted via email on July 3, 2024 and thus the district had until August 12, 2024 to personally serve the request for review; however, as indicated in prior SRO decision, the time period for appealing an IHO decision begins to run based upon the date of the IHO's decision and State regulations regarding timeliness do not rely upon the date of a party's receipt of an IHO decision—or the date the IHO transmitted the decision by e-mail—for purposes of calculating the timelines for serving a request for review (*see* 8 NYCRR 279.4[a]; Mt. Vernon City Sch. Dist. v. R.N., 2019 WL 169380 [Sup. Ct. Westchester Cnty. Jan. 9, 2019] [upholding the dismissal of an SRO appeal as untimely, as calculation of the 40-day time period runs from the date of an IHO decision, not from date of receipt via email or regular mail], aff'd 188 A.D.3d 889 [2d Dep't 2020]; Application of a Student with a Disability, Appeal No. 19-043; Application of a Student with a Disability, Appeal No. 16-

The following issues presented on appeal must be resolved in order to render a decision in this case:⁵

1. whether the IHO erred in determining that the parent was denied meaningful participation in the student's educational planning process during the May 2021, May 2022, and August 2022 CSEs;
2. whether the IHO erred in determining that the evaluations of the student before the May 2021, May 2022, and August 2022 CSEs were insufficient to develop appropriate IEPs;
3. whether the IHO erred in determining that the present levels of performance in the May 2021, May 2022, and August 2022 IEPs were not sufficient to develop appropriate IEPs;
4. whether IHO erred in determining that the annual goals in the student's May 2021, May 2022, and August 2022 IEPs were unmeasurable, insufficient, and failed to address the student's needs;

029; Application of a Student with a Disability, Appeal No. 10-081; Application of a Student with a Disability, Appeal No. 10-034; Application of a Student with a Disability, Appeal No. 08-043; Application of a Child with a Disability, Appeal No. 04-004). Therefore, the actual date that the IHO's decision is transmitted to the parties or the actual date either of the parties receives the IHO's decision is not relevant to the calculus in determining whether a request for review is timely.

⁵ The parent argues that the district's appeal, alleging that the IHO improperly relied on ministerial discrepancies to find a denial of a FAPE, was too vague to raise for review specific findings of the IHO. State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). The district in its request for review states "[t]he IHO erred in concluding the [d]istrict denied the student a FAPE for the 2021- 2022 and 2022-2023 school years based upon alleged ministerial discrepancies with the student's IEPs, as well as inappropriate goals, related services, accommodations, and assessments and/or data" and "[b]y her decision, the IHO misrepresents and/or ignores the testimony and evidence presented by the [d]istrict, misinterprets and/or misappropriates the law, and fails to provide a legally sufficient rationale and meaningful support from the record for her determination" and cites pages of the IHO's decision (Req. for Rev. ¶ 5). Given the determinations by the IHO, the district's request for review sufficiently identifies the IHO's "findings, conclusions, and orders" to which it takes exception (see 8 NYCRR 279.4[a]). In addition, the district submits a memorandum of law, which puts forth additional argument with citations to relevant evidence, statutes/regulations, and case law to argue that it properly evaluated the student and that the May 2021, May 2022, and August 2022 CSEs had sufficient evaluative data to recommend a program that met the student's unique needs (see Dist. Memo. of Law at pp. 18-20). Accordingly, review of the request for review does not support the parent's argument that the district failed to appeal the IHO's findings regarding sufficiency of evaluations considered by the CSEs or regarding annual goals, services, and accommodations.

5. whether the IHO erred in determining that the student required an FBA and/or a BIP to address her behavior;
6. whether the IHO erred in determining that the May 2021, May 2022, and August 2022 IEPs were not appropriate to address the student's needs because they did not include provision for vision therapy and did not recommend sufficient reading instruction;
7. whether the IHO erred in determining that the student required ESY services;
8. whether the IHO erred in determining that Vincent Smith was appropriate to address the student's needs;
9. whether the IHO erred in determining that equitable considerations favor the parent's claim for tuition reimbursement;
10. whether the IHO erred in determining the parent was entitled to reimbursement for privately obtained education evaluations;
11. whether the IHO erred in determining the parent was entitled to reimbursement for privately obtained vision services.

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]).⁶

⁶ 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

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).

VI. Discussion

A. Sufficiency of Evaluative Information

The district argues that it comprehensively and sufficiently evaluated the student in all areas of suspected disability when creating her special education program. The district further argues that the student was being regularly assessed through IEP annual goals, classwork, reading running records, notes, observations, anecdotal data from the teachers, and within her classroom in reading, writing, and math. The parent argues that the IHO properly considered evidence regarding the CSE's failure to properly assess the student.

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,

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).

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).

1. May 2021 CSE

According to meeting comments attached to the May 2021 IEP, updated evaluations were completed, and the results were reviewed with the CSE (Dist. Ex. 2 at pp. 1-2; see Parent Exs. C at pp. 1-9; D at pp. 1-3; Dist. Exs. 2 at pp. 3-7; 7 at pp. 1-3; 13 at pp. 1-6; 16 at pp. 1-3; 17 at pp. 1-5; 18 at pp. 1-4). The hearing record shows that the May 2021 CSE had available a December 2020 psychological evaluation report, a January 2021 social history update, a February 2021 progress report for re-evaluation, a February 2021 PT re-evaluation, a March 2021 OT re-evaluation, and an April 2021 speech-language re-evaluation (Parent Exs. C at pp. 1-9; D at pp. 1-4; Dist. Ex. 13 at pp. 1-6; 16 at pp. 1-3; 17 at pp. 1-5; 18 at pp. 1-4).

Within the December 2020 psychological evaluation report the school psychologist, who conducted the evaluation and participated in the May 2021 CSE meeting, indicated that her assessment instruments included the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), social history update, review of records, and teacher reports (Parent Ex. C at p. 1; see Tr. pp. 558, 579). The school psychologist found the student was compliant throughout the evaluation, required frequent breaks to stay motivated, demonstrated difficulty maintaining focus/attention, exhibited impulsive responding at times which may have had a negative impact on her score, but was able to complete all required items to the best of her ability (Parent Ex. C at pp. 1-2). The school psychologist stated that the evaluation was conducted under standardized conditions and was therefore a valid representation of the student's cognitive ability at that time (id. at p. 2).

Administration of the WISC-V yielded a full-scale intelligence quotient (FSIQ) of 67 which placed the student in the extremely low range of intellectual functioning (Parent Ex. C at p. 3). On the verbal comprehension index the student received a score of 81 (low average), on the visual spatial index the student received a score of 64 (extremely low range), on the fluid reasoning index the student received a score of 76 (very low range), on the working memory index the student received a score of 67 (extremely low range), and on the processing speed index the student received a score of 69 (extremely low range) (id. at pp. 3-7).⁷ These results were comparable to those obtained on previous cognitive assessments conducted in December 2017 (see Dist. Ex. 1 at p. 4).

In her due process complaint notice, the parent argued that the December 2020 psychological evaluation consisted of only one standardized assessment, the WISC-V (Parent Ex. A at p. 4). Review of the hearing record shows the psychological evaluation consisted of an

⁷ As examined in more detail later in this decision, the IHO correctly noted that the appendix to the evaluation report included incorrect testing scores (IHO Decision at p. 9; compare Parent Ex. C at p. 9 with Parent Ex. C at pp. 3-8).

assessment of the student's cognitive functioning using the WISC-V (Parent Ex. C). Although the resultant report included a brief section on background information and behavioral observations, the focus of the report is the student's performance on the WISC-V (*id.*). The psychological evaluation cites the WISC-V, social history update, review of records and teacher reports as the assessment instruments used by the evaluator (*id.*). As described in detail below, the district conducted additional evaluations of the student that included standardized assessments.

The January 2021 social history update, which included reporting by the parent, stated that the student was healthy overall, attended school regularly, enjoyed being in class with her peers, and that her least favorite thing about school was when she struggled with a difficult task (Dist. Ex. 18 at pp. 2-3). The parent reported that the student had poor reading skills, struggled with writing and was not functioning at her proper grade level in either area and that the parent believed the student was behind in her math skills and should be "at a higher level with her current age" (*id.* at p. 3). Socially, the parent reported that the student had a tendency to get frustrated at home, struggled with listening and following directions, interacted well with her peers and other adults, and enjoyed arts and crafts, riding her bike, and playing with her toys at home (*id.*).

The February 2021 progress report for reevaluation, conducted by the student's classroom special education teacher during the student's third grade (2020-21) school year, included observations that the student worked "very hard" during class, participated "tremendously" in class discussions, was easily redirected when fatigued, was independent in her morning routine, was an active member of the classroom and a leader, sometimes had a difficult time maintaining her attention and needed reminders to stay on task, and had improved in remembering her personal schedule and in her ability to attend to the task at hand (Dist. Ex. 13 at pp.1-2, 6; *see* Tr. pp. 11-12, 19). The teacher stated that the student had shown significant progress in all academic areas of study (Dist. Ex. 13 at p. 2). According to the report the student had improved her guided reading level from a "level C" in September 2020 to a "level E" in January 2021, was able to answer comprehension questions regarding main characters and story location, and was able to locate the problem and resolution in a story read to her, but had a more difficult time answering questions and locating details when "asked to read a story at her level" (*id.*). The teacher reported that the student had improved her known sight words from 43 "level 1 words" and zero "level 2 words" in September to 65 "level 1 words" and 19 "level 2 words" in January and was able to find those words in text she was reading (*id.*). In the area of math, the student was able to work with word problems, pick the correct operation most of the time, understood the signals for addition and subtraction, relied on drawing dots to count on, could count by tens and most fives but struggled with twos, and was working on counting with one to one correspondence, finding patterns in larger numbers and using charts to recognize numbers up to 100 (*id.*). According to the report the student was able to "tell a story," but needed prompting to stay on topic during writing, needed to be encouraged to add more to her writing and edit her work, and that once she had reached her limit on an assignment she would usually announce "I'm done!" (*id.* at pp. 2-3).

The February 2021 reevaluation report included testing results from administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) (Dist. Ex. 13 at pp. 3-6). In the area of listening comprehension, the student attained a standard score of 94, which was considered a relative strength for her, as the teacher noted that the student was better able to comprehend when a story was read to her as opposed to when she was asked to read something on her own (*id.* at pp. 3-5). On subtests in the areas of early reading skills and reading comprehension the student

attained standard scores of 90 and 73 respectively and the teacher noted that the student was highly distracted on the reading comprehension subtest and needed frequent redirection (*id.* at p. 5). The teacher characterized reading comprehension an area of weakness for the student (*id.* at p. 5). In the areas of word reading and decoding the student attained standard scores of 67 and 70 respectively, identified as another area of weakness, and the teacher reported that the student became tired and fatigued as the testing went on and was not attentive to the task (*id.* at pp. 4-5). In the area of writing, the student received a standard score of 99 on a subtest of alphabet writing fluency, an area of strength, but struggled on a subtest involving sentence combining and building receiving a standard score of 66 (*id.* at p. 5). In the remaining areas of math problem solving, numerical operations, oral expression, and spelling the student attained standard scores of 57, 40, 75 and 75 respectively (*id.* at pp. 5-6).

Within the February 2021 PT reevaluation report the evaluator indicated that the student demonstrated fair eye contact, required minimal verbal cues for attention to task, benefitted from visual demonstrations to execute tasks, displayed low/normal muscle tone throughout her trunk and lower extremities, presented with active and passive range of motion within normal limits, displayed muscle strength which was "grossly graded as Poor," and displayed below average balance skills throughout the assessment and that the teacher reported concerns with the student's ability to keep up with her peers during physical activities (Dist. Ex. 17 at pp. 1-2). Administration of the Bruininks-Oseretsky Test of Motor Proficiency-2nd Edition (BOT-2), gross motor portion, found the student performing in the below average range on the body coordination composite, which included bilateral coordination and balance, and in the well-below average range in the areas of running speed, agility, and strength (*id.* at pp. 2-3).

The March 2021 OT reevaluation report included results from the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), 5th Edition, visual perception and motor coordination Subtests; the BOT-2, fine motor precision and fine motor integration subtests; and clinical observations (Dist. Ex. 16 at 1). Results of the BOT-2 found the student performing in the below average range on the fine motor integration subtest and well below average on the fine motor precision subtest and the occupational therapist, who conducted the evaluation and provided the student OT services during the 2020-21 and 2021-22 school years, stated that these significant delays would impact the student's skills in the classroom with regard to tracing, cutting, coloring, handwriting and copying skills (Dist. Ex. 16 at p. 1-2; *see* Tr. pp. 377, 386-87, 410-11). Results of administration of the VMI found the student performing in the well below average range in the areas of visual perceptual and motor coordination skills, however, the occupational therapist noted that the student had a tendency to rush through the visual perceptual subtest, requiring cues to "take her time" and therefore it was the opinion of the therapist that the scores on the visual perceptual subtest were an underestimate of the student's actual ability (Dist. Ex. 16 at pp. 2-3; *see* Tr. pp. 457-59).

Regarding the "errors" within the evaluation report noted by the IHO, the occupational therapist testified that the testing within her report was done in September 2020, but that for the annual review she liked to incorporate progress from the school year in her report and that was why the report was "noted for March 1st," closer to her CSE date and that, with respect to the report indicating the student was in a 15:1+1 special class, that it was a "typo" and acknowledged that the student was in a "12:1+1" (IHO Decision at p. 9; Tr. pp. 389, 475).

Within the evaluation report, the occupational therapist noted that with respect to visual motor skills the student benefitted from bolded or highlighted lines and starting dots; was able to copy two lines of print from direct line with improved letter size, line regard, and formation using visual strategies; had difficulty copying shapes with intersecting lines and staying within defined boundaries in mazes and coloring; and had shown improved usage of color (Dist. Ex. 16 at p. 3). In the area of functional fine motor skills, the occupational therapist reported that the student had shown progress and was able to manipulate fine pegs with a tripod/pincer grasp, button "5/5 1 inch buttons" on a panel, zip/unzip her jacket, and use classroom manipulatives (*id.*). The occupational therapist concluded that while the student had made progress, she continued to present with delays in regard to her visual and fine motor skills that impacted her ability to write, cut, copy, and trace and needed support in those domains (*id.*).

Within the April 2021 speech-language reevaluation report the speech-language pathologist, who conducted the evaluation and provided the student services during the 2020-21 school year, observed that the student presented with a positive attitude and the willingness to try her best and required some redirection or refocusing to complete subtests and repetition of directions and/or content during the testing time and noted that during speech and language sessions the student was always engaged and able to participate (Parent Ex. D at p. 1). The speech-language pathologist administered the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) in September 2020 on which the student received a total Core Language standard score of 68 "placing [her performance] below the average range" (*id.* at p. 2). The student received a receptive language index standard score of 55, an expressive language index standard score of 72, language content index standard score of 57, and a language structure index standard score of 68 all of which were identified in the report as below the average range (*id.* at pp. 2-3). The speech-language pathologist reported that based on the student's improved attention and language skills in the pull-out speech-language sessions, further evaluations including the Receptive One-Word Picture Vocabulary Test - Fourth Edition (ROWPVT-4) and the Expressive One-Word Picture Vocabulary Test Fourth Edition (EOWPVT-4), were done in March 2021 to report any changes or updates (*id.* at p. 3). The speech-language pathologist explained that the ROWPVT-4 was used to assess an individual's ability to match a spoken word with an image of an object, action, or concept and that it was not a language test but looked at the ability to understand the meaning of spoken words without context (*id.*). The speech pathologist noted that the student often answered quickly and changed her responses at times but obtained a standard score of 88, indicating that the student had average understanding (receptive) of high frequency vocabulary (*id.* at pp. 3-4). On the EOWPVT-4, which assessed the student's ability to name objects, actions, and concepts when presented with color illustrations, the student obtained a standard score of 86, which according to the speech-language pathologist, indicated that the student had average use (expressive) of high frequency vocabulary (*id.*). The evaluation report stated that the student demonstrated relative strength in her ability to understand and use word structure; had difficulty with formulating grammatically correct sentences, following directions, basic linguistic concepts, and sentence comprehension; and demonstrated the most difficulty in understanding word relationships (*id.* at p. 4). The speech-language pathologist reported that the student rushed her answers and self-corrected and exhibited difficulty remembering and repeating specific information necessary for the development, use, and understanding of language commonly used in academic and everyday activities (*id.*). The speech-language pathologist stated that due to changes throughout the school year it was recommended

that the test results be viewed with caution as they may not be indicative of the student's true performance (id.).

At the impartial hearing the speech pathologist testified that the student's test results from September weren't indicative of what she knew the student was capable of doing and she knew that there was a lot of attention that was playing into the scores that were obtained (Tr. p. 675-76). She continued to explain that while the student's attention was inconsistent as it was coming closer to the CSE meeting she realized how the student had improved so much with her attention that she thought she should retest the student and try to show that she had better skills than she had demonstrated in September (Tr. p. 676). The speech pathologist explained her reasoning for choosing a new test in March was that the "CELF" was very laborious and for the student it was extremely difficult as it took a long time and so the speech pathologist believed she did not need to put the student through all that again (Tr. p. 734).

In addition to the evaluative information detailed above, the May 2021 CSE considered the input of the student's teachers, providers, and parent, as indicated by the May 2021 IEP's present levels of performance, and had available quarterly progress reports, quarterly report cards, OT session notes and progress monitoring, speech-language therapy session notes, and reading data all from the 2020-21 school year (see Dist. Exs. 2 at pp. 5-7; 22; 24; 26; 27; 29; 31).

The occupational therapist testified that she did not recommend any additional testing for the student at the May 2021 CSE meeting (Tr. p. 480).

Regarding the parent's argument that the district should have conducted an audiological evaluation, I note there was no indication in testing that this was an area of need for the student or evidence that the parent discussed this as a concern at the CSE meeting. In addition, as noted above, the student was found to have a relative strength in the area of listening and that any attentional and focusing deficits were attributed to fatigue not as a result of audiological concerns.

2. May 2022 CSE

In addition to the evaluative information available to the May 2021 CSE, the May 2022 IEP stated that the CSE had available a May 2022 OT progress summary, a May 2022 PT progress summary, a May 2022 special education teacher report, and a May 2022 speech-language progress summary (Dist. Ex. 3 at p. 3). The May 2022 IEP also included State and district-wide testing results in reading and math and input from the student's teachers, providers, and parent (Dist. Ex. 3 at pp. 5-7).

The occupational therapist testified that in preparation for the May 2022 CSE meeting she spoke with the student's teacher, the physical therapist, and the parent and that everything seemed on target and there were no issues that she could recall (Tr. p. 432). Regarding the May 2022 IEP's present levels of performance physical development section, the occupational therapist testified that they were a fair and accurate depiction of the student's needs at that time (Tr. pp. 433-34).

The parent, in her due process complaint notice, argued the May 2022 CSE did not recommend a specific reading assessment to better understand the student's reading deficits; however, as indicated above, the May 2022 CSE considered a February 2021 progress report for re-evaluation, a January 2022 reading assessment, a May 2022 special education teacher report,

results from State and district-wide testing, and input from the student's special education teacher and providers during the 2021-22 school year to base its readings recommendations on (see Dist. Ex. 3; Parent Ex. A ¶ 68-69). The parent has not indicated what reading assessment the district should have performed (see generally Parent Ex. A). Moreover, the January 2022 NWEA reading assessment showed the student had strengths in understanding language, craft, and structure but struggled in decoding text (Dist. Ex. 3 at p. 6). The May 2022 CSE noted and recommended the student continued to learn using "Wilson Strategies to assist in decoding text" (id.).

3. August 2022 CSE

The director of pupil personnel services, who chaired the August 2022 CSE meeting, testified that anytime that she saw concerns being raised at the CSE meeting she always considered other evaluations that might be beneficial to the committee in making recommendations and that she did in this case (Tr. p. 262). The director testified that at the meeting they discussed the possibility of doing a neuropsychological exam and that the parent shared that she believed the student had previously had one (Tr. pp. 262-63). The director noted that they did not have a copy of that document so they asked the parent if she would be willing to share that with the committee (Tr. p. 263).

The director added that there was a discussion about the student's writing and the CSE talked about doing an assistive technology evaluation (Tr. pp. 263-64). On September 13, 2022 the district, through Nassau BOCES, sent the parent an assistive technology evaluation information form (Parent Ex. H). In a September 21, 2022 email the parents stated that they were not against the assistive technology evaluation "per se," but that they were frustrated that this and other evaluations were not conducted sooner, and that the student was currently placed at Vincent Smith and that they felt the evaluation would be disruptive for the student and asked that it be put on hold (Parent Ex. I).

Based on the foregoing, the hearing record does not support the IHO's determinations that the CSEs for the 2021-22 and 2022-23 school years lacked sufficient evaluative information to determine appropriate programming for the student for these school years. Moreover, even if the undersigned agreed that the district committed a procedural violation by mistakenly including incorrect scores for one subtest on the student's May 2021 and May 2022 IEPs, as further describe below such a procedural violation would not rise to a level of a denial of FAPE.

B. May 2021, May 2022, and August 2022 IEPs

1. Present Levels of Educational Performance

The district argues that the IHO erred in concluding that the district denied the student a FAPE based upon alleged ministerial discrepancies with the student's IEP. The district also argues that the IHO erred in finding such errors denied the parent meaningful participation. The parent argues these errors were "material" in nature and that the IHO properly emphasized the district's material omission of assessment and other data and the disparities between assessment reports and the student's IEPs.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation

to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

I find that the errors identified by the IHO, some detailed above, were correctly identified by the district staff as "typos" or clerical errors and did not materially change the outcome of the May 2021 CSE meeting and the resultant IEP and as noted by the district did not deprive the student of any educational benefit or otherwise deny the student a FAPE or impede the parent's opportunity to participate.

Here, the evidence shows that the May 2021 and May 2022 IEPs contained inconsistent evaluative information from Wechsler Intelligence Scale for Children-V (WISC-V) that was administered during a psychoeducational evaluation dated December 8, 2020 (compare Dist. Ex. 2 at p. 4, and Dist. Ex. 3 at p. 4, with Dist. Ex. 4 at p. 4). According to emails between the parent and the district dated May 25, 2022 to June 7, 2022, the scores reported in the appendix of the December 2020 psychoeducational evaluation did not match the scores contained within the body of December 2020 psychoeducational evaluation (see Dist. Ex. 15). The district offered to schedule a CSE meeting with the parent to "re-review the evaluation with the CSE," but there is no evidence that the parent wished to review the evaluation again or availed herself of that opportunity (Dist. Ex. 15 at p. 3).

The evidence shows that despite that the May 2021 IEP, May 2022 IEP, and December 2020 psychoeducational evaluation appendix contained incorrect scores for the WISC-V, the December 2020 psychoeducational evaluation nonetheless contained the correct scores throughout the evaluation (see Dist. Ex. 14). The parents had a copy of the December 2020 psychoeducational evaluation and there is nothing in the hearing record to suggest that the May 2021 and May 2022 CSEs did not engage in through conversation regarding the student's needs for the 2021-22 and 2022-23 school year. The evidence shows that the May 2021, May 2022, and August 2022 CSEs reviewed evaluative information other than the December 2020 psychoeducational evaluation and had input from the student's teachers, related services providers, and her parent (see Dist. Exs. 2-3; 5).

Next, regarding the IHO's findings regarding the CSEs' review of the February 2021 PT evaluation and the January 2021 social history update, the IHO is correct that these assessments were not listed on the May 2021 IEP with the other evaluations and reports and contrary to the IHO's finding the IEP does not include the testing results from the Bruininks-Oseretsky Test of Motor Proficiency-2nd Edition (BOT-2) with respect to gross motor function as evaluated within the PT evaluation, but only the fine motor portion scores obtained through the March 2021 OT re-evaluation (IHO Decision at p. 9; see Dist. Ex. 2 at p. 3-5; compare Dist. Ex. 17 at p. 2, with Dist. Exs. 2 at p. 4; 16 at p. 2). However, the May 2021 IEP's present levels of performance included results and findings from the February 2021 PT reevaluation and stated that as per standardized testing results the student displayed significant delays in the "gross motor area" including muscle strength, balance, coordination, and agility and then continued in detailing the student's abilities

and needs in each of those areas (compare Dist. Ex. 2 at pp. 6-7, with Dist. Ex. 17 at pp. 2-4). Additionally, the IEP's present levels of performance included much of the information reported by the parent in the January 2021 social history update, including the student's need for more support in reading, her struggles with difficult tasks and attention to task, difficulty in writing, reading, and math, and that she enjoyed participating in class with others, and interacted well with peers (compare Dist. Ex. 2 at pp. 1, 5, with Dist. Ex. 18 at p. 3).

Consistent with the findings above regarding the sufficiency of evaluative data before the May 2021, May 2022, and August 2022 CSEs, the evidence in the hearing record does not support a finding that, overall, the present levels of education performance inaccurately reflected the student's needs. The hearing record shows that the present levels of performance were specifically updated for each school year and the CSEs had sufficient data to make a recommendation.

2. Annual Goals

The district argues that the CSEs identified all the student's needs and developed appropriate annual goals that set forth the measurement criteria, the method of measuring progress and a schedule of when progress would be periodically measured. The parents argue the IHO properly determined the student's annual goals for the 2021-22 and 2022-23 school years were inappropriate.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). However, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *20-*21 [S.D.N.Y. Feb. 14, 2017]).

Here, the May 2021 IEP included annual goals addressing the student's identified needs in the areas of study skills, reading, writing, mathematics, speech-language development, and motor skills (Dist. Ex. 2 at pp. 8-9). The study skills annual goal targeted maintaining attention for 10 minutes during class lessons and assignments (Dist. Ex. 2 at p. 8). The three reading annual goals addressed applying learned decoding skills, increasing known sight words by 40 words, and retelling details from a story in order (id.). The writing annual goals involved writing a four-sentence paragraph on one topic in sequential order and editing written work and adding details (id.). The math annual goals involved adding two-digit numbers without regrouping and identifying the operation the key word represents in a word problem (id.). The speech-language annual goals involved recalling and comprehending a sequence of three events from a short story,

using vocabulary related through association, and verbally discussing objects by identifying similarities and differences (id. at pp. 8-9). The motor skills annual goals targeted improving visual perceptual skills, maintaining upright postural control in sitting at desk, completing five specified exercises requiring lower body strength, participating in a physical activity "from [ten] to [five] minutes" without fatigue to assist in classroom participation, maintain balance for ten minutes while participating in static or dynamic activities in the educational setting, and using far point copying skills to copy two lines of print with appropriate spacing and line placement (id. at p. 9).

Within her decision, the IHO detailed a number of concerns with respect to the May 2021 IEP's annual goals, however a review of the student's then-current progress report as well as the reevaluation reports does not provide reason to suggest the annual goals included in the May 2021 IEP were inappropriate or so deficient that they would have denied the student a FAPE (IHO Decision at pp. 10-13; compare Parent Ex. D; Dist. Exs. 13; 16; 17; 22, with Dist. Ex. 2 at pp. 8-9).

For example, the 2020-21 school year progress report shows that by April 2021 the student had achieved an annual goal of maintaining attention on task during class lessons and assignments (Dist. Ex. 22 at p. 3), while the May 2021 IEP added a time frame to the goal and included the annual goal of maintaining attention for 10 minutes during class lessons and assignments (Dist. Ex. 2 at p. 8). The student's teacher, who participated at the May 2021 CSE meeting stated that the student's attention and focus was inconsistent, so they wanted to work with the student on monitoring and maintaining her attention (Tr. pp. 86-87). Regarding the IHO's concerns around the student's writing abilities and a proposed writing annual goal, the February 2021 reevaluation report stated that the student was able to write a sentence with accuracy including the key word and therefore there is no reason to suggest the May 2021 IEP's annual goal involving writing a four-sentence paragraph was not an appropriate next step (see Dist. Exs. 2 at p. 8; 13 at p. 5). At impartial hearing the student's teacher testified that the student was able to write sentences and so they "built on that goal" where the student would write four sentences in order on one topic (Tr. pp. 87-88). With regard to math annual goals the teacher testified that because the student did not meet the annual goal involving two digit addition without regrouping, they maintained that goal and that since the student was able to identify the key word in a word problem but was not able to identify the operation, they built on that goal (Tr. p. 88; compare Dist. Ex. 22 at p. 4, with Dist. Ex. 2 at p. 8).

In addition, I note that all the annual goals contained in the May 2021 IEP included evaluation criteria (e.g., four out of five trials over four weeks, 90 percent success over 10 months), a method for evaluating progress (e.g., teacher observations, recorded observations, writing samples), and an evaluation schedule (e.g., monthly, every four weeks) (Dist. Ex. 2 at pp. 8-9).

The May 2022 IEP included annual goals targeting the student's needs in the areas of reading, writing, mathematics, speech-language development, and motor skills (Dist. Ex. 3 at pp. 8-10). Again, and as noted for the previous school year, a review of the student's 2021-22 progress report alongside the May 2022 IEP's annual goals does not provide reason to find the annual goals were inappropriate (see Dist. Exs. 3 at pp. 8-10; 23 at pp. 1-8).

The August 2022 IEP carried over the same annual goals included on the May 2022 IEP (compare Dist. Ex. 5 at pp. 9-11, with Dist. Ex. 3 at pp. 8-10). The May 2022 and August 2022 IEP's annual goals included evaluation criteria (e.g., 80 percent success over eight weeks, four out of five trials), a method for evaluating progress (e.g., data collection sheets, work samples, recorded observations), and an evaluation schedule (e.g., monthly) (Dist. Exs. 3 at pp. 8-10; 5 at pp. 9-11).

The IHO found that it was not plausible that the student did not need study skills for the 2022-23 school year (IHO Decision at p. 18). The May 2022 IEP did not include a study skills annual goal (see Dist. Ex. 3 at pp. 8-10). However, I note that the 2021-22 progress report indicated that as of April the student was progressing satisfactorily toward and was expected to achieve her study skills annual goal involving maintaining her attention to task for 10 minutes (Dist. Ex. 23 at p. 2). Moreover, the student's teacher during the 2021-22 school year, who attended the May 2022 CSE meeting, testified that in her opinion study skills goals were really difficult to track because everyone had good days and bad days and also a student's preference for a given subject or lesson would dictate how well the student was able to attend during that class (Tr. pp. 884-85).

Nevertheless, courts have explained that an IEP need not identify annual goals as the only vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). In addition, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). As noted above, the May 2022 IEP included accommodations and supports to address the student's attentional needs such as short breaks, visual prompts, and flexible seating and the August 2022 IEP provided a shared aide daily (Dist. Exs. 3 at pp. 10-11; 5 at pp. 11-12).

Thus, I do not find that the annual goals in the May 2021, May 2022 and August 2022 IEPs were so deficient that they would have prevented the student from making educational progress nor did the CSE shortcomings in drafting the student's IEP goals render the IEP so deficient as to amount to a denial of a FAPE.

3. Special Factors – Interfering Behaviors

The IHO found that the record was "replete" with the student having "behaviors," such as "a learning [sic], distracted, not engaged, inattentive, and 'needing' prompting to remain on task" (IHO Decision at p. 8). The district argues that the student did not exhibit any social-emotional or behavioral concerns that would have indicated a psychiatric assessment was necessary and added that the student's attentional issues did not interfere with her ability to learn such that she required an FBA as the student was easily redirected and was making progress in her program.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

The May 2021 IEP included the notation that the student needed strategies including positive behavioral interventions, supports and other strategies to address behaviors, but did not need a BIP (Dist. Ex. 2 at p. 7).

The evaluation reports, detailed above, included reporting that the student was very friendly, enthusiastic and delightful, was a pleasure to have in class, worked very hard, was very motivated, always put forth excellent effort, presented with a positive attitude, and was kind and respectful to the teacher and classmates (Parent Ex. D at p. 1; Dist. Exs. 13 at p. 1; 16 at pp. 1, 3).

The school psychologist, who conducted the December 2020 psychological evaluation, testified that from her observation of the student in the classroom she recalled the student struggling with her attention and focus and that she required some individualized instruction within the classroom; she added that the student was good at following classroom directions, raising her hand and participating to the best of her ability but that she did require a significant amount of refocusing and redirection (Tr. pp. 561-62).

The April 2021 speech-language reevaluation report stated that the student required some redirection and refocusing to complete subtests and some repetition of directions and/or content during testing (Parent Ex. D at p. 1). The speech pathologist noted within the report that during sessions the student was always engaged, able to participate, and able to take turns but could need reminders to stay on task (*id.*). The occupational therapist, who provided services to the student during the 2020-21 school year, testified that the student needed prompting and redirection and that she responded well to them but also noted that the student did not require "hand over hand" support (Tr. pp. 354-55, 462-63). The student's reading teacher during the 2020-21 school year testified that the student was compliant, eager to learn, and motivated and was not a behavioral problem (Tr. p. 913).

Within the February 2021 progress report for reevaluation, the student's then-current teacher identified the student's interfering behaviors as forgetting to raise her hand, calling out at times, having a difficult time maintaining her attention, and asking "are we done yet?" (Dist. Ex. 13 at p. 1). The teacher reported that with quick reassurances and sharing of the plan the student was easily redirected (*id.* at pp. 1, 6). At hearing the teacher testified that when the student was done with something, "she was done" and that she would just say "I'm done now. That's it" (Tr. p. 73). The teacher testified that with a little prompting, "she would" and added that the student really did care about what the teacher thought and about doing the right thing or something to make her teachers proud (*id.*). Regarding behaviors and social/emotional functioning, at the impartial hearing the student's teacher testified that there was very little concern other than "the attention and focus piece" and that the student did not need a behavior plan and was fine with the class-wide behavior plan (Tr. pp. 202-03). In dealing with focus or social issues, the teacher testified that the student was able to use strategies taught and the language they used in the classroom such as "I'm frustrated" or "What do I do now?" (Tr. p. 75). Additionally, the teacher testified that the student's May 2021 IEP included program accommodations such as checks for understanding and refocusing and redirection targeting the student's needs around attention skills (Tr. p. 92).

The student's special education teacher for the 2021-22 school year testified that she created a classroom-wide behavior system that the student was successful with, and that she incorporated social-emotional learning and socializing into her classroom (Tr. pp. 765-66, 772-73, 808). The student's special education teacher for the 2021-22 school year also testified that student did not exhibit behavioral concerns nor any emotional distress at school and described the student as a rule-follower (Tr. pp. 809-11, 856-58, 860-61).

The May 2022 IEP reflected similar student needs in the area of behaviors and attentional needs and again indicated that the student needed strategies including positive behavioral interventions, supports and other strategies to address behaviors, but did not need a BIP (*compare* Dist. Ex. 3 at pp. 5-8, *with* Dist. Ex. 2 at pp. 5-7). The May 2022 IEP's present levels of performance included reporting that when distracted, the student was easily redirected to the task

and described the student as a hard worker who was kind and friendly and got along well with others (Dist. Ex. 3 at p. 5-7).

To address the student's continued attention and focusing needs the May 2022 IEP provided additional supports for the student including short breaks during extended work time, directions simplified, visual prompts, re-teaching of materials, and flexible seating (Dist. Ex. 3 at pp. 10-11).

The director, who served as the CSE chairperson, testified that at the August 2022 CSE meeting they talked about the student's attention and her attentional needs, and they recommended the student have access to a shared aide in the classroom so that they could help the student with refocusing and redirection (Tr. pp. 264-65; see Dist. Ex. 5 at p. 12).

Based on the foregoing, while the evidence shows the student required redirecting and refocusing throughout the school day, contrary to the parent's argument, the student's behavior did not impede her learning or that of others such that it would necessitate an FBA, and the CSEs adequately identified the student's behaviors in the May 2021, May 2022 and August 2022 IEPs and addressed the areas of concern with supplementary aids and services, program modifications and accommodations (see Dist. Exs. 2 at p. 10; 3 at pp. 10-11; 5 at pp. 11-12).

4. Vision Therapy

It appears that the IHO took issue with the fact that the district did not recommend vision services but rather was addressing the student's vision needs through OT (see IHO Decision at pp. 24-25). The IHO described the vision-related skills the occupational therapist worked on, noting the provider attempted to address the student's vision deficit through activities such as copying near point, copying far point, and navigating the school's hallways (IHO Decision at p. 24; see Tr. p. 482; Dist. Ex. 17). The IHO also noted that OT provider's session notes had "numerous entries" related to the student's vision needs (IHO Decision at p. 24). The IHO then appeared to compare the OT provider's notes with the parent's private vision provider's testimony to show that the student required more than what was being provided in OT (id.); however, the evidence does not support this contention.⁸ The IHO noted the private vision provider testified that the student had significant vision needs that were impacting her learning and academics, that the deficits were developmental, and that the private vision therapy was addressing the student's needs and overall visual performance (IHO Decision at p. 25; see Tr. pp. 1228-230, 1238). However, the IHO did not grapple with the degree to which the OT services were addressing the student's vision needs. Indeed, the evidence in the hearing record shows that the district identified a need and was providing services to address such need.

State regulation defines "related services" as follows:

Related services means developmental, corrective, and other supportive services as are required to assist a student with a disability and includes . . . occupational therapy, . . . other appropriate developmental or corrective support services, and other

⁸ The parent's private vision provider who testified was a Doctor of Optometry and composed the February 2023 developmental vision evaluation report (see Tr. pp. 1218-81; Dist. Ex. 21).

appropriate support services and includes the early identification and assessment of disabling conditions in students.

(8 NYCRR 200.1[qq]; see 34 CFR 300.34[a] [emphasis added]).

As relevant here, the regulation uses the word "corrective" in its description of related services that may be required to "assist a student with a disability," and specifically identifies occupational therapy as a related service (8 NYCRR 200.1[qq]).⁹ "Occupational therapy" is defined in State regulation as "the functional evaluation of the student and the planning and use of a program of purposeful activities to develop or maintain adaptive skills, designed to achieve maximal physical and mental functioning of the student in his or her daily life tasks" (8 NYCRR 200.1[gg]).

In its appeal, the district contends the student was receiving vision therapy vis a vis the parent to correct ocular deficits, a medical issue that the IHO concedes was developmental in nature which needed to be addressed by a medical professional in a doctor's office (see IHO Decision at p. 25). With respect to any visual-motor deficits the student had that were indeed impacting her education, those were identified by the CSE and addressed through her IEPs.

As noted earlier, the occupational therapist evaluated the student in the areas of visual motor integration, visual perception, and motor coordination and identified needs in the areas of copying age appropriate shapes, copying shapes with intersecting lines, staying within defined boundaries with mazes and coloring, and visual motor skills as they pertain to writing and copying in order to keep up with the class (see Dist. Ex. 16 at pp. 1-3).

To address these identified student needs, the May 2021 IEP included OT services in a small group and included one annual goal involving improving visual perceptual skills by copying a design with diagonal or intersecting lines on paper or using manipulatives and a second annual goal involving using far point copying skills to copy two lines of print with appropriate spacing and line placement (Dist. Ex. 2 at pp. 1, 9, 10). The 2021-22 school year progress report indicated that the student had achieved the annual goal of copying a design with diagonal or intersecting lines and was progressing satisfactorily toward the annual goal of far point copying (Dist. Ex. 23 at pp. 7-8).

Regarding the student's visual processing delay the occupational therapist testified that she worked on copying designs, task breakdown, scaffolding, simple steps, and building 3D images with cubes (Tr. pp. 485-86). The student's teacher during the 2021-22 school year testified that the student had some trouble copying from the board and that the student opted to sit on the carpet to be closer to the board because "the tracking from looking down to up" was difficult for her (Tr.

⁹ In addition, the definition of related services includes "medical services," which are defined by State regulation as "evaluative and diagnostic services provided by a licensed physician . . . to determine whether a student has a medically related disability which may result in the student's need for special education and related services" (8 NYCRR 200.1[ee]). It is unclear from this record whether the developmental optometrist's proposed functional vision therapy evaluation would constitute an evaluative and diagnostic service provided by a licensed physician to determine whether the student has a medically related disability which may result in the student's need for special education and related services. However, based on the determination herein with respect to the parent's appeal, this question need not be resolved in this matter.

pp. 850-51). The teacher testified that if there was something longer for the student to copy, she would print it and then the student could do near point copying instead of far point copying, noting that the student needed practice in both skills (Tr. p. 851). The May 2022 IEP continued OT services and included an annual goal involving improving visual motor skills by copying three lines of text from near point with appropriate line placement and spacing, and an accommodation of flexible seating (Dist. Ex. 3 at pp. 1, 9-11).

With respect to generalizing the skills which were being worked on in OT, including visual motor skills, the occupational therapist testified that during the student's fourth grade year (2021-22), she found that the student was asking for "her strategies" more and that she gave the student bolded paper and spacer sticks and recalled the student using them in the classroom and stated "that was a nice improvement" (Tr. pp. 467-68). The August 2022 IEP added accommodations of utilizing a modified paper format of bold lined paper, including but not limited to use of spacers and highlighting as well as access to an iPad/computer daily as needed (Dist. Ex. 5 at p. 12).

The district argues that the IHO did not include any reasoning as to why the occupational therapy and accommodations the student was receiving were not sufficient to address her needs in this area, or indicate that the district was not addressing this need. Instead, the IHO's decision is predicated on testimony that vision therapy was improving the student's overall visual performance and therefore beneficial for the student. While it may be true that the student benefited from vision therapy, that does not mean that the service was required to enable the student to receive educational benefit. Moreover, the IHO erred in relying upon the February 2023 developmental vision evaluation report to determine that the OT services were not appropriate to address the student's vision needs, as the February 2023 developmental vision evaluation report was not before the May 2021, May 2022, or August 2022 CSEs (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that, in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]).

Based on the foregoing, the evidence in the hearing record demonstrates that the IEPs for the 2021-22 and 2022-23 school years included sufficient services and supports to address the student's identified vision needs.

5. Reading Instruction

Much of the IHO's decision underlying her finding that the district denied the student a FAPE for the 2021-22 and 2022-23 school years related to her view that the district failed to appropriately address the student's need in the area of reading or offer an individualized and specialized reading program or a reading evaluation (IHO Decision at pp. 2, 8-9, 11-16, 19-21). Again, the district argues that the IHO erred and that it provided a program during the 2021-22 and 2022-23 school years that was tailored to address the student's reading needs. The parent in her answer indicates that the student required "multiple levels" of reading instruction, noting that the student received Orton-Gillingham program in addition to Wilson at Vincent Smith which enabled her to make progress.

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs, as defined in subdivision 2 of section 4401 of the Education Law, in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). Education Law § 4401(2), in turn, sets for the definitions of "[s]pecial services or programs," which includes, among other things, special classes, resource rooms, consultant teacher services, and related services. Consistent with the reference to the various special services or programs included in the definition of special education under State Law, State guidance notes that specialized reading instruction could be recommended in the IEP of the student as a special class, direct consultant teacher service, related service, resource room program ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Requirements," at p. 31, Office of Special Educ. Mem. [Updated Oct. 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf).

In addition, generally, an IEP is not required to specify the methodologies used with a student and the precise teaching methodologies to be used by a student's teacher are usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94). Indeed, a CSE should take care to avoid restricting school district teachers and providers to using only the specific methodologies listed in a student's IEP unless the CSE believes such a restriction is necessary in order to provide the student a FAPE. However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

Here, the evidence shows that during the May 2021 CSE meeting, there were concerns noted with respect to the student's progress in reading and thus the May 2021 CSE recommended daily "specific reading instruction" in the classroom to be added to the student's IEP as a supplementary aid or service/program modification/accommodation (Dist. Ex. 2 at p. 10; see Tr.

pp. 589-90). The evidence in the hearing record does not support the IHO's determination that the IEP as a whole failed to adequately address the student's reading needs.

Other than the recommendation for specific reading instruction, the IEP recommended a 12:1+1 special class for the student (Dist. Ex. 2 at p. 10). As noted above, specialized reading instruction may be provided in a special class ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Requirements," at p. 31). In addition, to address the student's reading needs, the May 2021 IEP included reading annual goals involving applying learned decoding skills, increasing known sight words by 40 words, and retelling details from a story in order (*id.* at p. 8). Also, the IEP recommended speech-language therapy where the therapist worked toward annual goals involving recalling and comprehending a sequence of three events from a short story, using vocabulary related through association, and verbally discussing objects by identifying similarities and differences (*id.* at pp. 1, 8-10).

Turning to the information available to the May and August 2022 CSEs, in addition to the evaluative data regarding the student's reading needs as summarized above, I note that the student attended the district under the programming for the preceding 2021-22 school year. The student's special education teacher for the preceding 2021-22 school year testified that she provided the student with individualized instruction within her 12:1+1 special class program, incorporating Wilson methodology for reading where appropriate and frequently utilizing small group instruction (Tr. pp. 749-51, 767-69, 771-72, 778-79, 785-86, 845-46).¹⁰ The special education teacher also testified that she attended literacy trainings and worked with literacy coaches within the district to learn how to adapt and individualize the general education literacy curriculum to be appropriate to use with the student in the areas of grammar, spelling, decoding and comprehension (Tr. pp. 773-74, 785-86, 787-88). She further testified that the student received reading instruction daily in the classroom with her and then outside the classroom with a reading teacher who used multisensory instruction and a variety of methodologies and who she collaborated with often (Tr. pp. 788-89; *see* Tr. pp. 1164-174).

According to the student's goal progress report for the 2021-22 school year, for the second annual goal, that targeted the student's ability to apply her learned decoding skills to a test at her reading level, the student was progressing gradually in November 2021 and January 2022 but then was making satisfactory progress in April 2022 and June 2022 (Dist. Ex. 23 at p. 3). As for the third goal, that targeted the student's ability to increase her known sight words by 40 words, the student was noted as progressing gradually in November 2021 but then was progressing satisfactorily for the remainder of the school year (*id.*). As for the fourth goal, that targeted the student's ability to retell four details from a story in order, the student again was noted as progressing gradually in November 2021 but then was progressing satisfactorily for the remainder of the school year (*id.*).

For the 2022-23 school year, the August 2022 CSE meeting comments included reporting from the student's teacher that Wilson Reading strategies were used and, while she struggled with

¹⁰ While the special education teacher's testimony would have been retrospective in an analysis of the May 2021 CSE, it is noted here only to discuss the student's program leading up to the May and August 2022 CSE meetings.

long-vowel sounds, the student was becoming more consistent in using skills taught (Dist. Ex. 5 at p. 1). The August 2022 IEP included reading annual goals that targeted the student's ability to read a list of 10 single syllable words that include long vowel sounds, 10 single syllable words that include welded sounds, and verbally summarize a text using proper sequence when given a visual, as well as the recommendation of one-to-one specific reading instruction 30-minutes daily (Dist. Ex. 5 at pp. 2, 11). The director of pupil services for the district who was the district representative for the August 2022 CSE, testified that, based on the input from CSE members and concerns of the parent regarding the student's lack of progress in reading, the August 2022 CSE recommended 1:1 specific reading instruction, once daily for 30-minutes to be provided in the classroom or reading room (Tr. pp. 262, 270, 824; Dist. Exs. 5 at p. 11; 10).

Further, while the district did not conduct a specific reading evaluation as noted above it was determined that the evaluation of the student was adequate, and neither the parent nor IHO has so much as suggested what addition assessment(s) should have been conducted (see IHO Decision; Parent Ex. A). As noted above, the district formally assessed the student's reading abilities with subtests in the areas of early reading skills, reading comprehension, word reading, and pseudoword decoding as well as in reading related areas of listening comprehension and alphabet writing fluency (see Dist. Ex. 13 at pp. 2-5).

The foregoing demonstrates that the CSEs considered the student's needs in the area of reading and recommended appropriate programming with supports designed to address those specific needs. Further, under the circumstances presented in this matter, although the parent's dissatisfaction with the student's rate of progress in reading and desire for even faster improvement is understandable, the evidence in the hearing record does not lead me to the conclusion that the student required a specific reading methodology to the exclusion of all others in order to receive a FAPE. The CSE was not required to rely solely on the Wilson Reading Program or an Orton-Gillingham program (or a specific combination) and it was permissible for the teacher in her professional judgment to use Wilson amongst a number of other approaches in the student's instruction (see A.G. on behalf of J.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist., 2017 WL 1200906, at *9 [S.D.N.Y. Mar. 29, 2017] [noting that in response to the parent's challenges of a lack of "fidelity" to the Wilson reading system, there is no requirement that any particular methodology be used, or that it be used exclusively]). Overall, it was not necessary for the CS to limit the instructional methodologies used by the teacher, and the after-the-fact evidence raised at the time of the impartial hearing regarding the methodological choices selected for student during the 2022-23 school year at Vincent Smith is not appropriate evidence to rely upon to conclude that the CSE's decisions regarding programming were inappropriate.

6. Extended School Year Services

The IHO determined that the district's failure to recommend ESY services for the 2021-22 and 2022-23 school year denied the student a FAPE (IHO Decision at pp. 21, 24, 29-30). The IHO noted in her decision that the only area of regression for the student was in reading, however the

IHO's analysis did not use the proper standard for evaluating whether a student requires 12-month services (id. at p. 18).¹¹

The purpose of 12-month services is "to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," at p. 3, VESID Mem. [Feb. 2006], available at <https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2024.pdf>). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id.; see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 3d 94, 125 [E.D.N.Y. 2017]).

As summarized above, the documents before the May 2021, May 2022 and August 2022 CSE did not include information that the student experienced regression, i.e. that the student had achieved skills and then lost them to the degree that it would take an inordinate period of review to reestablish them.

While, as the IHO noted, a review of the student's Fountas and Pinnell benchmarks from the 2020-21 and 2021-22 school years in particular offer some evidence of regression in the area of reading (IHO Decision at p. 15-16; Dist. Ex. 31), however a wider and more comprehensive review of the student's progress during the 2021-22 school year does not indicate that she experienced substantial regression.¹²

It is not clear from what source the IHO gathered the grade level descriptors included in her chart of the benchmark scores reported in the reading data sheets; however, I note that, while she correctly notes that the student's instructional levels fluctuated "not necessarily in an upward manner" and that over three school years the student's level went from kindergarten to a mid-first grade, this indicates slow but steady growth which is not inconsistent with the student's delays in cognitive and language skills and her reported inconsistent progress rates (see IHO Decision at pp. 15-16; Parent Ex. C at pp. 1-8; Dist. Exs. 2 at p. 7; 3 at pp. 6, 8; 31 at pp. 1-72). I further note that according to the IHO's grade level descriptors, the student's instructional level "fluctuations" between levels "C" and "G" using Fountas and Pinnell indicators during the 2020-21 and 2021-22

¹¹ The parent in her due process complaint notice also does not indicate why the student needed ESY services except to support her argument that the student did not make progress within the district program during the 2021-22 school year which deprived her of a FAPE (see generally Parent Ex. A).

¹² I note the chart of the Fountas and Pinnell benchmark scoring percentages compiled by the IHO contains some errors (compare IHO Decision at p. 15, with Dist. Ex. 31 at pp. 11, 24).

school years represented a range from kindergarten to mid first grade, which was not necessarily an unexpected range of performance for a student with attention, focus and stamina concerns (IHO Decision at pp. 15-16; see Tr. pp. 75, 417-18; Dist. Exs. 2 at pp. 1, 5, 7; 3 at pp. 5-6).

The student's teacher during the 2021-22 school year testified that she believed that when the student "came in" she was told the student was at a "G" reading level but that she had questioned that, as when she did some assessments, she believed the student was at a level "D" at that time (Tr. p. 789). She added that it was not uncommon for students to experience some regression, but that there seemed to be a lot of regression for the student and that she did not know the circumstances of what had happened prior (Tr. p. 789). A review of the student's benchmark scores from the year prior, January 2020 to October 2020, does not suggest the student suffered from substantial regression over that summer break, and therefore it does not seem unreasonable for the student's teacher to question the circumstances which led to the student's apparent demonstration of learning loss at the beginning of the 2021-22 school year (IHO Decision at p. 15; Dist. Ex. 31 at pp. 5-12; see Tr. pp. 789-90).

Reporting from district staff did not indicate regression. The speech pathologist, who worked with the student during the 2021-22 school year and participated at the May 2022 CSE meeting, testified that the committee was not concerned with the student's deficits in memory and attention because with regard to ESY services the CSE looked at regression and she was not seeing regression during periods of time when the student was away from school (Tr. p. 1040). The occupational therapist, who worked with the student during the 2019-20, 2020-21, and 2021-22 school years, testified that she did not recall the student showing signs of regression at the beginning of the 2021-22 school year and while the student sometimes needed a little time to catch up she would not say "regression, per se like that required a lot of reteaching" (Tr. p. 510). The student's reading teacher during the 2021-22 school year testified that she had never recommended to any of her colleagues or to the CSE that the student receive ESY services (Tr. p. 1185).

Additionally, none of the evaluation reports conducted during this period of time, including a parentally obtained June 2021 neuropsychological evaluation, identified that the student experienced substantial regression or included a recommendation for the student to receive ESY services (see Parent Exs. C at pp. 1-8; D at pp. 1-4; E at pp. 1-10; Dist. Exs. 13 at pp. 1-6; 16 at pp. 1-3; 17 at pp. 1-5; 18 at pp. 1-4).

Review of the hearing record does not convince me that the student met the criteria for substantial regression during school breaks, or that the parent requested a 12-month program be considered at any time prior to the August 2022 ten-day notice of unilateral placement (Parent Ex. G; see Dist. Exs. 2-3, 5). Without evidence of substantial regression at the time of the CSE meetings, such that the student inordinate period of review to recover specific lost skills, the IHO erred by finding that the failure to consider extended school year services contributed to a denial of FAPE as the district had no reason to consider such services at the time of the May 2021, May 2022, or August 2022 CSE meetings.

C. Independent Educational Evaluations (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]).¹³

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]).

Here, the IHO erred in awarding reimbursement for the IEEs as there is nothing in the hearing record to suggest the parent ever expressed disagreement with district evaluations (see generally Parent Exs. A-V; Dist. Exs. 1-36; Tr. pp. 1822-96). The parent testified she never asked the district to fund any of the IEEs she obtained (Tr. p. 1883). It appears the first time the parent requested payment for the IEEs was in her due process complaint notice (see Parent Ex. A). However, as determined above, the CSEs that developed IEPs for the 2021-22 and 2022-23 school year had sufficient and appropriate evaluations to base its recommendations upon (see Dist. Exs. 2-5). The evidence shows that the parent obtained an independent psychoeducational evaluation report dated November 27, 2022, an independent auditory processing evaluation dated December 26, 2022 and an independent developmental vision evaluation report dated February 10, 2023, that she provided to the district on April 25, 2023 (Dist. Exs. 19-21; 36). As I have found that the district offered the student a FAPE, there is no alternative ground to order district funding of the IEE as equitable relief. Moreover, the 2023-24 school year was not at issue in this case, thus it was outside the scope of the impartial hearing and the IHO erred by addressing and awarding relief

¹³ 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]).

tied to the June 2023 CSE's recommendations (see generally Parent Ex. A). As such the IHO's ordered relief of reimbursement for private IEEs must also be reversed.

VII. Conclusion

Having determined that the IHO erred in finding that the district denied the student a FAPE for the 2021-22, and 2022-23 school years, the necessary inquiry is at an end. Furthermore, based on the determinations above, the IHO also erred in awarding reimbursement for private vision services and for the private IEEs obtained by the parent.

I have considered the parties' remaining contentions and find them unnecessary to address given my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated July 5, 2024, is modified by reversing those portions which determined that the district did not offer the student a FAPE for the 2021-22 and 2022-23 school years and directed the district to reimburse the parents for the cost of tuition at Vincent Smith for the 2022-23 school year; and

IT IS FURTHER ORDERED that the IHO's decision, dated July 5, 2024, is modified by reversing those portions which ordered the district to reimburse the parent for private vision services and private independent educational evaluations consisting of the November 27, 2022 psychoeducational evaluation report, the December 26, 2022 auditory processing evaluation, and the February 10, 2022 developmental vision evaluation.

Dated: **Albany, New York**
 October 4, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER