



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-521

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

Appearances:

Law Offices of Nancy Rothenberg, P.L.L.C., attorneys for petitioner, by Nancy Rothenberg, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that her claims for the 2021-22 school year were barred by the statute of limitations and that the educational programs respondent (the district) had recommended for her son for the 2022-23 and 2023-24 school years were appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 student received home-based services through the Early Intervention Program (EIP), including applied behavior analysis (ABA), occupational therapy (OT), physical therapy (PT), and speech-language therapy (Parent Exs. K at pp. 1, 3; X at p. 2; Z ¶ 13; BB 1). A neurological evaluation, conducted when the student was three years old, yielded the following diagnoses: autistic disorder; developmental disorder of speech and language, unspecified; and attention and concentration deficit, among others (Parent Exs. K at p. 1; Y; Z ¶ 13). According to the parent, the student's neurologist advised her that the student required ABA services, which were funded through insurance (Parent Ex. BB ¶ 3). In March 2019, the student was found eligible for preschool special education as a preschool student with a disability and received special education itinerant teacher (SEIT) services, along with speech-language and occupational therapies (Parent Ex. K at

p. 3). The student subsequently transitioned to the CSE where he was found eligible for special education as a student with a speech or language impairment and it was recommended that he receive integrated co-teaching (ICT) services and related services beginning in kindergarten (2020-21 school year) (*id.*).¹

The CSE convened on April 18, 2021 and recommended that the student receive 10 periods per week of ICT services for English language arts (ELA); eight periods per week of ICT services for math; three periods per week of ICT services for social studies; two periods per week of ICT services for sciences; two 30-minute sessions per week of group OT; and two 30-minute sessions per week of group speech-language therapy (Parent Ex. I at pp. 12, 18).^{2, 3}

The student attended a district school for the 2021-22 school year (first grade) (*see* Parent Exs. K at p. 3; R; S). The parent became concerned in February 2022 when the student began exhibiting stress-related behaviors at home and the student's teacher suggested the student was in the "wrong setting" (Parent Ex. P at p. 1). According to the parent, she learned, sometime in the winter, that the student had not been receiving ICT services in either kindergarten or first grade (Parent Ex. BB ¶10).

The CSE convened on April 5, 2022 and, after finding the student continued to be eligible for special education as a student with a speech or language impairment, recommended that he receive 10 periods per week of ICT services for math; 10 periods per week of ICT services for ELA; two periods per week of ICT services for social studies; two periods per week of ICT services for sciences; and two 30-minute sessions per week of group speech-language therapy (Parent Ex. H at pp. 16, 22). The parent requested a reevaluation of the student, at or around the time of the April 2022 CSE meeting, and the district conducted a psychoeducational evaluation of the student in May 2022 (Parent Ex. BB ¶¶12-13; Dist. Ex. 14).

On May 31, 2022, the CSE reconvened and recommended that the student receive 10 periods per week of ICT services for ELA; five periods per week of ICT services for math; three periods per week of ICT services for social studies; two periods per week of ICT services for sciences; one 30-minute session per week of group counseling services; two 30-minute sessions per week of individual OT; and two 30-minute sessions per week of group speech-language therapy (Parent Ex. G at pp. 19, 26). The May 2022 IEP stated that the student had been referred by the parent for a reevaluation, which the hearing record shows took place on May 13, 2022 (*see* Parent Exs. G at pp. 2-3; Dist. Exs. 12; 13). In addition, the IEP noted that due to a clerical error the April 2023 (*sic*) IEP did not indicate that the student received OT (*id.* at p. 3). Via a prior

¹ According to reports from the parent, the student did not receive ICT services or OT from the district during kindergarten (Parent Ex. K at p. 2).

² The April 2021 IEP noted that "[g]eneral education was considered but [the student] benefit[ted] from the attention of a full time Special Education Teacher" (Parent Ex. I at p. 18). However, the hearing record indicates that the student did not receive ICT services in first grade (Parent Ex. K at p. 2).

³ Prior to and during the school years at issue, the student was found eligible for special education as a student with a speech or language impairment (*see* Parent Exs. E at p. 1; F at p. 1; G at pp. 1, 2; H at pp. 1, 2; I at pp. 1, 2). The IHO incorrectly identified the student's educational disability classification as learning disability (IHO Decision at p. 5).

written noticed dated June 1, 2022, the district notified the parent of the recommendations made by the May 2022 CSE (see Dist. Ex. 18). The parent requested that the student be transferred to a different school for second grade so that ICT services would be available for the student (Parent Ex. K at p. 2; Dist. Ex. 18 at p. 2). However, after the student transferred to the new public school, the parent was advised that there were not enough second grade students to create an ICT class and the student did not receive ICT services (Parent Ex. K at p. 2).

In October and December 2022, a private psychologist administered a behavior rating scale and checklist to the student's parent and teacher (Parent Ex. P). According to the resultant March 2023 report, the parent's responses were very elevated for measures of defiance, generalized anxiety, dysthymia, and autism spectrum disorder, while the teacher's responses were not elevated on any measure (Parent Ex. 1-2). The private psychologist offered diagnoses of autism spectrum disorder with accompanying language disorder and attention deficit hyperactivity disorder (combined type) but noted that the student needed a neuropsychological evaluation to confirm the diagnoses and to determine appropriate educational services (Parent Ex. P at p. 3).

On June 5, 2023, the CSE convened and recommended that the student receive two periods per week of group special education teacher support services (SETSS) for ELA and two periods per week of group SETSS for math for the remainder of the 2022-23 school year with a beginning date of June 14, 2023 and an ending date of June 27, 2023 (Parent Ex. F at p. 15, 22). For the 2023-24 school year, beginning September 7, 2023, the June 2023 CSE recommended that the student receive 10 periods per week of ICT services for ELA and 10 periods per week of ICT services for math (id. at p. 15). The CSE also recommended that the student receive related services beginning June 16, 2023 consisting of one 30-minute session per week of group counseling services; two 30-minute sessions per week of group OT; and two 30-minute sessions per week of group speech-language therapy (id. at pp. 15-16).⁴ A prior written notice dated June 20, 2023 notified the parent of the recommendations made by the June 5, 2023 CSE (see Dist. Ex. 11).

On October 4, 2023, the parent notified the district that she disagreed with the district's evaluations and requested an independent educational evaluation (IEE) in the following areas: a neuropsychological evaluation; a speech-language evaluation; an OT evaluation; an assistive technology evaluation; a central auditory processing evaluation; and an autism skills assessment by a board certified behavior analyst (BCBA) (Parent Ex. B). On October 25, 2023, the district conducted an OT evaluation of the student (see Parent Ex. O).

A. Due Process Complaint Notice

In a due process complaint notice dated November 9, 2023, the parent asserted that the district denied the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years (see Parent Ex. A). Generally, and without referring to any specific school year at issue, the parent asserted that the district failed to recommend an appropriate program and placement for the student; failed to provide the services recommended in the student's

⁴ The related services were the same as those recommended by the May 2022 CSE, with the exception of OT, which was changed from an individual to a group service (compare Parent Ex. G at p. 19, with Parent Ex. F at pp. 15-16).

IEPs; failed to properly compose the CSE; failed to meaningfully include the parent in the CSE process; failed to appropriately or sufficiently evaluate the student; failed to provide the student with appropriate speech-language services; failed to provide the student with appropriate OT; failed to adequately address the student's behavioral issues, conduct a functional behavioral assessment (FBA), or develop a behavioral intervention plan (BIP); failed to properly notify the parent of changes to the student's educational programs by providing the parent with prior written notices; failed to either fund an IEE or in the alternative initiate a hearing to defend its evaluations; failed to develop appropriate or measurable annual goals for the student; failed to provide appropriate assistive technology; failed to provide appropriate counseling services; failed to properly classify the student as a student with autism; failed to use appropriate methodologies to address the student's needs; failed to provide the student with home-based ABA services with supervision by a BCBA; failed to recommend extended school year services; failed to provide the parent with appropriate parent counseling and training; failed to provide the parent with regular reports of the student's progress; and failed to provide the parent with the student's complete educational records (Parent Ex. D at pp. 8-12).⁵ The parent requested a finding that the student was denied a FAPE for the 2021-22, 2022-23 and 2023-24 school years; for an order directing the CSE to reconvene, address the student's individual learning needs and develop an IEP to change the student's placement; for an order directing the CSE to conduct appropriate assessments and evaluations; for the district to conduct an FBA and create a BIP; an order directing compensatory special education and related services; and an order directing the district to provide the parent with all of the student's records and hearing notes (*id.* at pp. 12-15).

B. Events Post Dating the Due Process Complaint

The district completed a social history and speech-language evaluation of the student on November 8, 2023, a classroom observation on November 20, 2023, and an assistive technology evaluation on November 30, 2023 (*see* Parent Exs. L, M; Dist. Exs. 5; 8; 10 at p. 1). In addition, on December 11, 2023 the district conducted an assessment to consider whether the student required an FBA or a BIP (Dist. Ex. 4).

Following a conference held on December 14, 2023, the parties appeared for a hearing on December 20, 2023 to address the parent's request for an IEE (Tr. pp. 6-22; Interim Decision at p. 2). The parent submitted a written motion, dated December 20, 2023, requesting that the IHO order an independent neuropsychological evaluation at the rate of \$6,500 and affirmed that the parent had "agreed to allow the district to conduct several of the requested evaluations" (IHO Ex. IV at pp. 6-21). The district submitted a response to the parent's request for IEEs, dated January 11, 2024, in which the district admitted that it did not respond to the parent's October 2023 IEE request arguing that the parent failed to allege a disagreement with a specific district neuropsychological evaluation (IHO Ex. IV at pp. 1-5).⁶ Via a January 14, 2024 interim decision,

⁵ The hearing record includes duplicates of some exhibits, such as the due process complaint notice. This decision will cite to the parent's exhibits when there is a duplicate district exhibit in the hearing record.

⁶ A hearing took place on January 11, 2024, at which time the district did not appear and counsel for the parent resubmitted her motion for the IHO's consideration (Tr. pp. 23-30).

the IHO ordered the district to fund an independent neuropsychological evaluation at the requested rate of \$6,500 (see Interim Order).

On January 10, 2024 the CSE convened and recommended that the student receive five periods per week of ICT services for math; five periods per week of ICT services for ELA; one 30-minute session per week of group counseling services; one 30-minute session per week of group OT; and two 30-minute sessions per week of group speech-language therapy (Parent Ex. E at pp. 19, 24). A prior written notice dated January 26, 2024, notified the parent of the recommendations made by the January 10, 2024 CSE (see Dist. Ex. 2).

The parent filed an amended due process complaint notice dated February 2, 2024, which contained all the same allegations set forth in the former due process complaint notice, but added that the parent disagreed with the results and recommendations of the district's recent OT, speech-language, and assistive technology evaluations (see Parent Ex. D at pp. 6-7, 9). The parent requested that, in addition to the independent neuropsychological evaluation that the district was ordered to fund, the district also be ordered to fund the following independent evaluations: speech-language; OT; assistive technology; central auditory processing; and an autism skills assessment (id. at p. 13).

In a neuropsychological report dated February 26, 2024, a psychologist diagnosed the student as having autism spectrum disorder, mild; ADHD, combined type; adjustment disorder with mixed anxiety and depressed mood (moderate); specific reading disorder with impairment in automaticity, word reading, and reading comprehension (mild); disorder of written expression with impairment in composition writing (mild); and mathematic disorder with impairment in automaticity, calculation, and math reasoning (mild) (Parent Ex. K at p. 25; Z ¶¶ 13, 16).

C. Impartial Hearing Officer Decision

An impartial hearing convened on April 9, 2024 and concluded on September 30, 2024 after eight days of hearings (Tr. pp. 52-278).⁷ In a decision dated October 3, 2024, the IHO found that the parent's claims for the 2021-22 school year were barred by the statute of limitations (IHO Decision at p. 19). The IHO held that the district established that it provided the student with a FAPE for the 2022-23 and 2023-24 school years (id. at pp. 19-22). Accordingly, the IHO denied the parent's request for compensatory relief (id. at p. 22). The IHO next addressed the parent's request for an IEE and denied the request for additional IEEs (id. at p. 27). Finally, the IHO reviewed and denied the parent's request for an FBA and a BIP (id. at p. 28). Overall, the IHO denied the majority of the relief requested by the parent; however, the IHO granted the parent's request for a CSE to reconvene to address the student's individual learning needs and create a program for the student if it had not already done so and the parent's request for educational records (id. at pp. 29-30).

⁷ In addition to what was described above, status conferences were held on January 26, 2024; February 6, 2024; February 20, 2024; and March 4, 2024 (Tr. pp. 31-51).

IV. Appeal for State-Level Review

The parent appeals, raising a number of allegations of IHO error. First the parent asserts that the IHO erred in failing to apply the regulatory timelines, for holding a resolution session or responding to the IEE, following the parent's amendment of the due process complaint notice and further erred by extending the compliance date numerous times over the objections of the parent's representative. With respect to the IHO's statute of limitations finding, the parent asserts that the IHO incorrectly used the April 11, 2024 acceptance date of the amended due process complaint notice rather than the initial November, 2023 due process complaint notice and failed to apply either of the two exceptions. Turning to the IHO's findings regarding the provision of a FAPE, the parent argues that the IHO held the district to a lesser burden of proof, excused the district from responding to each challenge raised in the due process complaint notice, and failed to thoroughly review the student's evaluations and reports or whether the parent was given the opportunity to meaningfully participate in the student's CSE meetings. The parent alleges that the IHO erred in finding that the student was properly classified. In addition, she asserts the IHO failed to consider whether the district's failure to implement the ICT program during the 2021-22 and 2022-23 school years should have resulted in a denial of a FAPE. The parent further argues that the IHO failed to make a determination on each issue raised in the parent's due process complaint. The parent also raised objections to the IHO's findings as to the parent's request for an IEE, arguing that the IHO misapplied the timing of events after the filing of the amended due process complaint notice and erred in finding an IEE was not available when a district had not conducted particular assessments.

In its answer, the district argues that the IHO properly held that the parent's claims regarding the 2021-22 school year were barred by the statute of limitations, that the district offered the student a FAPE for the 2022-23 and 2023-24 school years, and the parent was not entitled to an additional IEE. The district requests that the IHO's findings be affirmed.

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]).⁸

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. IHO Conduct

The parent asserts that the IHO failed to render the decision in a timely manner, as the IHO allegedly improperly granted extensions of the compliance date over the objection of the parent and failed to follow the regulatory timelines for conducting a hearing and rendering a decision. The parent further asserts that the IHO failed to recuse herself upon the parent's repeated requests for recusal despite not having sufficient time to conduct the hearing in a timely manner.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]; C.E. v. Chappaqua Cent. Sch. Dist., 695 Fed. App'x 621, 625 [2d Cir. June 14, 2017]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their

⁸ 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).

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

Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 CFR 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 CFR 300.515[a]; 8 NYCRR 200.5[j][5][i]). However, extensions may only be granted consistent with regulatory constraints, and the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]).⁹ An IHO is explicitly prohibited from "solicit[ing] extension requests or grant[ing] extensions on his or her own behalf or unilaterally issu[ing] extensions for any reason" (8 NYCRR 200.5[j][5][i]).

The parent's initial due process complaint notice was dated November 9, 2023 (see Parent Ex. A). Following the initial filing, the parties participated in four hearing dates: December 14, 2023, December 20, 2023, January 11, 2024, and January 26, 2024 (see Tr. pp. 1-37). The parent submitted an amended due process complaint notice, dated February 2, 2024 (see Parent Ex. D). The timelines for the impartial hearing recommenced when the parent filed the amended due process complaint notice (8 NYCRR 200.5[i][7][ii]).

Thereafter, the parties participated in eleven hearing dates between February 6, 2024 and September 30, 2024 (Tr. pp. 38-278). Review of the hearing dates shows that they were adjourned at the requests of the parties. The parent's attorney did not appear on February 6, 2024 and the district requested an adjournment, which the IHO granted (Tr. pp. 38-42). On February 20, 2024, the IHO granted the parent's request for an extension of the compliance date in order for the parent to receive the already ordered independent neuropsychological evaluation and on March 4, 2024 the IHO granted the parent's request to extend the compliance date for witness availability and to prepare affidavits; on both occasions counsel for the parent indicated that there would be no harm to the student (Tr. pp. 44-45; 48-49). During the April 9, 2024 hearing, the district attorney did not appear and the parent's attorney objected to the district's emailed request for an adjournment based on a district attorney having just been assigned to the case and the parent requested that the IHO recuse herself; the IHO granted the requested adjournment and denied the request for recusal (Tr. pp. 52, 58, 60-61, 68-77).¹⁰

⁹ State regulation provided for extensions beyond 30 days but for no more than 60 days during the time that "schools [we]re closed pursuant to an Executive order issued by the Governor pursuant to a State of emergency for the COVID-19 crisis" (8 NYCRR 200.5[j][5][i]).

¹⁰ At the conclusion of the April 9, 2024 hearing date, the matter was adjourned to May 11, 2024; however, the

During the May 31, 2024 hearing, the IHO explained that the parent's filing of an amended due process complaint notice necessitated the parent having to reenter her prior evidence into the hearing record, determined that the district was entitled to the five-day disclosure rule for the resubmission of the parent's evidence after the acceptance of the amended due process complaint notice, denied the parent's request that the IHO recuse herself, and granted the district's motion to extend compliance over the parent's objection (Tr. pp. 85-86; 88-90; 92-93; 97).¹¹ The hearing commenced at the next hearing date on June 12, 2024 and, after the district introduced its documentary evidence, the district attorney indicated the district did not have any witnesses and the matter moved to the parent's presentation (Tr. pp. 100-160). At the end of the June 12, 2024 hearing, the IHO granted the district's request to extend compliance "to accommodate witness availability and to finish the hearing at the next date" over the parent's objection (Tr. p. 158). The hearing continued on July 1, 2024 and, at the conclusion of that hearing date, the IHO granted the district's request to extend compliance "to allow to finish th[e] hearing with the parent on video" (Tr. pp. 161-20). The hearing again proceeded on July 10, 2024 and ,at the conclusion of the July 10, 2024 hearing, the IHO granted the district's request to extend compliance "in order to submit closing briefs and finish this hearing" (Tr. p. 236).¹² The parties appeared on August 1, 2024 and submitted their closing briefs (Tr. pp. 241-53; IHO Exs. I; II). At the conclusion of the August 1, 2024 hearing, the IHO granted the district's request for a final extension of the compliance date over the parent's objection (Tr. pp. 250-51). The parties then appeared for a final hearing date on September 30, 2024 and addressed some issues concerning the evidence (Tr. pp. 254-78).

The IHO decision was dated October 3, 2024 and indicated the record close date was October 3, 2024 (see generally IHO Decision).¹³ The IHO noted in her decision that the parent sought the IHO's recusal due to delays and the parent's attorney alleged a denial of a FAPE, but this request was denied and the IHO sent the parties an email dated August 8, 2024 outlining the hearing dates (id. at p. 4).¹⁴

parties did not reconvene for a hearing until May 31, 2024 (Tr. pp. 81, 83).

¹¹Review of the hearing record shows that counsel for the district indicated during the February 6, 2024 hearing date that he would accept the amended request for review (Tr. p. 40). However, it appears that as of the May 31, 2024 hearing date the amended due process complaint had recently been accepted by the district (Tr. pp. 85-86).

¹² The hearing record includes a statement by the IHO on the record on July 23, 2023, without the presence of the parties, which indicated that the hearing was completed and the matter was set for presentation of closing briefs on August 1, 2024 (Tr. pp. 238-40).

¹³ According to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]). While an IHO determines when the record is closed, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO. Once a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record ("Requirements Related to Special Education Impartial Hearings" Office of Special Educ. [Sept. 2017], available at <http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf>; see 8 NYCRR 200.5[j][5][iii]).

¹⁴ In the decision and order, the IHO states that the August 8, 2024 email "outlining the record of dates for hearing in this matter" was IHO Ex. V, but IHO Ex. V contains emails dated August 1, 2024 and August 2, 2024, all of

The hearing record does not include documentation of the IHO's written responses to the parties' extension requests stating the reasons relied upon for granting the extensions (see 8 NYCRR 200.5[j][5][iv]). Additionally, based on the above, the requests for extensions of the compliance deadlines were frequently made after prompting from the IHO and the reasoning provided for the IHO's granting of the extension requests was, at times, questionable as the hearing continued for five hearing dates after the district had completed its presentation of evidence based on application from the district made over the parent's objections. To be sure, the July 2024 portion of the hearing primarily consisted of district cross-examination of parent witness who presented their direct testimony via affidavit (Tr. pp. 161-237). However, the final three hearing dates all related to presentation of closing briefs and clearing up evidentiary matters that could have been handled more expeditiously (Tr. pp. 238-78).

In this matter, the parent has a valid argument concerning the timeline of the hearing and the hearing record reveals that the IHO did not comply with State and federal guidelines governing extensions of the compliance IHO's date. Ultimately, however, the hearing went forward, and the parent has not presented an argument as to how any delays in the proceeding resulted in either educational harm or that any delay led to a denial of a FAPE to the student (see Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45-day deadline, 'relief is warranted only if . . . [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education'"] [alternations in the original], quoting J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]). Accordingly, there is no basis to overturn the IHO's decision due solely to the IHO violating State regulations by entering extensions of the timeline for completing the impartial hearing. Additionally, as the parent's request for recusal by the IHO appears to have been based on the IHO's granting of the district's requests for extension of the timeline for issuing a decision, it does not raise any further basis for overturning the IHO's ultimate decision in this matter.

B. Statute of Limitations

The parent alleges that the IHO erred in finding that the parent's claims related to the 2021-22 school year were barred by the IDEA's two-year statute of limitations. The parent raises allegations regarding accrual dates for her claims, asserts that the IHO erred by using April 11, 2024 as a date for determining the two-year look back period rather than the initial November 2023 due process complaint notice, and contends that the IHO failed to apply either of the available two exceptions to the statute of limitations. In its answer, the district asserts that the IHO properly held the parent's claims for the 2021-22 school year to be barred by the two-year statute of limitations. The district argues that because the parent was present at the April 18, 2021 CSE meeting when matters regarding the student were discussed, and because the parent testified that she met with school staff at the beginning of the 2021-22 school year, the April 18, 2021 date should be used as the date of accrual for the purpose of calculating the two-year statute of limitations. In the alternative, the district asserts that October 1, 2021, a date one month into the 2021-22 school year,

which discuss post-hearing briefs, not hearing dates (compare IHO Decision at p. 4, with IHO Ex. V).

should be used to calculate the statute of limitations accrual date as the student was attending a district nonpublic school.

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

In this matter, the alleged action that formed the basis of the majority of the parent's claims for the 2021-22 school year related to the development of the April 18, 2021 IEP and the program recommendations set forth therein (see Parent Ex. D). The April 2021 IEP reflects that the parent participated in the CSE meeting via telephone and that the CSE recorded the parent's concerns (id. at pp. 2, 3, 18).¹⁶ Because the parent was present at the April 2021 CSE meeting, the parent knew or should have known, as of April 18, 2021, of the April 2021 CSE's program and placement recommendations, the composition of the CSE, the parent's ability to participate at the April 2021 CSE meeting, the evaluations relied on in the development of the April 2021 IEP, the related services recommendations, including speech-language and OT, the notations in the IEP that the student did not require an FBA or a BIP, the annual goals, the lack of a recommendation for assistive technology, the lack of a recommendation for "appropriate counseling," the district's failure to classify the student as a student with autism; the failure to provide appropriate methodologies, the failure to provide home-based ABA or BCBA supervision, the failure to recommend extended school year services, and the failure to recommend parent counseling and training; therefore, as of April 18, 2021, the parent knew or should have known of these alleged denials of a FAPE (compare Parent Ex. D at pp. 8-10, with Parent Ex. I). As these claims accrued

¹⁵ New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

¹⁶ The hearing record does not include a copy of a prior written notice reflecting the determinations made at the April 2021 CSE meeting.

more than two years prior to the parent's filing of the November 2023 due process complaint notice, the claims listed above are effectively barred by the statute of limitations.

However, the parent further alleged that the district failed to implement the recommended ICT services (Parent Ex. D at p. 8).¹⁷ Both the April 2021 IEP and the April 2022 IEP recommended that the student receive the support of ICT services for the 2021-22 school year (Parent Exs. I at pp. 1, 12, 18; H at pp. 1, 16, 22). The parent testified that it was not until "[s]ometime in the winter" of the 2021-22 school year that she discovered the student was not attending an ICT class (Parent Ex. BB ¶¶ 9-10).

In its closing brief, the district requested that all of the parent's claims for the 2021-22 school year be dismissed as being barred by the statute of limitations (IHO Ex. II at pp. 2-3). Although the district acknowledged that each claim required a fact-specific inquiry, the district focused its arguments on the student's behavioral issues and the extent to which the parent knew or should have known how the student's behaviors continued from the 2020-21 school year into the 2021-22 school year (IHO Ex. II at p. 3). The one district allegation potentially related to accrual of the parent's implementation claims was that the parent spoke with school staff in the beginning of the school year (*id.*; *see* Tr. pp. 213-14). Review of the parent's testimony shows that while she did testify that she spoke with school staff at the beginning of the school year, she also testified that the winter of the 2021-22 school year was when she was made aware that the student had not been placed in the correct setting (Tr. p. 213-18).

Further, review of the documentary evidence in the hearing record does not contradict the parent's testimony as to when she became aware of the lack of ICT services. The district failed to present documentary evidence of having provided the parent with prior written notices or the procedural safeguards notice before or after the April 18, 2021 CSE meeting. The May 2022 IEP was the first district document noting that the nonpublic school the student was attending did not have ICT services and that the parent wanted the student to attend a different school the next year so the student could receive ICT services (Parent Ex. G at p. 2). The April 2021 IEP mandated that the district was to send progress reports to the parent "at the same time school report cards [we]re issued" (Parent Ex. I at p. 11). However, the only reports in the hearing record regarding the 2021-22 school year were dated March 21, 2022 and May 20, 2022; accordingly, they could not have shown that the parent was notified of the district's failure to provide the student with ICT services prior to the date the parent provided, winter of 2022 (Dist. Exs. 13, 15).^{18, 19} The district failed to submit any evidence or testimony that the parent knew, or should have known, that the student was not receiving the support of ICT services by October 1, 2021. The district was on notice of the parent's allegation that she was unaware that the student was not in an ICT classroom until

¹⁷ The parent does not allege in either of her due process complaint notices, or her testimony during the hearing, that the district failed to implement the student's recommended counseling services, OT services, or speech-language therapy services (Parent Exs. A at p. 7; D at p. 8; BB; Tr. pp. 208-229).

¹⁸ The May 20, 2022 teacher report notes that the student "participates in the small group class sessions as often as possible, since this is not an ICT class" (Dist. Ex. 13 at p. 2).

¹⁹ The March 21, 2022 progress report is from the student's speech-language related service provider and does not discuss the student's academics (Dist. Ex. 15).

approximately February 2022, yet the district failed to provide any evidence of parent teacher conferences or progress reports, which could have shown that the parent knew or should have known that the student was not receiving ICT services during the 2021-22 school year prior to the winter of 2022.

As the district did not present any evidence or testimony showing that the parent was informed that the student was not receiving the support of ICT services prior to the winter of the 2021-22 school year, the parent's testimony establishes the accrual date for the implementation claim in the winter of the 2021-22 school year. Additionally, as this claim accrued less than two years prior to the November 2023 due process complaint notice, the statute of limitations does not apply to the parent's implementation claims.

Additionally, the April 2022 CSE meeting occurred within two years prior to the filing of the November 2023 due process complaint notice.²⁰ While the parent did amend the due process complaint notice in this matter in February 2024 and the amended due process complaint notice was not accepted until April 2024, an amended complaint may relate back to an earlier complaint under the relation back doctrine in order for "a plaintiff to correct a pleading error—by adding either a new claim or a new party—after the statutory limitations period has expired" (Buran v. Coupal, 661 N.E.2d 978, 981 [N.Y. 1995]). The relevant consideration is whether the original complaint gave the defendant notice of the transactions or occurrences at issue (O'Halloran v. Metro. Transp. Auth., 60 N.Y.S. 3d 128, 131–32 [1st Dept. 2017]). In this instance, the claims related to the April 2022 IEP and the 2021-22 school year in particular were identical in both the November 2023 due process complaint notice and the February 2024 amended due process complaint notice (compare Parent Ex. A, with Parent Ex. D). Accordingly, regardless of whether the acceptance date of the February 2024 amended due process complaint notice, in April 2024, would have changed the look back period, in this instance the look back period is from the November 2023 due process complaint notice and there is no question that any claims regarding the April 2022 CSE meeting and resultant IEP accrued within two years from the November 2023 date.

Turning to the parent's assertion that one of the two exceptions to the statute of limitations should apply, the IDEA provides that the statute of limitations will not apply if a parent was prevented from filing a due process complaint notice due to the district withholding information that the district was required to provide or due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. School Dist., 744 Fed Appx at 11; R.B., 2011 WL 4375694, at *4, *6; see D.K.,

²⁰ This is being addressed here as the IHO found that all of the parent's claims related to the 2021-22 school year were outside the statute of limitations period (IHO Decision at p. 19) and the April 2022 IEP, as well as the later May 2022 IEP, had implementation dates within the 2021-22 school year (Parent Exs. G at p. 1; H at p. 1). However, review of the IHO's decisions shows that the IHO addressed the parent's claims related to the April 2022 IEP and the May 2022 IEP (IHO Decision at pp. 19-21).

696 F.3d at 246; C.H., 815 F. Supp. 2d at 986; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7). Such safeguards include the requirement to provide parents with prior written notices and procedural safeguards notices containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3]; [d]; 34 CFR 300.503; 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

Even if the district had not supplied the parent with notices for all of the school years at issue, the totality of the evidence in the hearing record demonstrates that she was sufficiently aware of her rights (see N.J., 2021 WL 965323, at *12; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45). The hearing record includes a June 2022 prior written notice for the May 2022 IEP, which also notified the parent of the procedural safeguards notice (Dist. Ex. 18 at p. 1). The notice stated that the parent could download a copy of the procedural safeguards notice from the district's website and included a contact person for requesting a copy (id.). The notice gave additional sources to contact to obtain assistance in understanding the special education process (id.). Further, the prior written notice stated that, if the parent did "not agree with [the CSE's] recommendation, [she] ha[d] the right to request mediation or an impartial hearing" and provided addresses to submit such requests (id. at p. 2). As such, the hearing record supports finding that the withholding of information exception does not apply as the parent knew her rights and was not prevented from filing a due process complaint notice.

With respect to the specific misrepresentation exception, in order for the specific misrepresentation exception to apply, the district must have intentionally misled or knowingly deceived the parent regarding a relevant fact (see D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-46 [3d Cir. 2012]; Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar. 24, 2009], aff'd 422 Fed. App'x 76 [3d Cir. Apr. 6, 2011]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]; see also Application of a Student with a Disability, Appeal No. 13-215). In this instance, the parent contends that the district misrepresented "the type of educational program it was actually providing the student"; however, this assertion solely relates to the district's implementation of the recommended ICT services. As the parent's claims regarding implementation of the recommended ICT services during the 2021-22 school year accrued within the look back period, there is no reason to further address whether it fits within the specific misrepresentation exception. The parent also asserts that the parent's challenges to the district's "provision of accurate and comprehensive information about the student . . . prevented the parent from meeting the requisite level of knowledge"; however, this allegation appears to relate more to an accrual standard, i.e. whether the parent knew or should have known

of the facts underlying the claim, rather than to the district intentionally misleading or knowingly deceiving the parent regarding a relevant fact.²¹

Accordingly, based on the above, the parent's challenges to the April 2021 IEP are barred by the applicable statute of limitations and the exceptions to the statute of limitations do not apply to those claims. However, the parent's claims regarding implementation of ICT services during the 2021-22 school year are within the limitations period and will be addressed below and the IHO's holding that the parent's implementation claims for the 2021-22 school year were barred by the statute of limitations must be reversed.

C. Sufficiency of Evaluative Information

The parent asserts that the district denied the student a FAPE for the 2022-23 and 2023-24 school years. Specifically, in her amended due process complaint notice, the parent argued that "[t]he CSE relied upon 'evaluations' at the CSE meetings that clearly did not provide enough information to develop an appropriate program" (Parent Ex. D at p. 9 ¶ 5). In her request for review, the parent argues that the IHO erred when she failed to determine whether the evaluations and assessments were sufficiently comprehensive and accurate when the IHO solely relied on the information in the district's documents to determine whether a FAPE was provided to the student during the 2023-23 and 2023-24 school years. The parent further alleges that the IHO erred when she failed to determine whether the district had gathered sufficient information about the student prior to each CSE meeting, including the January 2024 CSE meeting, despite the district's awareness of the student's difficulties and deficits. In its answer, the district contends that the IHO properly found that the student was offered a FAPE for the 2022-23 school year and that the parent's allegations to the contrary have no merit. Further, the district argues that a review of the May 2022 IEP reflects that the CSE relied on, and incorporated, information drawn from the district's evaluation of the student. Additionally, the district argues that to the extent that the parent points to the private neuropsychological evaluation conducted of the student in February 2024 as evidence that the recommendations in the IEPs for the school years at issue were not appropriate, the private neuropsychological evaluation was not available to the CSEs and therefore, may not be relied on to retrospectively assess the CSEs' determinations.

Review of the evidence in the hearing record supports that the district's CSEs had sufficient evaluative information obtained from assessments, narrative reports from the student's teachers and related services providers, and progress reports during the school years at issue to create appropriate IEPs for the student. Further, the record supports the district's assertion that an assessment of the recommended educational programs for the 2021-22, 2022-23, and 2023-24 school years should focus on the information available to the April 2022, May 2022, June 2023, and January 2024 CSEs when they convened to recommend the student's programming.

²¹ The parent cites to the IHO decision for a summary of the challenges the parent raised regarding the evaluative information gathered by the district during the 2021-22 school year; however, the portion of the IHO decision cited only references parental actions that took place in April 2022 and May 2022, both of which are within the applicable limitations period and which relate to a reevaluation of the student (see Req. for Rev. ¶16; IHO Decision at pp. 5-6).

For the 2022-23 school year, the IHO found that the documentary evidence submitted by the district was sufficient (IHO Decision at pp. 19-20).

Initially, the hearing record is not detailed as to the evaluative information relied on by the April 2022 CSE (see Parent Ex. H). The IHO noted that the participants of the April 2022 CSE included the related service provider/special education teacher, general education teacher, the parent, the district representative, the speech teacher, and the school psychologist (IHO Decision at p. 20; see Parent Ex. H). In the evaluative results section of the April 2022 IEP, the IEP notes the student's scores on iReady and MAP assessments in reading and math and provides a Fountas and Pinnell score, but does not identify when or from where those scores were obtained (Parent Ex. H at p. 1). The hearing record does not further identify information considered by the April 2022 CSE and does not include a prior written notice for the April 2022 CSE further explaining what evaluations or assessments were relied on by the CSE.²²

The IHO noted that the parent requested a reevaluation of the student in April 2022 (id. at p. 19; see Dist. Ex. 14). The district then conducted a psychoeducational evaluation in May 2022 (Dist. Ex. 12). Turning to the May 2022 IEP, the IHO noted that the psychoeducational evaluation was reviewed, the meeting was held virtually, and the parent attended the meeting via phone (IHO Decision at p. 20; Parent Ex. G at p. 26).

As discussed by the IHO, the May 2022 CSE reviewed the May 2022 psychoeducational evaluation, as well as a teacher report dated May 20, 2022 and a speech-language progress report dated March 21, 2022 (IHO Decision at pp. 19-20; Dist. Exs. 13; 15).²³ In addition, the IHO noted that the May 2022 CSE addressed the parent's concerns regarding the student's social-emotional responses by recommending counseling services for the student (IHO Decision at p. 20).²⁴

Regarding speech-language development, the IHO reported the results of the March 21, 2022 speech-language progress report in her decision (IHO Decision at p. 19; see Dist. Ex. 15). The IHO noted that the report included the present levels of performance along with the student's then-current annual goals, that the report noted that the student received bi-weekly speech-language therapy to address his receptive and expressive language delays, that the student was a very motivated youngster who loved to participate in his speech sessions, and that the student required information to be repeated and presented in chunks and time to process information (id.). However, the IHO discussed that the student demonstrated progress with his overall speech-

²² The March 2022 speech-language progress report would have been available to the April 2022 CSE and the April 2022 IEP and May 2022 IEP include the same description of the student's present levels of performance for speech/language (compare Parent Ex. G at p. 5, with Parent Ex. H at p. 2; see Dist. Ex. 15). Accordingly, it can be assumed that the April 2022 CSE considered the same speech-language progress report as the May 2022 CSE.

²³ Prior written notice, dated June 1, 2022, identified the May 2022 psychoeducational evaluation as the evaluation considered by the May 2022 CSE; however, review of the present levels of performance section of the May 2022 IEP shows that the May 2022 CSE also considered the speech-language therapy progress report, teacher assessments and teacher reports, and an April 2022 OT progress report (Parent Ex. G at pp. 1-6; Dist. Exs. 12; 13; 15). A copy of the April 2022 OT progress report was not included in the hearing record.

²⁴ The IHO mistakenly referred to the April 2022 IEP; however, counseling services were recommended at the May 2022 CSE meeting (IHO Decision at p. 20; Parent Exs. G; H).

language skills, that his then-current goals focused on phonemic awareness, and that he was able to answer basic questions and follow two-to-three multiple step directions (*id.*). The IHO further noted that the student appeared to have difficulty with sight words and more complex story questioning (problem/solution), that the student had some difficulty with his expressive language as he became confused and repeated and re-figured his sentences, and that speech-language therapy continued to be recommended to address those goals with a change in mandate to two 30-minute sessions in a group of three in a separate location (IHO Decision at p. 20; *see* Dist. Ex. 15).

With respect to cognitive skills, the May 2022 psychological evaluation report indicated that the student demonstrated average cognitive abilities when compared to his same-aged peers (Dist. Ex. 12 at p. 8). In her decision, the IHO noted that the student demonstrated a relative strength in his visual spatial skills and a relative weakness in his short-term memory skills and math skills but indicated that his reading and writing skills were commensurate with his cognitive abilities (IHO Decision at p. 19; *see* Dist. Ex. 12). The IHO discussed that the May 2022 teacher report noted much improvement and addressed ELA tasks, phonics, comprehension, spelling, writing, math, and expressive and receptive language abilities () (IHO Decision at p. 19; *see* Dist. Ex. 13). The IHO noted that the report reflected that the student was the student of the month for February/March (IHO Decision at p. 19; Dist. Ex. 13 at p. 2).

The IHO discussed that during the May 2022 CSE the parent agreed that the continued recommendation for ICT services was appropriate, noting she was then aware that the student's school did not have ICT services for the student's grade and she was willing to have the student attend a different school for the next year in order receive ICT services (IHO Decision at p. 20).

Overall, the IHO noted that the district relied solely on documentary evidence; however, the IHO found that the evidence showed that the district offered a "cogent and responsive explanation" for the recommendations made in the April and May 2022 IEPs (IHO Decision at p. 20). The IHO further found that the IEPs were designed to meet the student's unique needs and were comprehensive and that the district complied with the procedural requirements set forth in the IDEA (*id.*). Therefore, the IHO found that the IEPs were substantively appropriate and met the obligation of providing a FAPE, as they were "reasonably calculated to enable the student to make progress appropriate in light of his circumstances" (*id.*).

As noted above, in March 2023, following the administration of a behavior rating scale and parent checklist to the student's mother and teacher, the student's private psychologist, who had delivered services to the student on seven days between April 19, 2022 and February 14, 2023, recommended that the student undergo a neuropsychological evaluation to confirm the student's diagnoses and determine appropriate services for the student (Parent Ex. P at p. 3).

The CSE convened on June 5, 2023 (Parent Ex. F). The prior written notice for the June 5, 2023 CSE meeting indicated that the CSE used the district's May 2022 psychoeducational assessment and a June 7, 2023 teacher report in developing the student's IEP for the 2023-24 school year (Dist. Ex. 11). Although a June 2023 teacher report is not in evidence, the IEP incorporated narrative statements and the results of "2022-23 School Year Assessments Based on Teacher

Progress Report[s]" including scores from teacher testing conducted in May 2023 (Parent Ex. F at pp. 2-3).²⁵

Following the parent's IEE request in October 2023 the district conducted numerous evaluations of the student including an October 2023 OT evaluation, a November 8, 2023 social history, a November 8, 2023 speech-language evaluation, a November 20, 2023 classroom observation, a November 30, 2023 assistive technology evaluation, and a December 11, 2023 assessment to consider the student's need for an FBA and a BIP (see Dist. Exs. 3-9).

The IHO briefly reviewed the evaluative information produced by the district and, similar to her findings regarding the 2022-23 school year, for both IEPs related to the 2023-24 school year, the IHO noted that the district relied solely on documentary evidence; however, the IHO found that the evidence showed that the district offered a "cogent and responsive explanation" for the recommendations made (IHO Decision at pp. 21-22). The IHO further found that the IEPs were designed to meet the student's unique needs and were comprehensive and that the district complied with the procedural requirements set forth in the IDEA (*id.* at p. 22). Therefore, the IHO found that the IEPs were substantively appropriate and met the obligation of providing a FAPE, as they were "reasonably calculated to enable the student to make progress appropriate in light of his circumstances" (*id.*).

On appeal, without specifying any particular CSE meeting, the parent asserts that the IHO erred in failing "to determine whether the evaluations or assessments were sufficiently comprehensive and accurate when she solely relied in the information in these district documents" despite the parent having challenged the district's evaluations (Req. for Rev. ¶18). Notably, the parent did challenge the district's evaluations; however, the parent's basis for challenging the district's evaluations were that the evaluations did not make recommendations, the evaluator's reported age instead of grade-level scores, and the district failed to conduct its own neuropsychological or central auditory processing evaluations or an autism skills assessment (Parent Ex. D at p. 9).²⁶

²⁵ The dates of the June 2023 IEP, the teacher reports, and the prior written notice are not entirely consistent as the prior written notice indicates the teacher report was dated June 7, 2023—two days after the CSE meeting, and the June 2023 IEP indicates one score on an iReady assessment reported as of June 13, 2023—after both the CSE meeting and the listed date of the teacher report (Parent Ex. F at p. 3; Dist. Ex. 11 at p. 1). However, as the prior written notice was dated June 20, 2023, and there is no allegation that the parent did not receive the prior written notice and a copy of the June 2023 IEP, the information contained in the IEP was available for consideration by the parent.

²⁶ In regard to the parent's contention that the district evaluations reported age instead of grade-level scores, this contention appears to have been made regarding the district's May 2022 psychoeducational evaluation as it is specifically referenced in the parent's November 2023 due process complaint notice (Parent Ex. A at p. 5). However, review of the May 2022 psychoeducational evaluation report shows that it reported the student's standard scores on the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) and Wechsler Individual Achievement Test, Fourth Edition (WIAT-4) (Dist. Ex. 12 at pp. 6-7). Standard scores are norm based referenced used for comparing the student's performance to his same aged peers (see Dist. Ex. 12 at pp. 1-6). Generally speaking, standard scores are considered more reliable than either age or grade level equivalent scores. The unreliability has been understood by education officials for decades, and in just a snapshot of state educational agency due process proceedings across the country in the current decade, such reliance on age and grade

To the extent that the parent argues that the evaluations were inappropriate because they failed to contain specific program recommendations or diagnoses, while a school district is required to ensure that students are evaluated in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), it is not necessarily required that the district, through its evaluation, "identify the underlying causes" of the student's needs (MB v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at *12 [S.D.N.Y. Mar. 29, 2018]). Moreover, a CSE is tasked with making recommendations for a student based on evaluations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]); the evaluations need not make specific recommendations in order to be sufficient. Additionally, the parent's request for a neuropsychological evaluation of the student appears to have been based on the private psychologist's recommendation and review of that recommendation shows that the request was made in order to "confirm [the student's] diagnosis and determine the appropriate educational services"; pertinently, the psychologist did not indicate any errors in the district's May 2022 psychoeducational evaluation or that there was anything missing from the evaluation (see Parent Ex. P).

The parent took exception to the district not conducting an autism skills assessment or a central auditory processing evaluation (see Parent Exs. B at p. 2; D at p. 9). Relevant to these requests, the psychologist's March 2023 report identified that the student received a diagnosis of autism spectrum disorder, with accompanying language disability (Parent Ex. P at p. 3). Additionally, the parent testified that the student was diagnosed with autism when he was three years old and received ABA services through insurance (Parent Ex. BB ¶3). However, the hearing record does not identify a need for a specific autism skills assessment or a need for a central auditory processing evaluation. It is worth noting that despite identifying a number of the student's needs as shown in the student's IEPs and despite including 20 enumerated challenges to the district's CSE process and substantive recommendations, the parent did not challenge the accuracy

equivalencies has continued to face considerable criticism (see, e.g., In re Baltimore County Pub. Schs., 123 LRP 24961 [SEA MD 2023] [noting that grade equivalents on testing results are not statistically reliable and can be misleading]; In re Independent School District No. 833 (South Washington County School District), 123 LRP 30369 [SEA MN 2023] [noting testimony that warned against the reliance on grade level equivalent data for assessing reading progress, that grade level equivalents are stated in certain assessments like the WIAT and WISC and explaining that grade level equivalents are "incredibly misleading" and statistically unsound, provide "misinformation" because they are based upon regression analysis and data extrapolation, not actual scores]; In re Williamsport Area Sch. Dist., 122 LRP 21678 [SEA PA 2021] [explaining that "this hearing officer is not endorsing the use of grade equivalents as an IEP present level metric"]; In re Morris Sch. Dist. Bd. of Educ., 121 LRP 24140 [SEA NJ 2021] [noting that age equivalency and grade equivalency are not used in special education programs and the question an evaluator's practice of switching between more reliable standard scores versus less reliable age and grade equivalents to justify the evaluator's argument in favor of a particular placement]; In re Sharpville Area Sch. Dist., 78 IDELR 179 [SEA PA 2020] [grade-level equivalency scores are a type of developmental score that must be interpreted cautiously and carefully, because they can be misleading for many reasons. For example, grade equivalents tend to exaggerate minor variations in performance; and, grade equivalents vary from instrument to instrument, and even from subtest to subtest, and are therefore quite difficult to compare]). With regard to the WIAT-4 used in this case, a Minnesota administrative law judge was careful to point out that "Pearson is the publishing company that created the WIAT-4 assessment," and Pearson itself had warned "that: 'Because of the inherent psychometric problems associated with age and grade equivalents that seriously limit their reliability and validity, these scores should not be used for making diagnostic placement decisions'" (In re Independent School District No. 833 (South Washington County School District), 123 LRP 30369 [SEA MN 2023]).

of the present levels of performance identified in any of the relevant IEPs (see Parent Ex. D at pp. 3-12). In addition, the district was not obligated to conduct a separate assessment or otherwise refer the student to either rule out, or to diagnose, whether he met the criteria for a diagnosis of autism (see MB v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at *12-*13 [S.D.N.Y. Mar. 29, 2018] [finding no procedural violation arising from a lack of a specific "autism evaluation" where the CSE had sufficient information about the student's individual needs and noting, in any event, that "there has been no showing that an autism-specific evaluation (or formal autism diagnosis) would have changed [the student's] recommended suite of special education services in any respect"]).

Further, the parent's assertions that the IHO erred in focusing solely on the documentation submitted by the district in finding that the evaluative information was sufficient overlooks that the district produced evaluations were what was available to each of the CSEs at the time they convened. The February 2024 neuropsychological evaluation report was not available until after the January 2024 CSE meeting, the last CSE meeting at issue in this proceeding. Accordingly, it cannot be relied on to retrospectively assess the earlier CSEs' recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"], citing R.E., 694 F.3d at 186–87).

Based on the above, and a review of the information available to each of the April 2022, May 2022, June 2023, and January 2024 CSEs, the hearing record supports finding that the district had conducted sufficient evaluations of the student during the 2022-23 and 2023-24 school years.

1. ICT and Related Services

On appeal, the parent asserts that the IHO erred by not requiring the district "to provide a cogent basis for its program determinations in each of the 2021-2022, 2022-2023, and 2023-2024 [school years]" (Req. for Rev. ¶17). The only specific allegation regarding the program recommendation contained in the request for review was the parent argument that the IHO failed to address the adequacy of the student's educational program to address among other things, his speech-language, OT, and sensory processing needs (Req. for Rev. ¶ 1d). Review of the amended due process complaint notice shows that the parent raised several arguments regarding the appropriateness of the district's recommendations for ICT and related services for each of the IEPs at issue in this proceeding, April 2021, April 2022, May 2022, June 2023, and January 2024 (Parent Ex. D at pp. 3-12). According to the parent, ICT services were "wholly inappropriate" for the student as any general education class with ICT services was not supportive enough for the student, and, in particular, after the student began receiving ICT services during the 2023-24 school year, the parent contended that the January 2024 CSE erred in reducing the recommendation from 20 periods per week to 10 periods per week (id. at pp. 6-8). In addition, the parent asserted that the district failed to provide the student with appropriate speech-language and OT services (id. at p. 9). In an answer, the district contends that the May 2022 IEP added OT services to the student's program (Answer ¶ 7). The IHO found that all of the IEPs, as a whole, provided the student with a FAPE (IHO Decision at pp. 20-22).

State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

As noted above, at the time the student's April 2022 IEP was created he was attending a general education first grade classroom where his IEP called for, but he did not receive, ICT services (Parent Exs. H at p. 2; K at p. 2). The hearing record includes two mid-year progress reports but no report cards for the 2021-22 school year. (Parent Exs. Q; R).

The January 2022 mid-year progress report indicated the student's reading level was "B/C" and the student was approaching understanding of the learning standards for reading, writing, listening and speaking, and math (Parent Ex. R). The student's IEP indicated that the student's iReady scores for reading placed him at an emerging kindergarten level for phonological awareness; a kindergarten level for phonics, vocabulary, literature, and informational texts; and a first-grade level for recognition of high frequency words (Parent Ex. H at p. 1). The IEP noted that the student's reading level for Fountas and Pinnell was level "A" (*id.*). In addition, the IEP noted the student's iReady scores for mathematics placed him at a kindergarten level for numbers and operations, algebra and algebraic thinking, measurement and data, and geometry (*id.*). According to the IEP, the student was demonstrating growth in ELA and math, as well as his self-confidence (*id.*). The student was, however, struggling with following directions and completing his work independently (*id.*). In terms of the student's resource to address the student's management needs, the IEP indicated the student needed consistent 1:1 redirection, small group instruction, brain breaks, assignments broken down into smaller tasks, manipulatives, consistent modeling, redirection, questions and directions repeated, positive models for behavioral support, reinforcement of appropriate learning behavior, scaffolding abstract topics, step-by-step to ensure comprehension of material, visual and hands on teaching, priority seating, positive reinforcement, and graphic organizers (*id.* at p. 3). The CSE developed academic goals that targeted the student's ability read a text on his reading level and answer questions about key details in the text; correctly identify long and short vowel sounds; write a full sentence using proper spelling, grammar, and finger spacing; and subtract double numbers fluently with the support of a drawing or manipulatives (*id.* at pp. 8-10). The CSE recommended that the student receive ICT services for 10 periods per week for both ELA and math and two periods per week for both social studies and sciences (Parent Ex. H at p. 16).

The April 5, 2022 IEP indicated that, at the time it was created, the student was receiving speech-language therapy "biweekly" to address his delays in receptive and expressive language (Parent Ex. H at p. 2). The IEP reflected the content of a district March 2022 speech-language progress report that described the student as "a very motivated youngster who loved to participate in his speech sessions" (compare Dist. Ex. 15 at p.1, with Parent Ex. H at p. 2). The IEP indicated that the student needed information to be repeated and presented in chunks, as well as time to process information (*id.*). It further indicated that the student's goals focused on phonemic awareness for cvc/ccvc/cvce syllable words and stated that the student appeared to have difficulty with sight words and "more complex story questioning (problem/solution)" (*id.*). With regard to

expressive language, the IEP noted the student, at times, became confused and repeated and refigured his sentences (*id.*). However, it also noted the student was able to answer "wh" questions and follow two- to three-step directions (*id.*). According to the IEP, the student had demonstrated progress with his overall speech and language skills (*id.*). The April 2022 CSE recommended that the student continue to receive two 30-minute sessions of speech-language therapy in a group of three, which was an increase in group size from the prior school year (compare Parent Ex. I at p. 12, with Parent Ex. H at p. 16). The April 2022 IEP, which was scheduled to be implemented on April 18, 2022, included speech-language goals that targeted the student's ability to further develop his phonemic awareness skills by segmenting two to three-syllable words, develop his vocabulary by identifying grade-level sight words, develop his receptive language by providing answers for story elements, and develop his expressive language by answering questions that required multi-step answers (Parent Ex. H at pp. 5-7).

With regard to OT, the April 5, 2022 IEP indicated that the student's movement was within normal limits for active range of motion in his upper extremities, bilaterally, but that he exhibited decreased fine motor control, gross motor control, and "[activities of daily living [ADL] self[-]care skills" (Parent Ex. H at p. 2). Although the IEP included annual goals for OT, it did not include a recommendation for OT services (Parent Ex. H at pp. 12, 13, 16).

Subsequent to the April 2022 CSE meeting the district conducted a psychoeducational evaluation of the student on May 13, 2022 that included both intelligence and achievement testing (Parent Ex. Q).²⁷ A CSE then convened on May 31, 2022 to review the results of the testing and the resultant IEP reflected the results of the psychoeducational evaluation (Dist. Ex. 18; compare Parent Ex. Q, with Parent Ex. G at pp. 1-5). More specifically, the IEP indicated that, as measured by the WISC-V, the student's full-scale IQ was in the average range (standard score 94, 34th percentile) (Parent Ex. G at pp. 2, 3). In addition, as measured by the WIAT-4, the student's overall reading and written expression were in the average range (reading skills - standard score 97, 42nd percentile; spelling skills – standard score 95, 37th percentile) (*id.*). The student's overall math skills, however, were in the below average range (standard score 81, 10th percentile) and the IEP indicated during testing the student was challenged by having to identify missing numbers, answer questions about graphs, read a calendar, and compute addition and subtraction problems past 10 (*id.* at pp. 2, 4). The IEP noted that the student had shown improvement in his ELA skills, especially oral reading, and growth in his ability blend sounds but needed to work on his ability to answer comprehension questions (*id.* at pp. 3-4). With regard to math, the IEP stated the student required a lot of assistance using CUBES to comprehend and solve grade level word problems (*id.* at p. 4). The May 2022 CSE modified the student's academic goals (compare Parent Ex. H at pp. 8-11, with Parent Ex. G at pp. 9-10). The new goals targeted the student's ability to answer comprehension questions after silently reading a story, identify the value of coins, and complete a story problem involving multi-step operations (*id.* at pp. 9-10). The CSE recommended the same ICT services as recommended in the April 2022 IEP (compare Parent Ex. G at p. 9, with Parent Ex. H at p. 16).

²⁷ A May 2022 mid-year progress report indicated the student was reading at a level "C" (end of year benchmark I/J) and meeting overall learning standards for reading, writing, mathematics, and listening and speaking (Parent Ex. R).

The May 2022 CSE meeting resulted in once weekly counseling services being added to the student's IEP (Parent Ex. G at p. 19). The IEP indicated that, when the student was presented with a task that he perceived as difficult, he became easily frustrated, and, when frustrated, he would cry and needed time to calm down before he could return to work (id. at p. 6). According to the IEP, the student's mother reported that he was rigid in his expectation of others and could become fixated and upset with others' behaviors (id.). The IEP noted that the student was challenged by changes in routine and the CSE recommended counseling support for the following school year, as the student was scheduled to attend a different school (id.). Goals targeting the student's ability to use coping strategies and problem solve in response to changes in routine and identify and explain how generalizations should not be taken literally were added to the IEP (id. at p. 12). In addition, the lack of a recommendation for OT was rectified at the May 2022 CSE meeting when OT services and updated annual goals were added to the student's IEP and scheduled to be implemented beginning on June 6, 2022 (Parent Ex. G at pp. 16-19; Dist. Ex. 12 at p. 2).

The May 2022 CSE recommended resources and strategies to address the student's management needs that remained largely the same as in his prior IEP and included 1:1 or small group instruction, brain breaks, instructions and tasks broken down into smaller chunks, use of manipulatives, redirection, questions and directives repeated, positive models of behavior support, scaffolding abstract topics, visual and hands on teaching methods to reinforce comprehensions, and verbal praise and tangibles (id. at p. 7). Additional strategies included discreetly reminding the student go to the restroom and extended time to complete tasks (id.).

Next, a CSE convened on June 5, 2023 to develop an IEP for the student for the remainder of the 2022-23 school year and for the 2023-24 school year (third grade) (Parent Ex. F). With regard to academics, the IEP included the results of teacher assessments conducted during the 2022-23 school year (id. at pp. 1-4). The teacher's May 2023 iReady assessment results showed that the student's overall rating for math was "Grade 1" and overall rating for ELA was "Grade Early 2" (id. at pp. 2, 3). The student's Fountas and Pinnell reading level was reported as "Level M (Ending Second Grade Level)" (id. at p. 4). The IEP stated that the student's strength in ELA was responding to questions and talking about what was read (id. at p. 4). The IEP noted the student was able to write about things he found motivating but had difficulty writing about academic based material (id.). With respect to reading, the IEP indicated the student understood grade-level literary and informational texts and applied effective comprehension skills and strategies; demonstrated a growing command of grade-level words and word learning skills; was able to decode five-syllable words and less common three and four-syllable words; and used prefixes, suffixes and base words (id.). In terms of math, the IEP indicated the student could identify the number that was one more than a given number up to 10 and "add and subtract with five" (id.). The IEP stated that the student would benefit from a review of prior grade level skills related to quantitative reasoning and instruction that connected counting patterns with addition and subtraction (id.). According to the IEP, the student demonstrated strengths in spelling and counting numbers and needed to continue to work on developing phonemic awareness skills, identifying grade-level sight words, answering questions with multiple steps/prompts, answering "wh" questions after reading texts, identifying coin values and solving multi-step operations in a word problem (id. at p. 5). The CSE recommended the same resources and strategies to address the student's management needs as in the prior school year and developed academic goals that targeted the student's ability to answer inferential questions after reading an instructional level text and solve real-world math stories by identifying which operations to use and solving the problem (id.).

at pp. 13-14). The June 2023 CSE recommended that the student receive SETSS for academic support through the end of the 2022-23 school year and then the same ICT services, as previously recommended, for the start of the 2023-24 school year (*id.* at pp. 7, 15). The June 2023 IEP indicated the student was receiving speech-language therapy twice weekly in a group of two (Parent Ex. F at p. 4). With regard to the student's participation in therapy sessions, the June 2023 IEP noted that the student was typically well mannered and friendly, that he was eager to please, and that he was motivated to follow rules and engage in lessons (Parent Ex. F at p. 4). According to the IEP, the focus of the student's speech-language therapy had been on increasing his ability to respond to varied questions and developing his vocabulary skills (*id.* at p. 5). The IEP noted that the student had achieved goals related to correctly using and defining grade-level vocabulary words and to providing more details in his responses when listening to a story read aloud (*id.*). In addition, the IEP stated that the student had shown great progress in all areas of speaking and listening and highlighted the student's improvement in abstract thinking skills, and ability to respond to a variety of "wh" questions (*id.*). The IEP noted, however, that the student required more verbal prompts and cues to respond to inferential questions than he did to respond to concrete questions and, although he could read along during speech sessions and comprehend what he read out loud or to himself, he struggled to answer more complex questions when reading independently (*id.*). The IEP stated that the student would be expected to provide more complex and grammatically correct sentences in his responses to complex questions and that the student needed to increase his ability to attend to verbal dictation as, at times, he lost his focus and provided the wrong response due to distractions (*id.*). The June 2023 CSE recommended that the student continue to receive speech-language therapy for two 30-minute sessions per week in a group of three and recommended annual goals that targeted the student's ability to formulate complex sentences using correct grammatical structure, read short passages/texts aloud and respond to detail-based questions, and increase listening comprehension/receptive language skills by providing responses to detail-based questions using visualization and verbalization strategies (*id.* at pp. 8-9, 16).

Regarding OT, the June 2023 IEP reflected that the student received two 30-minute sessions per week of individual OT to address his fine motor skills, visual perceptual skills, motor concerns, and focusing skills, noting that the student demonstrated progress in his fine motor skills and that he was able to lace and tie his shoes (Parent Ex. F at p. 6). According to the IEP, the student was easily distracted and required cues to stay focused and complete tasks (*id.*) The IEP indicated that the student's letter formation had improved but he continued to struggle with spacing, letter reversals, and punctuation (*id.*). In addition, he had some difficulties with right/left discrimination and copying age/grade level visual perceptual motor activities (*id.*). The IEP stated that the student was able to cut closer to the lines but had difficulties cutting geometric shapes on the line (*id.*). The IEP noted the student was able to open utensil and food packets (*id.*). The June 2023 CSE recommended that the student continue receive OT, this time in a group rather than individually, and developed annual goals that targeted the student's ability to focus on a task, and write/copy using "fairly" good spatial orientation and reduced reversals (*id.* at p. 12).

With respect to social/emotional development, the June 2023 IEP indicated the student appeared to be socially appropriate and to exhibit behaviors that were typical for his age-matched peers, he did not have difficulty making friends or maintaining positive relationships with peers and adults, and he was normally pleasant and followed rules and expectations in speech therapy

and when seen in the hallway (Parent Ex. F at p. 5). Strengths noted by the student's speech teacher included that the student was "friendly, verbally interactive, and ma[de] great conversation" (id.).

At the time of the June 2023 CSE meeting, the parent did not report any concerns regarding the student's social needs or development (Parent Ex. F at p. 6). Conversely, in her affidavit, the parent testified that the district was aware that the student had been struggling to learn, function in school, make friends, and understand personal space, further noting the district "also allowed [the student] to be bullied despite knowing he was being bullied, and it left him isolated and without the skills to make friends" (Parent Ex. BB ¶ 5). The parent further testified by affidavit that in first grade, the student was frustrated and crying a lot, had no flexibility and would get really fixated on things, like the behaviors of others; as a result, he was bullied physically and verbally, and called names which caused him to accept it and remain shut down and unhappy (id. ¶ 9). The parent testified by affidavit that in or around February 2022, the student began defecating on himself, wetting his bed, and grinding his teeth, further noting that initially his pediatrician thought it was because he was stressed, but it turned out to be in response to school (id.). According to the parent's affidavit, the student was too afraid to make others upset or to not do what was asked of him, and, at that time, the teacher told the parent that the student was in the wrong school setting (id.). The student's second grade teacher noted during the June 2023 CSE meeting that the student at times exhibited frustration when something was difficult or challenging and occasionally cried (Parent Ex. F at p. 4). However, the student's speech teacher noted that he exhibited age appropriate social and interaction skills and appeared to get along well with peers (id.).

Based on the parent's October 2023 request for IEEs the district conducted several evaluations of the student during the 2023-24 school year, including an OT evaluation, a speech-language evaluation, a social history, a classroom observation, an assistive technology evaluation, and an assessment of the student's need for an FBA/BIP (Parent Exs. L; M; N; O Dist. Exs. 4; 5). The October 25, 2023 OT evaluation report concluded that the student was performing comparably to his peers in all areas addressed by OT including access/movement, activities of daily living, management of classroom tools and materials, and writing and sensory skills (Parent Ex. O at p. 10). The evaluator recommended that—based on the student's performance during the evaluation, teacher report, and clinical observation—the student continue to receive OT two times per week, but at a reduced duration of 15 minutes, to address concerns related to the student's organization of personal belongings and materials (id. at p. 11). The classroom observation, conducted on November 20, 2023, did not note any concerns regarding the student's social/emotional development or classroom performance; rather, it indicated that the student read and spoke clearly when presenting to the class, operated his iPad without difficulty, and was focused on assigned activities (Dist. Ex. 5). A report of the speech-language evaluation, conducted on November 21, 2023, indicated that the student presented with receptive language skills in the low/moderate range and expressive language skills in the borderline/marginal/at risk range (Parent Ex. M at p. 9). The evaluator noted that the student had poor receptive and expressive vocabulary for his age as well as poor retentions skills, a lack of age-appropriate narrative retelling skills, delayed processing skills, and poor phonemic awareness (id.). The November 2023 assistive technology evaluation report indicated that the student was approaching grade-level standards for reading, writing, and math and that his academic skills were at a second to third-grade level (Dist. Ex. 3 at p. 4). The report noted that the student had executive functioning difficulties related to time management, sustained attention, organization, task initiation, and emotional control (id.). The report concluded that, based on the results of the evaluation and interviews with the student and school staff,

assistive technology was not being recommended (*id.* at p. 12). According to the report, the use of an iPad was trialed, but the student already used an iPad provided by the school and completed classwork and homework on it (*id.*). In addition, the student was reported as performing at grade level (*id.*). As discussed in more detail below, the district also assessed the student's need for an FBA and determined one was not warranted (Dist. Ex. 4). The CSE convened on January 10, 2024 and reviewed the evaluations conducted by the district (Parent Ex. E at p. 6, Dist. Ex. 2). The resultant IEP reflected information, provided by the student's teacher, that the student enjoyed reading on his tablet and joined in reading during whole group/small group instruction (Parent Ex. E at p. 3). The student was reportedly able to pull details from a text but needed assistance when asked to use text details to identify point of view, inferences, and the theme of a story (*id.*). In addition, the student required assistance to demonstrate comprehension and provide a detailed explanation (*id.*). Turning to writing, the IEP indicated that there were times when the student could directly answer a writing prompt and there were times when he struggled with details and creating a constructive response (*id.*). In math, the IEP indicated the student could solve addition and subtraction problems, including two to three-digit numbers up to 1000, "multiply basic multiplication facts" and understand skip counting, but was not able to compute problems using division (*id.*). The student also had difficulty identifying the correct operation in multi-step problems (*id.*). The IEP also reflected the results of the October 2023 OT evaluation, as well as information provided by the student's then-current therapist (*id.* at pp. 6, 7). According to the IEP, the student's occupational therapist reported the student had made progress in his fine motor and visual perceptual skills and, as a result, his handwriting had "greatly improved" (*id.* at p. 7). The therapist noted however, that the student continued to have some difficulty with letter reversal and completing near grade-level visual perceptual motor tasks (*id.*). The therapist indicated that the student was provided with breaks due to hand fatigue (*id.*). The therapist further indicated that the student could become distracted during classroom and group activities in the therapy room and would benefit from visual schedules, movement breaks when needed, and tangible rewards to assist him in organizing and completing his work (*id.*). The IEP stated that the parent was concerned about the student's writing skills and ability to focus (*id.*). The January 2024 CSE recommended that the student receive OT for one 30-minute session weekly to address his fine motor skills, visual motor skills, and adaptive skills (*id.* at pp. 7, 19). The CSE also developed annual goals that targeted the student's ability to pack up his belongings at dismissal, locate an assignment in his desk/folder/notebook, complete grade/age level visual perceptual activities, and focus on a task by following multi-step directions (*id.* at pp. 9-12.). In addition, the CSE recommended resources and strategies to address the student's management needs in this area including a cardboard desk separator to divide his desk into two compartments, checklists for organizing his belongings and cleaning out his desk, plastic folders for loose papers, twice weekly desk cleanings/organization of materials, limited visual distractions, and use of visual aids (*id.* at p. 7).

Turning to the student's speech and language needs, the January 2024 IEP included a summary of the November 2023 speech-language evaluation, as well as additional information provided by the student's speech-language therapist that detailed the student's then present levels of performance (Parent Ex. E at 1, 4). With regard to the information provided by the student's speech-language therapist, as in previous IEPs, the student was described as friendly, polite, and engaged in his therapy sessions (*id.* at p. 4). The IEP noted that the student understood jokes and humor, picked up on nonverbal body language and social cues, and appropriately reacted to social situations and responded to peers and adults (*id.*). According to the IEP, the student's

speech/language therapy targeted the student's receptive language by working on his ability to respond to concrete "wh" questions and execute one, two, and three-step directions (id.). The IEP stated that the student "follow[ed] speech classroom routines" and was able to understand assignments and instructions in that class (id.). The IEP reflected that the student's ability to execute speech assignments that were not heavily dependent on writing, and ability to speak in organized sentences and produce extended narrative, were age or grade appropriate (id.). In addition, based on information provided by the student's speech-language therapist, the IEP noted the student's processing skills were age-appropriate, and he was able to respond to inferential and reasoning questions with minimal cues and understood age-level vocabulary (id.). The IEP noted that, according to the student's therapist, there were no concerns regarding the student's expressive speech and language (id.). The IEP indicated that the student's mother expressed her desire for the student to continue to receive speech-language services to improve his ability to express himself in conversations and answer questions (id.). To address the student's speech-language needs, the CSE recommended that the student continue to receive two 30-minute sessions per week of group speech-language therapy and developed annual goals that targeted the student's ability to compare and contrast themes from a story, focus on the speaker while listening to a short story and identify critical information and respond to questions, use speech outlined strategies to respond to reading comprehension questions, and respond to higher order reasoning questions (id. at pp. 12-15).

In terms of the student's need for counseling services, the January 2024 IEP indicated the student was able to follow classroom rules and procedures without additional prompting, got along well with peers, and was respectful of his teachers and classmates (Parent Ex. E at pp. 3-4, 5). The IEP indicated the student was able to work well as part of a group or team, served as line leader and door holder, and worked hard to complete his assignments (id. at p. 5). In contrast with an earlier description of the student, the IEP stated that, at times, the student lost focus and needed to be redirected more than once (id.). The IEP also noted that, at times, the student became emotional when he did not understand instruction or was unsure about his belongings (id.). The CSE recommended that the student continue to receive counseling services for one 30-minute session per week to support him with improving his social and conversational skills (id. at pp. 5, 19). To address these concerns, the CSE developed a counseling goal that targeted increasing the student's social skills repertoire (id. at p. 16).

The January 2024 CSE reduced the student's recommended ICT services from 10 periods per week in each of ELA and math and two periods per week in each of social studies and science for a total of 24 periods per week, to five periods per week of ICT services in each of ELA and math for a total of 10 periods per week (compare Parent Ex. F at p. 15, with Parent Ex. E at p. 19).

Based on the foregoing, the CSEs respective recommendations for ICT services and related services consisting of speech-language therapy, OT, and counseling services were adequate to address the student's academic, receptive and expressive communication, fine motor, and social/emotional needs during the school years at issue. Accordingly, the IHO's determinations that the district's recommendation were appropriate to offer the student a FAPE are upheld.

2. Methodology

Turning to the parent's claim that the student required ABA services to receive educational benefit, and, therefore, required compensatory education to make up for the lack of such services

during the school years at issue, review of the evaluative information available to the CSEs does not indicate any kind of clear consensus that the student required instruction using ABA methodology in order to receive a FAPE during the school years in question. In the amended due process complaint notice, the parent argued that the district failed to recommend ABA services or another scientifically based methodology to instruct the student (Parent Ex. D ¶ 15).

According to the parent, when the student was two years old he began receiving ABA services through the Early Intervention Program (EIP) (Parent Ex. BB ¶ 2). The parent testified that, at age three, the student received a diagnosis of autism spectrum disorder level 2 and received ABA services through insurance (*id.*). In her affidavit, the parent noted that the "CPSE d[id] not provide ABA" services and that she believed that the district did not provide the student with "enough services" when he aged out of the EIP (*id.*, ¶ 4). The parent further asserted that the student needed both home-based and push-in ABA services, as recommended in the February 26, 2024 neuropsychological evaluation (Parent Ex. BB ¶ 21; *see* Parent Ex. K at pp. 25-26). However, this information was not available to the April 2021; April 2022; May 2022; June 2023; or January 2024 CSEs and there is no evidence in the hearing record of any other professional during that time recommending that the student receive ABA services (Parent Exs. E; F; G; H; I).²⁸

The precise teaching methodology to be used by a student's teacher is 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

²⁸ The neuropsychological evaluation report also noted that the student "experienced severe bullying in school"; however, the one specific incident identified in the neuropsychological evaluation report notes that the student did not notify school staff of the incident (Parent Ex. K at p. 21). Additionally, although the parent testified that the student was bullied over multiple school years, the hearing record does not identify a specific incident of which the district was made aware (Parent Ex. BB ¶¶ 1, 5, 9, 15). New York State has addressed bullying in schools through the Dignity for All Students Act (DASA), which imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18). One such obligation requires school districts to "identify the principal, superintendent or the principal's or superintendent's designee as the school employee charged with receiving reports of harassment, bullying and discrimination" (Educ. Law § 13 [1][a]). The designee is typically referred to as a DASA coordinator, who must "lead or supervise the thorough investigation of all reports of harassment, bullying and discrimination, and to ensure that such investigation is completed promptly after receipt of any written reports made under this section" (Educ. Law § 13[1][d]). If the student is subjected to bullying in the school environment, the district should take steps to ensure it is in compliance with its obligations.

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]).

In this matter, the CSEs for all the school years at issue identified the student's academic, social, communication, and physical needs using sufficient evaluative information and subsequently recommended an appropriate program and supportive management needs along with related services and annual goals aligned with the student's identified needs as discussed in detail above. Although the student received ABA services as part of the EIP, the evaluative information following the student's transition to CPSE and then school-age services did not provide a clear consensus that the student required ABA services in order to receive a FAPE. Accordingly, the CSEs were not required to recommend ABA teaching methodology in order to provide the student a FAPE. Moreover, the hearing record establishes that the CSEs for the 2021-22, 2022-23, and 2023-24 school years did not have access to the February 26, 2024 neuropsychological evaluator's ABA recommendation. Because the February 2024 neuropsychological evaluation was created after the CSEs at issue and therefore the information and recommendations contained in it were unavailable to the CSEs, its recommendations will not be considered in assessing the appropriateness of the CSEs recommendations.

The hearing record does not support the parent's assertion that the student required ABA teaching methodology, during the time periods at issue, in order to progress academically and socially. Further, although the hearing record lacks report cards, a review of the limited information as to the student's progress—specifically the student's 2022 midyear progress reports and the May 2022 and June 2023 IEPs—reflects that the student made some progress in the district's program, even without the provision of the recommended ICT services, and, therefore, the hearing record does not support finding that the student required a specific educational methodology in order to make progress during the 2021-22, 2022-23, or 2023-24 school years (Parent Exs. F; G; R; S).

During the 2021-22 school year, as discussed above, the student showed growth in the areas of self-confidence, math, and ELA (Parent Ex. H at p. 2). In January 2022, photos of the student's midyear progress report reflected that he was approaching understanding of most learning standards (2s) in most areas of mathematics; listening and speaking; writing; and reading (Parent Ex. S at p. 1). The progress report noted that the student's beginning of the year reading level was a level "A" and that his then-current reading level was a level "B/C" (id.). According to the report, the student was working to the best of his ability (id.). In May 2022, according to photos of the student's midyear progress report, the student achieved all 2s and 3s, with 2 indicating that he was approaching understanding of the learning standards and 3 indicating that he was meeting learning standards, in academic areas (Parent Ex. R at p. 1). The progress report noted that the student's then-current reading level was a level "C" (id.). Specifically, the report indicated that the student's

overall grade in all academic areas reflected that he met learning standards in writing; listening and speaking; and mathematics (id.).

Over the 2022-23 and 2023-24 (second and third grade) school years, with further respect to academic skills, the student showed progress in reading, moving from a Fountas & Pinnell level "A" to level "M" (compare Parent Ex. H at p. 1, with Parent F at p. 4). According to the May 2022 IEP, administration of the WIAT-4 to the student noted that spelling was an area of relative strength for the student (Parent Ex. G at p. 4). The June 2023 IEP reflected that the student's performance on an iReady diagnostic indicated an overall rating of "Grade K" (415) in reading in September 2022 whereas the student's performance in May 2023 reflected an overall rating of "Grade Early 2" (507) (Parent Ex. F at pp. 2-3). In math, although the June 2023 IEP indicated that math test results suggested that the student would benefit from review of various prior grade level skills and concepts related to quantitative reasoning and modeling, the IEP noted the student's iReady diagnostic ratings reflected he progressed from an overall rating of "Grade K" (372) in October 2022 to an overall rating of "Grade 1" (398) in May 2023 (id. at p. 2).

In terms of speech-language development, the June 2023 IEP reflected that the student achieved goals related to using and defining age level vocabulary words and providing more detailed responses to a story read aloud (Parent Ex. F at p. 5). In addition, the IEP indicated the student improved the accuracy of his abstract thinking skills, (id.). Further, the IEP reflected that the student "ha[d] shown great progress in all areas of [s]peaking and [l]istening" (id. at p. 17). Regarding fine motor development, although the May 2022 IEP indicated that the student demonstrated decreased fine motor control, gross motor control, and activities of daily living/self-care skills, the June 2023 IEP reflected that the student demonstrated progress in his fine motor skills evidenced by his ability to lace and tie his shoes (compare Parent Ex. F at p. 6, with Parent Ex. G at p. 6).

Based on the foregoing, although the IHO discussed the parent's claim regarding the student's need for ABA in relation to the recommendations made by the neuropsychological evaluator in February 2024, as the district asserted in its answer, such information was not available to the April 2021, April 2022, May 2022, June 2023, or January 2024 CSEs, and therefore, it would be improper to penalize the CSEs for not considering information that they did not have before them. Furthermore, the evidence of the student's progress contained in the hearing record shows that the student did not require ABA to receive an educational benefit during the school years at issue.

However, going forward when the CSE next convenes, if it has not already done so, it should consider the results of the February 2024 neuropsychological evaluation, including the recommendation for ABA services. A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels

of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakasic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

3. FBA/BIP

In the amended due process complaint, the parent argued that the student presented with behavioral issues including difficulty with emotional regulation, behavioral control, and transitions, and that the district failed to conduct a detailed, appropriate, and current FBA or develop a BIP (Parent Ex. D ¶ 8). The parent asserted in both of her due process complaint notices that a BIP was necessary to "address the interfering behaviors that [hindered the student's] ability to make meaningful progress" (Parent Exs. A at p. 11; D at p. 13). On appeal, the parent contends that the IHO failed to address the adequacy of the student's educational program to address, among other things, his behavior needs (Req. for Rev. ¶ 1). In an answer, the district asserts that there is no evidence in the hearing record that supports a finding that the student required an FBA or BIP (Answer ¶¶ 10, 11). The district argues that the May 2022 IEP added counseling and OT services, noting that the parent reported her concerns to the CSE regarding the student's social/emotional needs on managing his frustration or disappointment, and that the parent agreed with the CSE that the addition of counseling services would address those concerns (Answer ¶ 7, citing Dist. Ex. 16 at pp. 5, 25). Further, the district contends that, based on the evaluative information available to it, the CSE documented the student's difficulties with managing his frustration or disappointment, as well as the parent's concerns about the same, and recommended sufficient management strategies and counseling goals to address those issues (Answer ¶ 7, citing Dist. Ex. 16 at pp. 5-6, 10-11;). Finally, the district asserts that the parent did not express any concerns regarding the student's social/emotional development at the June 2023 CSE meeting (Answer ¶ 8, citing Dist. Ex. 1 at p. 6).

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). A district is also required to conduct a functional behavioral assessment (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 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 behavioral intervention plan (BIP) for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally,

State regulations define 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

include[s], 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 regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

The Second Circuit has explained 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). 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 (id.).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "[t]he [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]).

The district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x

2, 6-7 [2nd Cir 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

Of the five IEPs included in the hearing record spanning across the 2021-22, 2022-23, and 2023-24 school years, none of them reflected that the student needed strategies, including positive behavioral interventions, supports, and other strategies to address behaviors that impeded the student's learning or that of others, or that the student required a BIP (see generally Parent Exs. E; F; G; H; I). According to the April 2021 IEP, with respect to social/emotional development, the student was described as a "sweet boy who enjoys interacting with other students," noting that he would approach another student and start a conversation and that he enjoyed helping his teacher with any task (Parent Ex. I at p. 3). The IEP noted the parent's concern that the student would shut down when he did not understand the work or if the work did not match the original (id.). The April 2021 IEP afforded the student with the following management needs: visual and verbal cues; positive reinforcement; and repetition (id.).

The hearing record included a document entitled "Considerations of a Student's Need for Positive Behavior Supports, FBA, or a BIP CSE/CPSE Initial and Review Meetings" dated December 11, 2023 (see Dist. Ex. 4). The document included five questions under "PART 1: DETERMINATION OF NEED FOR AN FBA" which were all checked off as "No," e.g., "Does this student display behavior that impedes his or her learning or that of others?" (id. at pp. 1-2). According to the document, another question checked off as "No" stated "Does the student's behavior place the student or others at risk of physical or emotional harm or injury?" and another as "Is the CPSE/CSE considering more restrictive programs or placements as a result of the student's behavior?" (id. at p. 2).

As further detailed above, although the student sometimes became frustrated when his work did not match the teacher's work and he occasionally cried, nothing in the hearing record suggests that the student required an FBA and the development of a BIP to access his education during the school years at issue. The June 2023 IEP highlighted information from the student's speech-language therapist that noted the student "[wa]s friendly, verbally interactive and ma[de] great conversation," and that he was often seen asking friendly questions to his peers in school to make conversation (Parent Ex. F at p. 5). Additionally, the student was reported by his speech teacher to be socially appropriate, to exhibit typical behaviors as his age-matched peers, and to not have difficulty making friends or maintaining positive relationships with peers and adults (id.). The prior written notice dated January 26, 2024 reflected portions of the November 2023 social history assessment, in which the student's mother reported that he had emotional difficulties (e.g. feelings of low self-esteem, overly anxious) (Dist. Ex. 2 at p. 1; see Parent Ex. N at p. 2). However, the prior written notice indicated that "[t]h[ose] emotional difficulties [we]re not displayed in school" and that counseling services were recommended to address the student's "conversational skills with peers and adults" (Dist. Ex. 2 at p. 1; see Parent Ex. N).

As noted above, counseling services were recommended by the May 2022, June 2023, and January 2024 CSEs to address the student's social/emotional needs. Although I can sympathize with the parent's concerns regarding the student's behaviors, I note that, according to the May 2022 IEP, the CSE considered the parent's concerns regarding the student's need to work on managing his frustration or disappointment, on handling changes in routine, and on being flexible with others' language and phrases, and added counseling services and goals to the student's IEP and that the

June 2023 IEP noted the parent did not report any concerns regarding the student's social development at the time of the meeting (Parent Exs. F at p. 6; G at p. 6). The IHO noted in her decision that the parent agreed that the addition of counseling services was appropriate to address those concerns (IHO Decision at p. 20; Parent Ex. G at p. 25). Overall, the hearing record supports finding that the student did not require an FBA or a BIP during the 2021-22, 2022-23, and 2023-24 school years. Accordingly, the IHO decision is upheld on this point.

D. Implementation

The IHO did not address the parent's consistent assertion that the district denied the student a FAPE for the 2021-22 and 2022-23 school years through the district's failure to provide the student with the support of ICT services pursuant to the student's April 2021, April 2022, May 2022, and June 2023 IEPs (Parent Exs. A at p. 7; D at p. 8; F at pp. 15, 22; G at pp. 19, 26; H at pp. 16, 22; I at pp. 12, 16; Req. for Rev. ¶ 21). The parent's amended due process complaint notice included a sufficient allegation that the district failed to provide the student with the ICT services as recommended in the student's relevant IEPs (Parent Ex. D at p. 8). This failure to implement claim must be addressed.

A district's delivery of a placement and/or services must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F., 746 F.3d at 79). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]. The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202).

The student's April 2021, April 2022, May 2022, and June 2023 IEPs all recommended that the student receive the support of ICT services in his general education classroom (Parent Exs. F at pp. 15, 22; G at pp. 19, 26; H at pp. 16, 22; I at pp. 12, 16). The April 2021 IEP noted that "[g]eneral education was considered but [the student] benefit[ed] from the attention of a full time Special Education Teacher" (Parent Ex. I at p. 18). The April 2022 IEP stated that the student required a structured and organized learning environment that afforded smaller group instruction and that he would benefit from having a full time special education teacher throughout the day (Parent Ex. H at p. 3). The May 2022 IEP documented that the student's special education "needs

can be met with Integrated Co-Teaching services in the general education classroom" (Parent Ex. G at p. 26). The June 2023 IEP explained that a "[g]eneral education setting with no additional supports would not assist [the student] in his academic, speech/language, occupational/fine motor skills, and social emotional areas of concern" (Parent Ex. F at p. 22).

Despite four CSEs clearly documenting the student's need for the support of ICT services in his general education classroom, the district failed to provide the student with ICT services for the 2021-22 and 2022-23 school years (Parent Exs. F at pp. 7, 22; G at p. 3; BB ¶¶ 10, 15; Dist. Ex. 11 at p. 1; 18 at p. 1). The district explained in its June 1, 2022 prior written notice that the student's then-current school did not have ICT services available for the student's grade (Dist. Ex. 18 at p. 1). However, it does not appear that any attempt to rectify the lack of services was made until June 2023, at which time the June 2023 CSE recommended that the student receive two periods per week of SETSS in each of ELA and math from June 14, 2023 through June 27, 2023 (Parent Ex. F at p. 15). Essentially this would have resulted in a total of eight periods of SETSS at the very end of the 2023-24 school year. Although the district attempted to remediate the lack of ICT services toward the end of the student's 2022-23 school year this was insufficient to cure the district's material failure to deliver the ICT services mandated in the student's IEPs for the 2021-22 and 2022-23 school years (Dist. Ex. 11 at p. 1).²⁹

The district's failure to provide a witness to explain why the ICT services were not provided and when the supplementary SETSS services began leaves the parent's testimony unrebutted. Additionally, the parent's allegations of the district's material failure to implement the student's IEPs during the 2021-22 and 2022-23 school years are buttressed by the evidence in the hearing record, including the district's prior written notices and the February 2024 neuropsychological evaluation report (Parent Ex. K at p. 2; Dist. Exs. 11; 18). As such, the district materially deviated from the recommendations made by the April 2021, April 2022, and May 2022 CSEs by failing to provide the student with ICT services and the district, therefore, denied the student a FAPE for the 2021-22 and 2022-23 school years.

Although the parent alleges that the district denied the student a FAPE for the 2023-24 school year, the parent admits that the district provided the student with ICT services at the start of the 2023-24 school year (Req. for Rev. at p. 10; Parent Ex. BB ¶ 18).³⁰ According to the February 2024 neuropsychological evaluation report, the student received the recommended 20 hours per week of ICT services beginning in September 2023 until it was reduced to 10 hours per week at the January 2024 CSE meeting (Parent Ex. K at p. 2). Although it is not entirely clear that the student received all of the recommended ICT services, as the June 2023 IEP recommended that the student receive a total of 24 hours per week of ICT services (Parent Ex. F at p. 15), and the neuropsychological evaluation report only noted that the student was receiving 20 hours per week,

²⁹ Regarding the district's provision of SETSS in lieu of the student receiving ICT services, the hearing record does not contain evidence of the provision of SETSS prior to the recommendation for services to commence as of June 14, 2023, thereby leaving the student without special education services for the majority of the student's 2022-23 school year (Parent Ex. G at p. 22; Dist. Ex. 11 at p. 1).

³⁰ The hearing record establishes that the district was providing the student with his mandated counseling, OT, and speech-language therapy throughout the school years at issue (see Parent Exs. F; G; H; I; M Dist. Exs. 9; 13; 15.).

the hearing record does support finding that the service was generally being implemented. Accordingly, regarding the 2023-24 school year, because the district placed the student in an general education classroom with the support of ICT services, and provided the student with his recommended OT, speech-language therapy, and counseling mandates for that school year, the evidence weighs in favor of finding that the district did not materially deviate from implementing the student's IEP and I am upholding the IHO's determination that the district provided the student with a FAPE for the 2023-24 school year.

As discussed in further detail above, the evidence in the hearing record establishes that the district's special education recommendations were appropriate to meet the student's unique needs. It was the district's material failure to provide the special education program set forth in its own IEPs that constituted a denial of a FAPE.

E. Compensatory Education

Having found that the district denied the student a FAPE for the 2021-22 and 2022-23 school years, a determination must be made as to what, if any, compensatory education is appropriate to make up for the denial of a FAPE. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

The parent requests the following as compensatory education: 138 hours of speech-language therapy; 92 hours of OT; 46 hours of assistive technology instruction; 23 hours of assistive technology parent instruction; 460 hours of individualized academic remediation; 920 hours of ABA therapy; 92 hours of BCBA supervision; and 138 hours of parent counseling and training (Req. for Rev. at p. 10). Having reviewed the hearing record, as a whole, and as explained

in more detail in the analysis above, I find that the district provided the student with appropriate amounts of OT and speech-language therapy, and that the district's recommended programming was appropriate to meet the student's unique needs without the provision of assistive technology instruction, ABA therapy, or BCBA supervision. Therefore, the parent's request for compensatory awards of OT, speech-language therapy, assistive technology instruction, assistive technology parent instruction, ABA therapy, and BCBA supervision are denied.

Although the CSEs classified the student with having a speech or language impairment, the hearing record establishes that on November 9, 2018, the student's neurologist diagnosed him with autism spectrum disorder (Parent Exs. K at p. 1; Y at pp. 1-2). According to State regulation, educational programs for students with autism shall include "parent counseling and training... for the purpose of enabling parents to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.13[d]). In this instance, the student was classified as a student with a speech or language impairment in all of the relevant IEPs (Parent Ex. E at p. 1; F at p. 1; G at p. 1; H at p. 1; I at p. 1).

However, the hearing record shows that the district was aware the student was seen by a neurologist as it was reported in a January 2019 psychological report, and as noted the neurologist diagnosed the student with autism in 2018 (Parent Exs. U at p. 2; Y; BB ¶¶3-5). Based on the parent's testimony, and as the student's neurologist diagnosed the student with autism and a review of the hearing record does not present any indication that the district was not aware that the student had received a diagnosis of autism in 2018, the hearing record weighs towards finding that the district was aware of the diagnosis of autism going back to 2018.³¹

Accordingly, in this instance, without arguments as to why parent counseling and training should not have been provided to the student, the hearing record weighs in favor of finding that the district should have included parent counseling and training for the school years at issue. To remedy this error for the two school years within the statute of limitations, I will award compensatory parent counseling and training for the 2022-23 and 2023-24 school years at a rate of one hour per month. There are ten months to a school year and at one hour per month per school year, the parent is entitled to twenty hours of parent counseling and training to remedy the parent counseling and training that the parent should have received for the last two school years.

The parent's request for individualized academic instruction must likewise be addressed. The parent timely pled the district's failure to implement the April 2021 and April 2022 IEPs and is therefore not time-barred from receiving a compensatory award for the district's failure to implement the student's IEPs for the 2021-22 school year. The parent is also entitled to an award of individualized academic instruction for the 2022-23 school year due to the district's failure to provide ICT services throughout the school year. The parent is not entitled to an award for individualized academic instruction for the 2023-24 school year because the hearing record reflects that the student was provided with an appropriate special education program for that school year as illustrated in the analysis above and the hearing record reflects that the district implemented the student's educational program during that school year. To remedy the district's failure to implement the student's recommended special education program for the 2021-22 and 2022-23

³¹ The district's SESIS log redacted information prior to April 15, 2021 (Dist. Ex. 22 at p. 10).

school years, I am awarding academic instruction at a rate of five hours per week for 46 weeks for two years for a total of 460 hours of academic instruction to be provided as an individual service by a special education teacher.

F. Independent Educational Evaluations (IEEs)

The hearing record reflects that the parent requested an IEE by letter dated October 4, 2023 (Parent Ex. B). More specifically, the parent requested an independent neuropsychological evaluation, as well as independent evaluations in the areas of speech-language, OT, and assistive technology, a central auditory processing evaluation, and an autism skills assessment (*id.* at p. 3). Shortly after sending the letter requesting an IEE, the parent had the student begin the neuropsychological assessment (see Parent Ex. K at p. 1).

During the same period of time, the district performed updated speech-language, OT, and assistive technology evaluations in October 2023 and November 2023 (Parent Exs. L, M, O). After these evaluations, the parent moved for immediate funding of the requested IEE, specifically requesting funding just for the independent neuropsychological evaluation (IHO Ex. IV at pp. 6-21). The district opposed the parent's motion asserting that in the October 2023 letter, the parent did not disagree with a specific district conducted neuropsychological evaluation (IHO Ex. IV at pp. 1-5). In an interim decision dated January 14, 2024, the IHO granted the parent's request for an IEE and ordered the district to fund the neuropsychological evaluation of the student at the cost of \$6,500 by the parent's chosen provider (Interim IHO Decision).

In the parent's February 2024 amended due process complaint notice, the parent added an allegation that "[a]lthough the district conducted several evaluations after receiving the Parent's request for independent evaluations, these assessment[s] failed to make appropriate recommendations, in particular specific and appropriate methodologies to address [the student's] individual needs" (Parent Ex. D at p. 9). The parent asserted that the district's "failure to properly evaluate has contributed to the denial of FAPE for this child" (*id.*). However, the parent's request for an IEE remained unchanged from the initial November 2023 due process complaint notice to the February 2024 amended due process complaint notice (compare Parent Ex. A at pp. 8-9, with Parent Ex. D at p. 10). Both the initial due process complaint notice and the amended due process complaint notice contained the same requested relief regarding an IEE, seeking an interim order for funding of a neuropsychological evaluation, a speech-language evaluation; an OT evaluation; an assistive technology evaluation; a central auditory processing evaluation; and an autism skills assessment (Parent Ex. A at p. 11; D at p. 13).

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]).³²

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]).

In reviewing the parent's allegations regarding an IEE, the IHO held that the district reevaluation conducted in October and November 2023 was challenged in the amended due process complaint notice and that "[t]he district had insufficient time to respond" to the amended due process complaint notice (IHO Decision at p. 27). According to the IHO, the amended due process complaint notice was filed in February 2024, and was not accepted by the district until April 11, 2024, meaning that the resolution period ended "on or about May 12, 2024" (*id.*). The IHO emphasized that the parent chose to proceed with the hearing on the merits on April 9, 2024 on the initial due process complaint notice and then later abandoned that matter to proceed on the amended] due process complaint notice (*id.*). Additionally, the IHO noted that the parent received a district reevaluation and was not entitled to an additional evaluation and further determined that the parent was not entitled to an IEE based on an evaluation that she alleged the district should have conducted (*id.*).

Pertinently, the District Court of the Southern District of New York found that a parent may commence an impartial hearing and request a district-funded IEE in a due process complaint notice in the first instance and need not communicate with the school district or the CSE prior to seeking an impartial hearing regarding their request for such an IEE (Moonsammy v. Banks, 2024 WL 4277521, at *15-*17 [S.D.N.Y. Sept. 23, 2024]).³³ Accordingly, the parent's request for an

³² 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]).

³³ Under 34 CFR 300.502(b)(2), it would appear that the district has only one option to forestall litigation on the issue, and that is to grant the IEE at public expense before the presentation of evidence begins in the due process hearing that was commenced by the parent. This is of little consequence so long as the district is in agreement with the parent to grant the IEE. However, with the burden of production and persuasion placed on school districts under State law, there is little incentive for a parent to use the resolution meeting with a school district.

IEE at public expense may not be denied on this basis.³⁴ While the IHO may not have had the benefit of the district court's view in Moonsammy, ultimately I am constrained to reverse the IHO's determination to deny the parent's request for a publicly funded IEE solely because the district would not have had sufficient time to respond to the amended due process complaint notice.

Briefly, with respect to the IHO's finding on the timing of the acceptance of the amended due process complaint notice, there is no basis for holding that against the parent as the hearing moved forward and the district was required to defend against the request for an IEE as noted above. Further, although the IHO concluded that the district did not accept the parent's amended due process complaint notice until April 11, 2024, the district admits in its answer that the parent's amended due process complaint was dated February 2, 2024 and there are no allegations in the hearing record that the parent's amended due process complaint was improperly served (IHO Decision at p 27; Answer ¶¶ 4, 10).

Although both the parent's November 2023 due process complaint notice and February 2024 amended due process complaint notice included the same allegation regarding a request for an IEE, the parties' and the IHO all appear to agree that the basis for the request for an IEE in the amended due process complaint notice was a disagreement with the reevaluation conducted by the district in October and November 2023 (IHO Decision at p. 27; Req. for Rev. ¶¶22-23; Answer ¶10; see Parent Ex. A at p. 8-9; D at p. 10). Accordingly, having been informed of a request for an IEE, the district was required to take action; however, the district ignored the parent's February 2, 2024 request for an IEE and declined to address this request during the hearing.³⁵ The parent expressed her dissatisfaction with the district's recent assessment of the student in her amended due process complaint, which she is allowed to do under the district court's ruling in Moonsammy, giving the district an opportunity to defend its recent evaluations. The parent is therefore granted the requested IEEs.

In addition to the already granted neuropsychological evaluation, the parent's amended due process complaint notice requested the following evaluations at the following rates: speech-language at a rate of \$1,650; OT at a rate of \$1,500; assistive technology at a rate of \$2,200; central auditory processing at a rate of \$2,800; and an autism skills assessment at a rate of \$1,800 (Parent Ex. D at p. 13). However, the parent's appeal requested an award of the following IEEs at the

Strategically, it would almost always be more effective from a parent's perspective to force a district into defending itself in an impartial hearing as soon as possible on this issue. The district's second option under the regulation to commence a due process hearing of its own accord "without unnecessary delay" is illusory in cases where the parent has already initiated the proceeding by making the initial request for an IEE in their own due process complaint notice.

³⁴ Although the District Court in Moonsammy found that a parent may request an IEE in the due process complaint notice in the first instance (2024 WL 4277521, at *15-*17), the Court indicated that parents should endeavor whenever possible to "[s]eparat[e] the IEE process from the formal dispute resolution process" as the Second Circuit Court of Appeals has explained that this "serves to reinforce the focus on collaboration and communication among an IEP Team" and "provides an additional opportunity for discussion and cooperation between parent and school before the parties feel that they need to resort to formal procedures" (Trumbull, 975 F.3d at 170).

³⁵ The hearing record reflects that, as of February 6, 2024, the district knew that the parent had filed an amended due process complaint notice although the district had not yet accepted it (Tr. pp. 38-40).

following rates: OT at a rate of \$1,500; speech-language at a rate of \$1,650; sensory based feeding evaluation at a rate of \$2,200; and assistive technology at a rate of \$2,200 (Req. for Rev. at p. 10). Because the parent did not request a sensory based feeding evaluation in her amended due process complaint notice, and failed to request a central auditory processing evaluation or an autism skills assessment in her appeal, I decline to direct the district to fund those evaluations.

VII. Conclusion

The evidence in the hearing record reflects that the parent timely pled a claim for failure to implement the student's IEPs for the 2021-22 school year and that the district failed to provide the student with a FAPE for the 2021-22 and 2022-23 school years based on the district's failure to provide the student with the recommended ICT services. The parent is entitled to compensatory education for those denials of FAPE. Furthermore, the student is entitled to the requested IEE in the identified areas that the parent requested in her amended due process complaint notice but the district failed to acknowledge.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 3, 2024 is modified by reversing that portion which found that the parent was precluded by the statute of limitations from bringing IEP implementation claims for the 2021-22 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated October 3, 2024 is modified as the district failed to provide the student with a FAPE for the 2021-22 and 2022-23 school years based on a failure to provide the student with ICT services; and

IT IS FURTHER ORDERED that unless the parties shall otherwise agree, the district shall, using district employees, provide the parent with 20 hours of parent counseling and training and the student with 460 hours of academic instruction to be delivered on an individual basis by a special education teacher; and

IT IS FURTHER ORDERED that the district shall fund the following IEEs: an OT evaluation at a rate of \$1,500; a speech-language evaluation at the rate of \$1,650; and an assistive technology evaluation at the rate of \$2,200; and

IT IS FURTHER ORDERED that the compensatory education services awarded herein shall expire three years from the date of this decision if the parent and student have not used them by such date.

Dated: Albany, New York
March 28, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER