



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-479

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

### **Appearances:**

Law Offices of Adam Dayan, attorneys for petitioners, by Amled Perez, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the entire annual cost of their son's tuition at Imagine Academy Inc. (Imagine Academy) for the 12-month 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which determined that the educational program recommended by its Committee on Special Education (CSE) for the parents' son for the 10-month 2023-24 school year was not appropriate and ordered the district to fund the cost of a private neuropsychological evaluation. The appeal must be sustained to the extent indicated, and the cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

During the 2022-23 school year, the student attended a preschool Head Start program operated by a nonpublic school and received the following special education services through the district: 1:1 special education itinerant teacher (SEIT) services, speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Tr. p. 47; Parent Ex. Y ¶¶ 5-8; Dist. Exs. 4

at p. 1; 5 at p. 1; 8 at pp. 1, 8, 10, 12).<sup>1</sup> According to the parent, the SEIT implemented an applied behavioral analysis (ABA) program created by a board certified behavior analyst (BCBA) who was paid for through health insurance and, except for the time the student spent with the SEIT, he had the support of 1:1 paraprofessional services (Tr. p. 47; Parent Ex. Y ¶ 8).

In or around December 2022, the student's preschool informed the parents that the student would not be permitted to return as of January 2023 because the school "could not contain [the student's] behaviors" (Parent Ex. Y at ¶ 10; Dist. Exs. 4 at p. 1; 5 at p.1). Following the student leaving his preschool program, the parents indicated they contacted the district in an effort to place the student in a center-based program (Parent Ex. Y ¶¶ 11-12). The district conducted a social history interview in January 2023, a classroom observation in March 2023, and a psychoeducational evaluation in April 2023 (Parent Ex. Y ¶ 15; Dist. Exs. 4-6).<sup>2</sup> The parent indicated that, although not formally enrolled, the student began receiving 1:1 ABA and related services at Imagine Academy in spring 2023 (see Parent Ex. Y ¶¶ 13-14, 36; see Dist. Ex. 4 at p. 1).

On May 2, 2023, a CSE convened and noted on the student's IEP that he was temporarily attending Imagine Academy, he was not receiving any services from the district at the time of the meeting, and he had initially been recommended for a center-based program for preschool but the parents opted for a SEIT program instead (Parent Ex. Y ¶ 18; Dist. Exs. 1 at pp. 1, 40; 4 at p. 1; 5 at p. 1). During the May 2023 CSE meeting, in which the student's mother participated, the CSE determined the student was eligible for special education as a student with autism and developed an IEP with a projected implementation date of September 1, 2023 (Parent Ex. Y ¶ 18; Dist. Ex. 1 at pp. 1, 40).<sup>3</sup> The May 2023 CSE recommended that the student be placed in a 6:1+1 special class for math, English Language Arts (ELA), social studies, and sciences and receive the following supports and services: three 30-minute sessions of individual OT per week; four 30-minute sessions of individual speech-language therapy per week; three 30-minute sessions of individual PT per week (Dist. Ex. 1 at pp. 31-32). The IEP further recommended five 60-minute sessions of parent counseling and training per year and special transportation with door to door busing from the closest safe curb location to school (id. at pp. 32, 37). In addition, the IEP noted that the student was recommended for 12-month services consisting of the same special education programs and services as recommended for the 10-month school year (id. at p. 33).

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<sup>1</sup> State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at <https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities>). SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

<sup>2</sup> Parent Exhibit Z is duplicative of District Exhibit 5. For purposes of this decision, only the district exhibit was cited. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

<sup>3</sup> The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In an email dated May 10, 2023, the parents attempted to contact the student's Committee on Preschool Special Education (CPSE) administrator in order to locate a "spot[] in [a] nearby school[] that offer[ed] ABA" (Parent Exs. Y ¶21; AA at p. 3-4). In an email dated May 11, 2023, the student's then current CPSE administrator responded to the parents' email indicating that the student was "currently receiving" 10 hours per week of SEIT services, along with speech-language therapy, OT, and PT and that those services would continue to be provided "through the summer," further advising that the district did not "subscribe to an specific methodologies when implementing services" (Parent Ex. AA at p. 2). The parent responded the same day, notifying the CPSE administrator that the student had not been getting any services, other than ABA through an agency, since January 2023 when the student's school dismissed him and reiterated her request for "a school placement" (id. at p. 1).

The CPSE convened on June 2, 2023 and continued the student's program which, at the time, consisted of SEIT services and related services (Parent Ex. G).<sup>4</sup> The district sent the parent a consent form, dated June 2, 2023, for the provision of the CPSE program over July and August 2023, which indicated that the recommended changes would be made if the parent did not respond by June 15, 2023 (id.).

On or about June 8, 2023, the student's mother signed an enrollment contract with Imagine Academy for 2023-24 school year (Parent Ex. M).

On or about June 9, 2023, the district notified the parents of the public school at which the student's educational program would be implemented beginning in September 2023 (Dist. Ex. 3).

In email correspondence between parents and the CPSE administrator from June 13, 2023 through June 20, 2023, the parents requested that the district provide the student with a school placement for the summer, the CPSE administrator advised that the district could not change the student's preschool placement without a new evaluation, and the parents requested a reevaluation of the student in order for the CPSE to consider changing the student's IEP (Parent Exs. E; I; J).

On June 21, 2024, the parents provided the district with notice of their intent to unilaterally place the student at Imagine Academy for the 2023-24 school year and to seek district funding for the costs associated with the student's enrollment (Parent Ex. B). In that letter, the parents indicated that although the parents contacted the agencies identified in the list provided by the CPSE for an evaluation, an evaluation had not yet been scheduled and the parent had no choice but to set up her own program for the student (id. at p. 2).

The student began attending Imagine Academy as an enrolled student on July 6, 2023 (Parent Exs. Y ¶ 36; Q at p. 1).

In a letter dated August 4, 2023, the parents, expressed their disagreement with the program recommended for implementation in September 2023 and their disagreement with the public school the student was assigned to attend beginning in September 2023 (Parent Ex. F).

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<sup>4</sup> Neither party offered a copy of the June 2023 IEP for admission into the hearing record.

In an email sent on October 10, 2023, the student's mother informed the district that she had not heard from anyone as to scheduling an evaluation of the student and that, unless the district scheduled a neuropsychological evaluation, she would schedule her own and seek reimbursement (Parent Ex. K). According to the parents, after receiving no response, they scheduled a private neuropsychological evaluation of the student (Parent Ex. Y ¶ 31). In December 2023, the student underwent a private neuropsychological evaluation (Parent Ex. L).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated April 12, 2024, the parents, through their attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 12-month 2023-24 school year (Parent Ex. A). As for the summer session, the parents alleged that the district refused to recommend a full-time special education placement without a new evaluation, which the district failed to conduct or fund (*id.* at pp. 8-10). As for the 10-month school year, the parents alleged procedural flaws in the development of the May 2023 IEP, substantive deficiencies in the IEP itself, and that the district's assigned school would not have been able to implement the recommended program (*id.* at pp. 7-8, 10). Among other substantive deficiencies in the May 2023 IEP, the parents alleged that, given the student's behavioral challenges, the district should have recommended a paraprofessional for the student's safety (*id.* at pp. 7-8). The parents further alleged that the district failed to defend its psychoeducational evaluation, with which the parents expressly disagreed (*id.* at p. 11). As relief, the parents sought direct funding to Imagine Academy in the amount of \$144,000.00, the cost of the student's tuition for the 2023-24 school year, and reimbursement in the amount of \$5,000.00, for the cost of the December 2023 neuropsychological evaluation (*id.* at pp. 14-15).<sup>5</sup>

### **B. Impartial Hearing Officer Decision**

On July 17, 2024, an impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) and concluded the same day (*see* Tr. at pp. 1-68). The parents presented various exhibits, each of which the IHO admitted into evidence (*see* Tr. pp. 9-10; Parent Exs. A; B; E-CC). The parents' exhibits included testimony by affidavit of the neuropsychologist who evaluated the student in December 2023, the principal at Imagine Academy, and the student's mother, each of whom appeared for cross-examination during the hearing (*see* Tr. pp. 26-39, 42-48, 50-55; Parent Exs. W-Y). The district did not present any witness testimony but did offer several documents as evidence, each of which the IHO admitted into evidence (*see* Tr. pp. 7-8, 25; Dist. Exs. 1-8).

In a decision dated September 17, 2024, the IHO determined that the district's failure to recommend or implement a center-based program for the 12-month portion of the 2023-24 school year (i.e., the 2023 summer session) did not constitute a denial of a FAPE as the IHO determined that the recommendation for SEIT services and related services, with the additional ABA services

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<sup>5</sup> In their due process complaint notice, the parents also requested special transportation with all necessary special transportation accommodations, and/or reimbursement of any private transportation expenses incurred by the parents as a result of the district's failure to provide special transportation with all necessary special transportation accommodations (Parent Ex. A at p. 15). However, the student's mother later testified that the parents have no claim for transportation expenses, as the district provided transportation for the student for the 2023-24 school year (Parent Ex. Y ¶ 44).

the student received through insurance was sufficient (IHO Decision at p. 23). The IHO reasoned that, when the CPSE reconvened on June 2, 2023 and, again, recommended only SEIT services and related services, the parents had not provided new evaluative information to justify a change to a more restrictive program and did not immediately express disagreement with the CPSE's recommendations (id.). The IHO further reasoned that the parents agreed with the recommended SEIT services prior to the student's dismissal from his former preschool and did not register disagreement with the June 2023 IEP until June 14, 2023, at which point it was too late for the district to reevaluate the student and develop a new program prior to the start of the summer portion of the school year (id.). According to the IHO, the record did not show that the student needed a center-based program, and, because the parents rejected the district's offer to implement the recommended services, it was not the district's fault that the student did not have district-provided services during summer 2023 (id.).

As for the 10-month school year, the IHO initially rejected many of the parents' contentions, explicitly finding that the neuropsychological evaluation was not available to the May 2023 CSE and, therefore, any finding of a denial of FAPE could not be based on whether the CSE rejected the recommendations made as part of the neuropsychological evaluation (IHO Decision at p. 24). The IHO also rejected the parents' allegations related to the evaluative information relied on by the CSE, the student's alleged need for ABA services, the recommended class size, and the ability of the assigned public school to implement the IEP (id.). The IHO also found that it was reasonable to wait until the start of the school year to conduct a functional behavioral assessment (FBA) and complete a behavioral intervention plan (BIP) for the student as "his program was going to change drastically in the fall"; however, the IHO found that, given the nature of the student's aggressive and self-injurious behaviors and the May 2023 IEP notation that the student needed intensive and continuous supervision, the district should have recommended the support of a paraprofessional until an FBA and a BIP could be completed (id. at p. 25). The IHO found that, although the parents requested a paraprofessional, the May 2023 IEP did not contain a cogent or responsive explanation for the denial of that request (id.). For that reason alone, the IHO determined that the district did not meet its burden of proving that it offered the student a FAPE for the 10-month school year (id.).

Having determined that the district denied the student a FAPE for the 10-month school year, the IHO briefly addressed whether Imagine Academy provided an appropriate educational program for the student (IHO Decision at p. 25). According to the IHO, the parents met their burden in that regard with "evidence of significant individualization and adaptation of instruction to meet the student's unique needs," including the creation of individual goals and a behavior plan (id.). The IHO found "[m]oreover, the student made progress in the program" (id.).

Having determined that Imagine Academy provided an appropriate educational program for the student, the IHO also addressed whether equitable considerations supported the parents' request for relief (IHO Decision at pp. 23-24, 25). The IHO, noting that equitable considerations were an additional reason to deny funding for the summer portion of the 2023-24 school year, found that the parent was unreasonable in rejecting services during the summer months and that the hearing record was not clear as to whether the student was enrolled in Imagine Academy over the summer (id. at pp. 23-24). The IHO then found that it was unclear from the Imagine Academy and parents' contract whether the tuition costs of \$144,000.00 covered only the 10-month portion of the school year or the entire 12-month school year (id. at p. 25). Therefore, given the IHO's

determination that no relief was warranted for the summer months, the IHO ordered the parents to provide the district with a new payment affidavit clarifying whether the \$144,000.00 covered the entire school year and that if it did, the district must fund five-sixths of the total tuition amount, which was \$120,000.00 (*id.*).

Finally, the IHO addressed the parents' request for an independent educational evaluation (IEE) and ordered the district to provide reimbursement to the parents in the amount of \$5,000.00 for the cost of the private neuropsychological evaluation, upon receipt of the corresponding invoice and proof of payment (IHO Decision at p. 25). The IHO reasoned that the parents disagreed with a specific district evaluation, and the district neither filed for due process to defend its evaluation nor disputed the parents' reimbursement request (*id.*).

#### **IV. Appeal for State-Level Review**

The parents appeal for state-level review, and the district cross-appeals. The parties' familiarity with the issues raised in the parents' request for review and the district's answer and cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. In review of the pleadings, the parties raise the following issues on appeal: whether the IHO erred in determining that the district met its burden of proving that it offered the student a FAPE for the extended portion of the 2023-24 school year; whether the IHO erred in determining that the district did not meet its burden of proving that it offered the student a FAPE for the 10-month portion of the 2023-24 school year; and whether the IHO erred in awarding reimbursement of the cost of the December 2023 private neuropsychological evaluation.

#### **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; *see* T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the

Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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



provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>6</sup>

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. Preliminary Matters**

As an initial matter, neither party has appealed the IHO's determination that the parents met their burden of proving that the private school provided an appropriate educational program for the student. That unappealed determination has, therefore, become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992 (S.D.N.Y. March 21, 2013).

Before addressing the merits, I must also address the parents' submission of additional documentary evidence with their request for review. The district objects to admission of the parents' additional evidence, an email sent from the IHO to the parties' attorneys on August 15, 2024, for consideration on appeal (see Req. for Rev. Ex. DD).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at \*3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne.

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<sup>6</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

The document in question, an email to the parties' attorneys in which the IHO directed the district to submit the student's preschool IEP or face an adverse inference, is not necessary to render a decision on appeal (see Req. for Rev. Ex. DD). Indeed, as further discussed below, it is the absence of the June 2023 IEP from the hearing record, not the IHO's directive to submit said IEP, that is consequential in this case. In any event, the above-described email is already a part of the hearing record on appeal as a supplemental document required to be included in the record by State regulation (see 8 NYCRR 200.5[j][5][vi]; 279.9[a]). Therefore, I decline to accept the parents' additional evidence for admission and consideration on appeal.

Additionally, as a final preliminary matter, a brief discussion of the student's transition from preschool to school age special education services is warranted. As a preschool student with a disability, the student was entitled to continue to receive special education and related services under the CPSE through summer 2023 (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]). Thus, the June 2023 CPSE developed an IEP for the student for implementation over the summer and the May 2023 CSE developed an IEP for the student with an implementation date of September 1, 2023 (Parent Ex. G; Dist. Ex. 1).

## **B. 2023-24 School Year**

### **1. Evaluative Information and Student Needs**

Turning to the merits, the parties dispute whether the IHO erred in determining that the district offered the student a FAPE for the summer portion of the 2023-24 school year but denied the student a FAPE for the 10-month portion of the school year. A review of the student's needs and then-current functioning, as known to the district while planning for the student's education during the 2023-24 school year, will provide the further background necessary to evaluate the adequacy of the district's recommendations. To that end, the following materials were available to the district and considered in development of the student's educational plan for the 2023-24 school year at either or both of the May 2023 CSE and June 2023 CPSE meetings: a December 2022 SEIT progress report; a December 2022 speech-language therapy progress report; a January 2023 OT progress report; a January 2023 PT progress report; an Annual Review IEP report; a January 2023 social history update, a March 2023 classroom observation; and an April 2023 psychoeducational reevaluation (Dist. Exs. 4-8).

In December 2022, the agency delivering the student's preschool services provided progress reports for SEIT and speech-language therapy services, and in January 2023 progress reports for OT and PT services (Dist. Ex. 8 at pp. 1-13). In addition, the agency providing the student's services developed its own report of the student's present levels of performance and annual goals (id. at pp. 14-33).

The December 2022 SEIT progress report indicated that, at the time it was written, the student was attending a general education preschool Head Start program, where he received SEIT services, speech-language therapy, OT, and PT (Dist. Ex. 8 at p. 1). According to the SEIT progress report, the student presented with cognitive and social/emotional/behavioral deficits (id.).

The progress report noted the student had made progress in his attending skills in that he was able to attend to a short, close-ended activity, simple direction, and play with a toy for a "few short minutes" (id.). However, the student was unable to attend for longer than one to three minutes and was unsuccessful at attending to a short and interactive circle (id.). The progress report indicated the student had significant weaknesses understanding basic concepts related to color, shape, and size and was unable to understand many verbal directions (id. at pp. 1-2). With respect to communication, the SEIT progress report stated the student exhibited delays in receptive language, had difficulty interpreting nonverbal communication, and was minimally verbal (id. at p. 2). In terms of social/emotional development, the progress report indicated the student's weak social skills affected his ability to interact with adults and peers (id.). The progress report noted the student exhibited "continuous challenges with sharing [] toys or the space he [wa]s using" (id.). In addition, the student engaged in tantrums which often escalated to self-injury (e.g., banging his head on the floor), aggression toward peers and adults (e.g., pinching, biting, or kicking), and property destruction (id. at pp. 2, 5). According to the SEIT progress report, the student physically harmed classmates on a few occasions (id.). The SEIT progress report further documented that the student was not easily calmed down once irritated, struggled to transition without tantrums, and had made limited progress in tolerating changes to routine (id. at pp. 2-3, 5). The SEIT reported using ABA methodologies to address those deficits (id.). The SEIT progress report indicated that the student demonstrated delays in reading and math readiness skills and could not identify letters or numbers (id. at p. 3). The report also indicated the student demonstrated delays in prewriting skills and deficient self-care routines (id.). The SEIT progress report noted significant regression following breaks during which the student did not receive services (id. at p. 7).

According to the December 2022 speech-language progress report, the student received speech-language therapy services for four 30-minute sessions per week (Dist. Ex. 8 at p. 8). The speech-language progress report documented the student's significant attentional weakness, which affected his ability to initiate, attend to, and complete a task (id.). The progress report also identified the student's expressive language delays and oral motor deficits (id.). The student had difficulty answering questions or asking for help (id.). According to the speech-language progress report, delays in social pragmatics affected the student's use of language to communicate with others (id. at pp. 8-9). Notably, the student demonstrated an inability to make eye contact or initiate conversation with others (id. at p. 9). According to the progress report, the student also demonstrated articulation delays (id.). Lastly, the report noted significant regression in the student's social pragmatics and attention span following breaks during which the student did not received services (id.).

According to the January 2023 OT progress report, the student exhibited delays in the areas of visual motor/perception, activities of daily living (ADLs), attention span, gross motor planning, and fine motor coordination (Dist. Ex. 8 at p. 10). The OT progress report documented significant weakness in the student's daily living skills which affected his ability to dress himself, as well as sensory processing challenges which hindered his ability to perform fine motor activities with body awareness and coordination (id.). The progress report indicated the student was working on appropriate sitting posture during seatwork and under-responsiveness to proprioceptive stimuli (id.). The OT progress report noted significant regression in the areas of strength, balance, coordination, and fine motor skills after breaks (id. at p. 11).

The January 2023 PT progress report documented delays in the student's gross motor skills in the areas of strength, motor planning, and coordination (Dist. Ex. 8 at p. 12). According to the PT progress report, the student had decreased balance and significant weakness in his trunk, hips and ankles which affected his locomotion skills such as walking up and down stairs, riding a bike, and catching a ball (id.). Decreased body and safety awareness was a reported area of concern, as the student reportedly bumped into objects and peers when ambulating (id.). The PT progress report further documented that the student required significant prompting due to poor attending skills (id.). According to the report, anticipated interventions included working with the student on eliciting movement using unstable surfaces and moveable playground equipment (id. at p. 13). The PT progress report noted significant regression in the student's strength, balance, coordination, and age-appropriate gross motor development after breaks (id.).

According to the annual review IEP report prepared by the agency providing the student's services, the student presented with cognitive, social/emotional/behavioral, expressive language, and oral motor deficits (Dist. Ex. 8 at pp. 15-16). The annual review IEP report stated that based on the SMART Assessment tool, the student scored very poorly across cognitive, language, social, activities of daily living, and fine motor domains (id. at p. 15). The report further stated that informal assessment "revealed [an] inability to remain focused during a task, impulsive behaviors, and lack of eye contact" (id.). Additional informal assessments revealed delays in the student's ADLs, fine motor development, and sensory processing ability (id.). While the annual review IEP report stated the student "scored well in the gross motor domain" as measured by the SMART Assessment, and demonstrated age-appropriate gross motor skills based on informal assessment, it also stated that that delays were noted in the student's overall strength, balance, coordination and motor planning (id.). The annual review IEP report described the student's disposition as "self-directed" and "often impulsive" and noted that the student's preferred learning styles appeared to be visual, auditory, and kinesthetic/tactile (id. at pp. 15, 16). The report noted that the ability to use a picture exchange communication system to request tangible items was a strength of the student (id. at pp. 17-18).

Overall, the student's present levels of performance as described in the annual review IEP report mirrored the narratives found in the December 2022 SEIT and speech-language progress reports and the January 2023 OT and PT progress reports (compare Dist. 8 at pp. 15-19 with Dist. Ex. 8 at pp. 6-13).

Turning to the evaluations completed by the district, a district school psychologist completed a social history update and classroom observation as part of the student's reevaluation for his "Turning Five" CSE meeting (Dist. Exs. 5; 6; see Dist. Ex. 1 at p. 40). The social history update, completed on January 26, 2023, consisted of a parent interview which revealed that the student was not attending school as the agency providing the student's services felt it could not meet the student's needs (Dist. Ex. 5 at p. 1). The parent reported that, as a result of being home, the student was not receiving services from the district but was receiving two hours per day of SEIT services through insurance and that he had begun receiving ABA therapy at Imagine Academy (id.).

During a classroom observation, completed on March 30, 2023, the school psychologist observed the student with his board-certified behavior analyst (BCBA) and registered behavior

technician (RBT) who engaged in various activities with the student (Dist. Ex. 6 at pp. 1, 2).<sup>7</sup> The school psychologist reported that throughout the observation the student was "very self-directed" and only remained at a task for a few minutes (id. at p. 2). She further reported that the student made fair eye contact, repeated some words, and frequently made sounds (id. at p. 1). The school psychologist reported that the student took a while to transition from one location to another and initially remained in the hall (id.). She noted that the student touched toys, seemingly without any practical purpose, and tended to become aggressive as soon as he did not like something (id.). The school psychologist observed the student going in the "crash room," a room used for self-regulation, where he laid down on a cushion and kept opening and closing the door (id.). A therapist reportedly used a one-minute timer with a preferred object to engage the student, and the student reportedly followed simple directions (id.).

According to the school psychologist, an interview with the student's therapists revealed that the student had attended Imagine Academy for about one and a half months (Dist. Ex. 6 at p. 2). The student's therapists reported that the student "had no basic readiness skills" (e.g., letter or number recognition), but was able to sort colors (id.). In addition, according to the therapists, the student was not toilet trained and had difficulty with dressing, but he was able to feed himself (id.). As noted by the school psychologist, the therapists reported that, while the student followed simple one-step directions, he was "almost non-verbal" and unable to express his needs/wants clearly (id.). The therapists' characterized the student's attention/concentration as below average and reported delays in fine motor and visual motor skills, as well as sensory issues (id.). The student's therapists reportedly felt that the student's behavior was limiting his progress (id.). Based on her observation of the student and interview with his therapists, the school psychologist reported the student exhibited aggressive behaviors such as hitting, kicking, and biting (id.).<sup>8</sup> The student's reported tantrums included self-injurious behaviors such as banging himself on the floor (id.). The observation and therapists' interview revealed that the student required guidance and support during transitions (id.).

The district school psychologist who conducted the January 2023 social history update and March 2023 classroom observation, conducted an April 2023 psychoeducational evaluation of the student, which consisted of parent and teacher interviews and administration of the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) and the Gilliam Autism Rating Scale, Third Edition (GARS-3) (Dist. Ex. 4). According to the school psychologist, the interview with the student's mother revealed that the student lacked readiness skills and could not identify letters but could count through 14 (id. at p. 1). The student's mother reported that the student had a short attention span, moved around a lot, had difficulty following directions, and struggled with peer relations (id.).

The school psychologist reported staff at the agency that provided the student's preschool services were also interviewed and likewise reported delays in the student's early readiness skills (id.). Their biggest concern, however, was the student's behaviors, which included physical

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<sup>7</sup> Handwritten notes on a teacher interview form completed by the district school psychologist as part of an interview of the student's BCBA indicates that the student was not receiving the recommended 10 hours per week of SEIT services but was receiving 20 hours per week of ABA therapy (Dist. Ex. 7 at p. 2).

<sup>8</sup> A handwritten note on the psychologist's interview worksheet stated, "[b]ehaviors [b]ig [p]roblem" (Dist. Ex. 7 at p. 3).

aggression toward staff and students (id.). The program staff "felt they could not meet the students' needs in their school environment even with the ABA program" (id.).

The psychoeducational evaluation report reflected the school psychologist's classroom observation report that included provider interviews at Imagine Academy, which revealed the student's limited readiness and daily living skills, problems with transitioning, and short attention span (Dist. Ex. 4 at p. 3). Providers at Imagine Academy reported delays in the student's speech skills, fine and gross motor skills, and social pragmatics (id.). According to said providers, the student exhibited sensory issues, tantrums, aggressive behaviors, and significant difficulty relating to others (id.) The student's negative behaviors reportedly affected his speech-language progress (id.).

According to the April 2023 psychoeducational evaluation report, the Vineland Adaptive Behavior Scale-Third Edition (Vineland-3), administered as part of the reevaluation process, indicated that the student's overall functioning was in the "low range" based on parental report (Dist. Ex. 4 at pp. 3-4). More specifically, the student's score for the Adaptive Behavior Composite (ABC) fell below the first percentile, which suggested that his overall adaptive behavior was "significantly delayed" (id. at p. 3). Based on parent responses, the student's communication skills were in the "low range," consistent with significant speech-language deficits (id.). The student's daily living, socialization, and motor skills were also judged to be below the first percentile and in the low range (id. at pp. 3-4).

Administration of the GARS-3 to the parent yielded an Autism Index of 92 (30% percentile), which indicated it was "[v]ery [l]ikely" the student displayed the symptomatic behavior of a student with an autism spectrum disorder (Dist. Ex. 4 at p. 5). According to the psychoeducational evaluation report, the student's score was to be considered "Level Two," indicative of a child who required substantial support (id.). The evaluation report indicated the student exhibited the most difficulty in behaviors related to social communication (id.). The evaluation report reflected the parent's concerns that the student did not initiate conversations with peers or others and became frustrated quickly, resulting in temper tantrums such as hitting, screaming, or throwing himself on the floor (id.). If changes in routines occurred, the student became easily upset, echoed words or phrases verbally, and made high-pitched sounds and other vocalizations for self-stimulation (id.). According to the evaluation report, "[b]ehaviors of concern that [we]re somewhat like [the student] included": preoccupation with specific stimuli, objects, or items, staring at his hands, using toys inappropriately, repetitive behaviors, and making unintelligible sounds over and over (id.). The evaluation report indicated the student frequently engaged in repetitive or stereotyped behaviors such as rapid lunging or darting movements (id.).

The psychoeducational evaluation report characterized the student as "very self-directed" and "almost non-verbal" (Dist. Ex. 4 at pp. 5-6). Formal testing was not possible because the student "could not follow simple directions" and "did not show any interest in the testing materials" (id. at p. 5). According to the report, while working with therapists, the student was observed "constantly moving around the room, touching items[,] and maintaining only fleeting eye contact" (id.). The student struggled with transitions, especially to a non-preferred activity (id. at p. 6). When the student did not get what he wanted, he tended to cry, make noises, become physically aggressive, and/or self-injure (id. at p. 5). However, the student could be "easily calmed down by rubbing his back or speaking to him softly" (id.).

The school psychologist concluded that the student had delays in cognition, adaptive behavior, speech/language development, attention/concentration, motor skills, and social emotional functioning (Dist. Ex. 4 at p. 6). According to the evaluator, the student "require[d] a highly structured, low student to teacher ratio when he begins Kindergarten in the [f]all" (*id.*). The psychoeducational evaluation report further stated that the student "require[d] intensive and consistent supervision to help him to make progress and keep him safe in his school environment" (*id.* at p. 7).

## **2. May 2023 IEP**

As noted above, the May 2023 CSE convened to recommend a program for the 10-month portion of the 2023 school year with an implementation date of September 1, 2023 (Dist. Ex. 1 at p. 1). The May 2023 CSE recommended the student attend a 6:1+1 special class in a specialized school, in part due to his need for continuous supervision (*id.* at pp. 4, 9, 39). The CSE determined that the student's needs could not be met in either a general education setting or a 12:1+1 special class (Dist. Exs. 1 at pp. 9, 39; 2 at p. 2). The CSE also considered but rejected an 8:1+1 special class for the student, reasoning that the student "require[d] the support of a smaller class ratio to address behavioral concerns (such as aggressiveness and self-injurious behaviors)" (Dist. Exs. 1 at p. 39; 2 at pp. 2-3). The CSE considered but rejected conducting an FBA and developing a BIP for the student, reasoning that the student was "temporarily attending his current school," was not in a classroom with other students, and was being instructed using ABA methodology (Dist. Exs. 1 at p. 39; 2 at pp. 2-3). The May 2023 IEP further noted that "[t]he student would be attending a different program in the [f]all," at which time an "FBA/BIP should be considered" (*id.*).

With regard to related services, the CSE recommended that the student receive four 30-minute sessions of individual speech-language therapy per week to improve his expressive and receptive language skills, oral motor skills, and social pragmatics (Dist. Ex. 1 at pp. 4, 32). Regarding the student's physical development, the CSE recommended three 30-minute sessions of individual OT per week to improve the student's fine motor coordination, prewriting/handwriting skills, visual-motor coordination/visual perceptual skills, and sensory processing, as well as three 30-minute sessions of individual PT per week to improve the student's gross motor coordination and strength (*id.* at pp. 9, 32). The CSE recommended that teachers/providers use tactile sensory input (e.g., holding the student or stroking his back) to help the student control sensory needs and calm down (*id.* at p. 9). In terms of social/emotional support, the CSE recommended that teachers/providers give positive reinforcement (e.g., stickers), offer "incentives as needed during the instructional day," and offer alternatives when the student "does not get what he wants" (*id.* at p. 7). The CSE also recommended providing the student "with a quiet and safe space when he need[ed] to work on regulating his emotions" and teaching the student "strategies to help him to calm down (e.g., count to 3)" (*id.*).

The May 2023 CSE also identified the following modifications and resources to address the student's management needs: minimize distractions to help the student better focus on activities; provide short movement breaks every 20 minutes or as necessary when the student was unable to attend to tasks; verbal/positional prompts and/or cues to help the student respond to questions; provide high interest hands-on activities, visual aids, and manipulatives to help the student learn new concepts and maintain attention; provide the student with a visual schedule (picture cards) to help him follow the school routine; repeat directions/information/questions as

needed; provide simple instructions when giving the student tasks/activities; and post class rules (i.e., visual cards) so that the student would know what was expected of him (*id.* at p. 9). The CSE created 25 annual IEP goals for the student that focused on the following skills: letter identification; number identification; listening comprehension; 1:1 correspondence; matching items; ADL skills including toileting; attending; transitioning; dealing with frustration; managing social interactions; expressive and receptive language skills; oral motor skills; fine motor manipulation; visual motor coordination; sensory processing; and gross motor skills (*id.* at pp. 11-32).

### **3. June 2023 CPSE Meeting**

According to the parent's testimony, following the May 2023 CSE meeting, the parent attempted to contact the district for a placement for the student based on the recommendations made at the May 2023 CSE meeting, but the district informed her that the student was only recommended for SEIT and related services through the summer (Parent Ex. Y ¶22). The parent's testimony is consistent with email correspondence showing that, on May 10, 2023, the parents attempted to contact the CPSE administrator in order to locate a school for the student with ABA services and, on May 11, 2023, the CPSE administrator responded indicating that the student was "currently receiving" 10 hours per week of SEIT services, along with speech-language therapy, OT, and PT and that those services would continue to be provided "through the summer" (Parent Ex. AA at pp. 2-3).

Although a copy of the student's June 2023 IEP is not in the hearing record, according to a final notice of recommendation that the district sent to the parents on June 2, 2023, the CPSE convened on June 2, 2023 and continued the student's program which, at the time, consisted of 10 hours per week of individual SEIT services, three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT (Parent Ex. G). The district sent the parent a consent form, dated June 2, 2023, for the provision of the CPSE program over July and August 2023, which indicated that the recommended changes would be made if the parent did not respond by June 15, 2023 (*id.*).

On June 13, 2023, the student's mother contacted the CPSE administrator by email, informing the administrator that she could not sign the consent form for the summer services because the student was only receiving related services and ABA and was no longer enrolled in any school; the parent expressed disagreement with the recommendation for SEIT and related services and indicated the student needed a school to attend (Parent Exs. E at pp. 3-4; I at p. 7). The CPSE administrator advised the student's mother that she found a SEIT to begin providing services to the student on July 5, 2023 (Parent Exs. E at pp. 3-4; I at pp. 5-6). After some confusion as to the student's receipt of some services at Imagine Academy, the CPSE administrator informed the parents that the SEIT could provide services in the community or at home until the end of the summer and that a change from SEIT and related services to a center-based program would require "substantive documentation from [the student's] SEIT provider" (Parent Exs. E at p. 1; I at pp. 1-2). The parents then requested a new IEP for the student (Parent Ex. I at p. 3). The CPSE administrator reiterated her position that she "would need substantive documentation to consider a change in [the student's] current CPSE program" and informed the student's mother that if she would like the student to be reevaluated she had to submit a letter with her concerns (*id.* at p. 2).



Through a letter, dated June 15, 2023, the student's mother expressed disagreement with the April 2023 psychoeducational evaluation and asked that the district either conduct a neuropsychological evaluation of the student or authorize a private evaluation at public expense (Parent Ex. H at p. 1). In an email sent on June 16, 2023, the CPSE administrator acknowledged receipt of the aforementioned letter, identified it as a request for a reevaluation of the student, provided forms to authorize the student's reevaluation, and provided a directory from which the parents were to select an evaluator (Parent Ex. I at p. 1; see Parent Ex. J). On or about June 20, 2023, the student's mother signed and returned the district's consent for reevaluation form (Parent Exs. Y ¶26; J at p. 1).

## **C. FAPE**

### **1. Summer 2023**

Turning to the parents' arguments on appeal, the parents contend that the district failed to create an appropriately supportive program and failed to defend the appropriateness of the recommended program for summer 2023. More specifically, the parents argue that the CPSE should have recommended a more restrictive placement due to the student's behavior, and, while the record includes the reasons the student was dismissed from his preschool, it does not include the June 2023 IEP, any prior written notice regarding the June 2023 IEP, meeting minutes, or testimony from a CPSE participant to explain the June 2023 CPSE's actions. According to the district, the IHO's determination should be upheld because the evidence shows that the parents did not make a clear request for a new preschool IEP until June 14, 2023, failed to complete the assessments necessary to change the student's placement, and prevented the district from implementing the student's preschool IEP during summer 2023.

In this instance, it is worth noting that the June 2023 IEP, which recommended the student's educational program for the summer 2023 is not in the hearing record, nor is the student's prior IEP which recommended the same educational program as was later recommended in the June 2023 IEP (see Parent Ex. G). Turning to the IHO's decision, the IHO noted that the parent had rejected an offer of a center based preschool program that had been "made earlier in the student's preschool term" citing the parent's testimony (IHO Decision at pp. 7, 23). Review of the cited parent testimony shows that the parents put the student in the Head Start program "to see how he does" (Tr. p. 48). However, the parent's testimony indicates that in January 2023, the agency providing the student's services informed the parents that "they could not contain [the student's] behaviors and could not keep him" (Parent Ex. Y ¶¶10-11). Similarly, the May 2023 IEP noted that the student was initially recommended for a center-based program as a preschool student with a disability and was not then currently receiving any services from the district (Dist. Ex. 1 at p. 1). However, the May 2023 IEP omitted the reasoning as to why the student was not then currently receiving services from the district that had been reported to the district as part of the January 2023 social history update, specifically that the agency providing the student's preschool services "felt that they could not meet his educational and social/emotional needs" (Dist. Ex. 5 at p. 1; see Dist. Ex. 1 at p. 1). Missing from the district's position in this matter is an explanation as to how SEIT services, at the time of the June 2023 CPSE meeting, were appropriately designed to meet the student's identified needs.

In Andrew F., the Supreme Court held that the "reviewing court may fairly expect [school] authorities . . . to offer a cogent and responsive explanation for their decisions that shows the IEP

is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"(580 U.S. at 404). While the district's burden does not require that the district call witnesses, it does require the district to defend its recommendations and provide evidence that explains such recommendations. If the district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]).

At the time of the June 2023 CPSE meeting, the district possessed the same evaluative information that the May 2023 CSE considered in recommending a more restrictive setting with continuous supervision for the student (see Dist. Exs. 1 at pp. 4, 9, 39; 2 at pp. 1-3). It therefore stands to reason that the district possessed enough evaluative information upon which the June 2023 CPSE could have considered the parent's request for a center-based program without requiring an additional evaluation to be conducted as part of the CPSE evaluation process. In any event, having failed to offer into evidence the June 2023 IEP, any prior written notice regarding the June 2023 IEP, meeting minutes, or testimony from a CPSE participant to explain the June 2023 CPSE's recommendation, the district has not met its burden of proving that the June 2023 IEP recommending a continuation of SEIT services, services that the district was aware the student had not been able to take advantage of since January 2023, offered the student a FAPE for summer 2023 (cf. Application of a Student with a Disability, Appeal No. 24-318 [finding that the district met its burden of proving that it offered the student a FAPE where the district's evidence listed the evaluative materials upon which the CSE relied and stated the CSE's rationale for rejecting alternative placements]; Application of a Student with a Disability, Appeal No. 24-084, [finding that the district met its burden of proving that it offered the student a FAPE even though the district did not present all the evaluative informative on which the CSE relied]).

## **2. 10-Month School Year**

As for the 10-month portion of the school year, the district contends that the IHO erred in determining that the district's failure to recommend a paraprofessional to address the student's behavioral needs amounted to a denial of a FAPE. More specifically, the district argues that the May 2023 CSE adequately addressed the student's behavioral needs by recommending placement in a "highly structured, low student to teacher ratio" environment, identifying many detailed management needs which guided instructors to intervene, and incorporating coping strategies into the student's measurable goals, thus, obviating the need for a paraprofessional.

While not set forth among the special factors in the IDEA or federal regulation, State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the

1:1 aide, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012 contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at <https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disabilitys-need-for-a-one-to-one-aide.pdf>).

The evaluative materials before the May 2023 CSE are replete with indicators that the student required a full time, 1:1 paraprofessional services to help him maneuver safely in a school environment, provide him with sensory breaks, escort him to the calm down room, and provide constant redirection and prompting to assist with attention (see Dist. Exs. 8 at pp. 1, 2, 5, 7, 17-18; 6 at pp. 1-2; 7 at p. 3; 4 at pp. 1-3). Review of the May 2023 IEP itself suggests that it would have been difficult for the student to access his educational programming without consistent dedicated support due to repeated and restrictive behaviors, aggressive and self-injurious behaviors, limited ability to sustain attention and focus, and limited ability to self-regulate (see Dist. Ex. 1 at pp. 2-7). Indeed, the May 2023 IEP states that the student "require[d] intensive and continuous supervision to help him to make progress and remain safe in his school environment" (*id.* at p. 9). The May 2023 IEP further indicates that the student's needs could not be met in a general education setting, a 12:1+1 special class setting, or even an 8:1+1 special class setting; and an FBA/BIP should be considered in the fall (*id.* at p. 39). Moreover, the parents presented evidence that the student's mother requested a paraprofessional during the May 2023 CSE meeting (Parent Exs. Y ¶ 20; B at p. 1). More specifically, the parent stated that she "requested a paraprofessional be included in [the student's] IEP, but the CSE told [her] that they were not allowed to write that on the IEP" (Parent Ex. B at p. 1). The parent further stated that "despite acknowledging [the student's] need for this type of [ABA] intervention and individual supports" the district CSE members informed her that they would not recommend it on the student's IEP (*id.*). While the district was not required to accede to the parents' request per se, (see *F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist.*, 735 Fed. App'x 38, 40 [2d Cir. 2018]; *E.F. v. New York City Dep't of Educ.*, 2013 WL 4495676, at \*17 [E.D.N.Y. Aug. 19, 2013]; *Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ.*, 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006]), the district has not sufficiently explained the May 2023 CSE's decision to omit a paraprofessional from the recommended program or even establish whether the CSE considered the provision of an additional support personnel for the student in the classroom. For the preceding reasons, the hearing record supports the IHO's determination that the district failed to prove that it offered the student a FAPE for the 10-month portion of the 2023-24 school year.

#### **D. Equitable Considerations**

Having determined that the district denied the student a FAPE for the 2023-24 school year, I must address whether equitable considerations support the parents' request for relief.

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The record evidence established that the parents cooperated with the reevaluation conducted in early 2023, participated in the May 2023 CSE meeting, toured the recommended public school, and provided a timely 10-day notice (see Parent Exs. Y ¶¶ 18, 27, 29; B at pp. 1-5; Dist. Exs. 1 at p. 40; 4 at pp. 1-2; 5 at pp. 1-2). Although the IHO found no denial of a FAPE for summer 2023, the IHO found, in the alternative, that the parents' rejection of the district's offer of summer services was unreasonable and warranted denial of funding for the summer session on equitable grounds. To the contrary, the parents did not act unreasonably in placing the student at Imagine Academy rather than accepting the recommended summer programming, which they believed to be inadequate to meet the student's needs (cf. Application of a Student with a Disability, Appeal No. 12-209 [upholding the IHO's determination that the parents' rejection of an RSA to provide the student with OT and insistence on receiving such services at home was unreasonable where the parties otherwise agreed on the student's need for OT]). As discussed in more detail above, the hearing record supports the parents' assertion that the recommended summer program, consisting of 10 hours of SEIT services per week and related services, was indeed inadequate to address the student's needs. Based on the above, equitable considerations weigh in the parents' favor and support the parents' request for relief.

Related to the IHO's findings as to a denial of an award for summer services, the parents also appeal from the IHO's decision to the extent that it ordered the parents to provide the district with a new payment affidavit clarifying whether the contract amount of \$144,000.00 covered the student's attendance at Imagine Academy for 10 months or 12 months during the 2023-24 school

year.<sup>9</sup> According to the parents, there is no uncertainty regarding the parents' obligation to pay \$144,000.00 for the entire 12-month school year, as the tuition affidavit and attendance records show that the student started attending Imagine Academy on July 6, 2023.

Under the Burlington/Carter framework, proof of an actual financial risk incurred by parents is a prerequisite to obtaining funding of the cost of a student's unilateral placement (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. at 374 [stating that "financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district]; see also Forest Grove Sch. Dist., 557 U.S. at 247 [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Regarding proof of financial risk, the Second Circuit has held that some blanks left unfilled in a written agreement would not render it unenforceable where "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement" (E.M., 758 F.3d at 458). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]).

The parents' enrollment contract with Imagine Academy, which states that "tuition for the 2023-24 school year will be \$144,000.00," does not expressly state that \$144,000.00 covers 12-months of tuition (Parent Ex. M at p. 1). However, the hearing record also includes the following evidence: the student's attendance record with Imagine Academy which indicates that the student was enrolled for the 2023-24 school year from July 6, 2023 to June 20, 2024; and an affidavit of an Imagine Academy employee who indicated that the contract amount covered the period from July 6, 2023 to June 20, 2024 (see Parent Ex. Q at p. 1; N at p. 1). Considered together, the enrollment contract, the attendance record, and the tuition affidavit established the parents' obligation to pay \$144,000.00 for the 12-month 2023-24 school year. Thus, the record evidence supports the parents' contention that a new payment affidavit is unwarranted.

## **E. Independent Educational Evaluation**

As a final matter, the parties dispute whether the IHO erred in ordering the district to fund the cost of the December 2023 private neuropsychological evaluation. The district contends that the parent failed to properly dispute the April 2023 psychoeducational reevaluation, conducted as a part of the "Turning Five" process, by sending a letter to a representative of the CPSE rather than the CSE.

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]).

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<sup>9</sup> The district's answer with cross-appeal did not address the need for a new payment affidavit.

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]).<sup>10</sup>

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 an [IEE] is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be same as the criteria that the [district] uses when it initiates an evaluation, to the extent that those criteria are consistent with the parent's right to an [IEE]" (34 CFR 300.502 [e][1]; see also 8 NYCRR 200.5[g][1][ii]). 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]). Contrary to the district's argument on appeal, the district "may not impose conditions or timelines" other than those described above (34 CFR 300.502 [e][2]; see also 8 NYCRR 200.5[g][1][i]).

The hearing record includes evidence that the student's mother conveyed disagreement with a specific district evaluation and requested a private neuropsychological evaluation at public expense (see Parent Exs. Y ¶ 25; H at p. 1; B at pp. 1-2; F at p. 1; K at p. 1). In a letter dated June 15, 2023, the student's mother wrote, "I disagree with the April 2023 most recent psychoeducational 'reevaluation' of my son" (Parent Ex. H at p. 1). The June 15 letter further states, "[i]f the CPSE is unable to promptly schedule and/or [a neuropsychological evaluation], please issue an authorization for me to get one done privately" (id.). Following the district agreeing to conduct an evaluation of the student and the parents providing consent for such evaluation on June 20, 2023, the student's mother reiterated her disagreement with the April 2023 psychoeducational reevaluation and restated her request for an independent neuropsychological evaluation in subsequent correspondence to the district on June 21, 2023, August 4, 2023, and October 10, 2023 (see Parent Exs. B at pp. 1-2; F at p. 1; J; K at p. 1). On the other hand, the

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<sup>10</sup> 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]).

hearing record lacks evidence that the district initiated an impartial hearing to establish that the April 2023 psychoeducational reevaluation was appropriate. Based on the foregoing, I find no reason to disturb the IHO's order that the district provide reimbursement to the parents for the cost of the private neuropsychological evaluation upon receipt of the corresponding invoice and proof of payment (cf. Application of a Student with a Disability, Appeal No. 24-345 [reversing the IHO's order of reimbursement for IEEs where the hearing record lacked evidence that the parent had expressed disagreement with a district evaluation or "asked the district to fund any of the IEEs she obtained"]).

## **VII. Conclusion**

In summary, I decline to accept the parents' additional documentary evidence for admission and consideration on appeal. As explained above, while the hearing record supports the IHO's determination that the district denied the student a FAPE for the 10-month portion of the 2023-24 school year, the hearing record does not support the IHO's determination that the district offered the student a FAPE for the summer portion of the 2023-24 school year. Moreover, as explained above, I find that the record evidence established the parents' obligation to pay \$144,000.00 for the 12-month 2023-24 school year, and I find no reason to deny or reduce the requested relief on equitable grounds. Finally, I decline to disturb the IHO's order that the district provide reimbursement to the parents for the cost of the private neuropsychological evaluation upon receipt of the corresponding invoice and proof of payment.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated September 17, 2024 is modified by reversing that portion which determined that the district offered the student a FAPE for the 2023-2024 extended school year; and

**IT IS FURTHER ORDERED** that IHO's decision dated September 17, 2024 is modified to provide that the district shall fund the cost of the student's 2023-24 annual tuition at Imagine Academy, in the amount of \$144,000.00, by direct payment to Imagine Academy.

**Dated:**           **Albany, New York**  
                          **January 27, 2025**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**