The University of the State of New York

The State Education Department
State Review Officer
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No. 18-015

Application of a STUDENT WITH A DISABILITY, by her 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:
The Law Office of Elisa Hyman, P.C., attorneys for the petitioner, by Elisa Hyman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, 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 the May 2016 educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2016-17 school year was appropriate. The appeal must be sustained in part and the matter must be remanded to an IHO for further administrative proceedings, as outlined below.

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

Following a diagnosis of pervasive developmental disorder/autism, the student began receiving services of applied behavior analysis (ABA), speech-language therapy, and occupational therapy (OT) through the Early Intervention Program (Parent Ex. C at p. 2; Dist. Ex. 10 at p. 3). The student subsequently transitioned to the Committee on Preschool Special Education (CPSE), where she received special education itinerant teacher (SEIT) services (three hours per day, five days per week, along with speech-language therapy, OT, and physical therapy (PT) (Parent. Exs. C at p. 2; I at p. 1; Dist. Ex. 10 at p. 3).

In February/March 2015, the district evaluated the student in anticipation of her transition to kindergarten and the Committee on Special Education (CSE) (see Parent Ex. B; Dist. Exs. 7 at p. 2; 59-61). On May 14, 2015 a CSE convened and found the student eligible for special education services as a student with autism (Dist. Ex. 62 at pp. 1, 11). The CSE recommended that the student receive integrated co-teaching (ICT) services for ELA, math, social studies and science; special education teacher support services (SETSS) for ELA and math; and related services of speech-language therapy, OT, PT, counseling, and parent counseling and training (id. at p. 8). The CSE also recommended that the student receive 12-month services (id. at p. 9).[1] The special factors section of the IEP indicated that the student did not need a special education service to address her language needs as they related to the IEP and the CSE recommended that the student's special education and related services be provided to her in English (id. at pp. 3, 8). By e-mail dated June 25, 2015, the parent advised the district that the student's IEP was incomplete because it did not include an agreed upon paraprofessional, did not include special transportation, and did not indicate that the student was a native Spanish speaker and required her services in Spanish (Dist. Ex. 9 at p. 1). The parent requested that the CSE reconvene to add a paraprofessional and special transportation to the student's IEP and to recommend an assigned school with a dual language program and ICT services (id. at pp. 1-2).[2] The parent also notified the district that she had found a bilingual psychologist to conduct an independent evaluation of the student (id. at p. 1).

Subsequently, the parent obtained an independent, bilingual psychoeducational evaluation in July 2015 (Parent Ex. C at p. 1; Dist. Ex. 10 at p. 2).[3] Based on a review of relevant records, parent interview, observation, and the results of standardized testing, the evaluating psychologist recommended that the student be placed in a full-day kindergarten program in a classroom with both a special education and regular education teacher, with the support of a 1:1 bilingual paraprofessional (Parent Ex. C at p. 7; Dist. Ex. 10 at p. 8).

The CSE reconvened on August 25, 2015 and modified the present levels of performance along with the special education program and services recommendations on the student's proposed 2015-16 IEP. (Dist. Ex. 11 at pp. 1-4, 9-10). Notably, the present levels of performance were revised to reflect the results of the July 2015 independent psychological evaluation, as well as the student's need for bilingual support in school (id. at pp. 2-4). In addition, SETSS five times per week and a part time (.8) "Spanish" health paraprofessional were added to the student's IEP (id. at pp. 9-10). The special factors section of the IEP was revised to indicate that the student required a special education service to address her language needs as they related to the IEP and the service delivery recommendations were revised to indicate that the student's ICT and related services

[1] In this case, the hearing record and pleadings refer to both extended school year (ESY) and 12-month services interchangeably; however, I use the term 12-month services in this decision.

[2] The parent asserted in her email that the school to which the district assigned the student had neither a dual language program (which the parent requested in her school application) or ICT services (Dist. Ex. 9 at pp. 1-2).

[3] The July 2015 private psychological evaluation was entered into the record by both the parent and district (see Parent Ex. C; Dist. Ex. 10). The district's exhibit contains an additional page as a fax cover sheet was included (Dist. Ex. 10 at p. 1).

would be provided in Spanish (id. at pp. 9-10). The CSE continued to recommend the student for a 12-month school year (id. at pp. 9-10).

On September 22, 2015 the district administered the New York State Identification Test for English Language Learners (NYSITELL) to the student which she passed at the "commanding" level (Dist. Ex. 1; Tr. pp. 49-53). On September 30, 2015 the CSE convened and revised the frequency of the student's ICT services and SETSS (compare Dist. Ex. 11 at pp. 9-10 with Dist. Ex. 15 at p. 12). With the exception of OT and PT, the CSE continued to recommend that the student's special education and related services be provided in Spanish (Dist. Ex. 15 at pp. 13-14).

The student attended the district's recommended kindergarten program for the 2015-16 school year (see Dist. Exs. 2 at p. 1; 55 at pp. 1-2).[4] According to her final report card, the student excelled on academic and personal behavior standards by the end of her kindergarten year (Dist. Ex. 55 at pp. 1-2).

On May 23, 2016 the CSE convened to develop an IEP for the student's 2016-17 school year (first grade) (Dist. Ex. 2 at pp. 11, 13-14). The CSE found the student continued to be eligible for special education as a student with autism and recommended ICT services in math, ELA, social studies, and science (id. at p. 8). The CSE also recommended that the student receive related services, including three 30-minute sessions per week of individual OT; one 30-minute session per week of individual PT; one 30-minute session per week of individual speech-language therapy; and two 30-minute sessions per week of group speech-language therapy (id. at pp. 8-9). Additionally, the CSE recommended that the student receive the daily support of a full-time health paraprofessional (id. at p. 9). The CSE recommended that all of the student's special education and related services be provided in English except for speech-language therapy, which was recommend to be delivered in Spanish (id. at pp. 8-9).[5] The student was recommended for 12-month school year services; however, the IEP did not identify a specific program for the summer (id. at p. 9). In contrast to the previous school year, the CSE did not recommend SETSS or counseling services for the student (see Dist. Ex. 2 at pp 8-9).

The May 2016 IEP was amended in June 2016 to include five 60-minute sessions of parent counseling and training (Dist. Ex. 22 at p. 11). Further, the June IEP indicated that the student would receive the same special education program/services during July and August as recommended for the 10-month school year (id. at p. 12). [6]

[4] District Exhibit 55 is a copy of the student's report cards for the 2015-16 and 2016-17 school years; it was entered into evidence as District Ex. 7 and later as District Ex. 55 (Tr. pp. 161, 207, 212). As another Exhibit was entered as District Ex. 7, a May 2015 prior written notice—the student's 2015-16 and 2016-17 report cards are identified as District Exhibit 55 in this decision (see Tr. pp. 200, 207).

[5] The special factors section of the May 2016 IEP indicated that the student did not need a special education service to address her language needs as they related to the IEP (Dist. Ex. 2 at p. 3).

[6] The hearing record does not clarify how the district would implement ICT services over the summer months when non-disabled peers are less likely to attend school.

In August 2016, the parent reached out to the psychologist who had evaluated the student in July 2015 and expressed concern that the district had removed "all supports" from the student's educational programing (Parent Ex. D at p. 1). According to the psychologist, the parent was concerned that the removal of previously provided supports would significantly impact the student's ability to function in first grade, where the academic and social demands would be greater than in kindergarten (id.). The psychologist conducted an observation of the student in a park to assess her ability to function in a setting with minimal support (id.). Based on her observation, the psychologist recommended that the student required the ongoing support of a "special educator," counseling services, speech-language therapy and OT (Parent Ex. D at p. 4). On September 22, 2016, the parent requested that the CSE reconvene to consider adding SETSS back onto the student's IEP (Dist. Ex. 26).[7] After obtaining the parent's consent, the district conducted a classroom observation and a psychological evaluation of the student in October 2016 (Dist. Exs. 27-29). The written classroom observation indicated that the student appeared attentive, participated in the classroom lesson, and completed her assigned work with minimal assistance (Dist. Ex. 28 at p. 1). The psychoeducational evaluation report indicated that the student was functioning within the "[h]igh [a]verage" range of intellectual ability, and that her performance in math was "[a]verage" and performance in reading "[h]igh [a]verage" (Dist. Ex. 29 at p. 4).[8] In addition to the new evaluations, the student's related services providers completed progress updates of the student (Dist. Exs. 31-33).

The CSE convened on November 15, 2016 to review the results of the reevaluation of the student and among other things, determine the student's eligibility for SETSS (Dist. Exs. 30 at p. 1; 34 at pp. 10-11, 13; see Dist. Ex. 29 at pp. 1-2). As a result of the CSE review, the recommended ICT services for math were reduced from 12 times per week to 7 times per week; ICT services for reading were increased from 10 times per week to 11 times per week; the student's OT was reduced by one session per week and one OT session per week was changed from individual to group; and the student's PT session was changed from individual to group (compare Dist. Ex. 2 at pp. 8-9 with Dist. Ex. 34 at p. 7).[9] In addition, the CSE recommended that the student's individual health paraprofessional be changed to a shared paraprofessional and reduced from full time to part time (.8) (compare Dist. Ex. 2 at pp. 8-9 with Dist. Ex. 34 at p. 7). The November 2016 CSE did not recommend SETSS for the student (see Dist. Ex. 34 at p. 7). In addition, while the May 2016 CSE found that the student was eligible for 12-month school year services, the November 2016 CSE found that the student was not (id. at p. 8).

[7] The hearing record contains a notice to the parent indicating that a "requested review" of the student's IEP was scheduled for September 30, 2016; however, the date on the notice (September 16, 2016) predated the parent's written request for review (Dist. Ex. 25).

[8] The psychological evaluation report contains internal inconsistencies. The reported standard scores do not appear to match the reported qualitative descriptors (Dist. Ex. 29 at p. 2). In addition, the report states that the student's math problem solving skills are in the "[b]elow [a]verage range," however, later characterizes the student's performance in math as being in the "[a]verage" range and notes that she was able to provide accurate responses to the word problems presented and resolve math operations independently (id. at p. 4).

[9] Speech-language therapy was recommended to be provided in Spanish (Dist. Ex. 34 at p. 7).

In an e-mail dated November 23, 2016, the parent requested that the CSE reconvene to discuss her concern that the student required a 1:1 paraprofessional "at all times while at school" and 12-month services (Parent Ex. N at p. 3; see Parent Ex. N at pp. 4-5).[10, 11] The parent also raised concerns in her November 2016 e-mail regarding incidents of harassment occurring during the student's bus ride (id).

The CSE reconvened on December 5, 2016 and recommended the same program as was recommended by the November 2016 CSE (compare Dist. Ex. 34 at pp. 7-8; with Dist. Ex. 38 at pp. 7-8, 10-11, 13). During the December 2016 CSE meeting, the parent reported that the summer services provided to the student in previous years were provided in English, which caused the student to act out significantly as the student was not able to understand the teachers (Dist. Ex. 38 at p. 2). The parent requested that summer services be reinstated and provided in Spanish; however, the CSE indicated that there was no evidence at school to support the parent's request as the student responded well to lessons provided in English and Spanish (id.). Further, the IEP indicated that the parent was concerned the student "receive every service that can help to enhance her performance and better serve her needs" (id. at p. 11). The IEP indicated that the parent believed the student was stronger in Spanish than English and she did not agree with the recommendation for the student's services to be delivered in English (id.). The IEP further indicated that the parent was seeking a new psychoeducational evaluation and a new PT evaluation of the student (id.).

In January 2017, the CSE reconvened; however, the student's parents did not attend the meeting (Dist. Ex. 41 at pp. 12-13, 15). The CSE continued the recommendation for ICT services but modified the student's related services from the December 2016 IEP (id. at pp. 9-10). The CSE recommended that the student's one 30-minute session per week of group PT be switched to individual PT, that parent counseling and training be added to the IEP, and that the student's speech-language therapy, which had been provided in Spanish, be provided in English (id. at pp. 9-10). Further, the CSE recommended that the shared paraprofessional, instituted in November 2016, be returned to a full-time individual paraprofessional for the student (id.).

Contemporaneous with the January 2017 CSE meeting, the parents referred the student for a neuropsychological evaluation for a diagnostic evaluation and educational programming recommendations (Dist. Ex. 3). Based on a review of the student's records, the results of standardized testing and rating scales, and observation of the student, the evaluating neuropsychologist opined that the student required "a classroom environment, as part of a 12-month curriculum that c[ould] provide [the student] with the structure and support she w[ould] need to make appropriate progress, academically and socially" (id. at p. 22). The neuropsychologist suggested that the setting should provide the student with an "academic curriculum appropriate to her age and cognitive abilities" and a paraprofessional trained and aware

[10] In an email dated November 28, 2016, the school principal advised the parent that the district would continue to provide the student with a full-time paraprofessional until the CSE reconvened (Parent Ex. N at p. 1).

[11] The IHO did not list Parent Ex. N in the exhibit list attached to the decision (IHO Decision at p. 35). However, the transcript reflects that Parent Ex. N was admitted into the hearing record (Tr. p. 216). Although, the transcript reflects "Student" exhibits F through S were admitted into the hearing record, a review of the transcript demonstrates that these were the Parent exhibits (Tr. pp. 212-216).

of the student's unique needs (id.). Among other things, the neuropsychologist recommended that the student participate in a dual language program in order to maintain proficiency in both English and Spanish and that she receive speech-language therapy, OT, counseling, social skills training, and reading remediation using a structured program (id. at pp. 22-26). A May 2017 progress report indicated that academically the student was performing at grade level and related services progress reports indicated that the student continued to make progress in all areas of receptive and expressive language skills and demonstrated age-appropriate gross motor skills, with some safety concerns noted (Dist. Exs. 5, 6, 48).

The CSE convened on May 25, 2017 for an annual review, to determine the student's eligibility and develop an IEP for the student for the 2017-18 school year (second grade) (Dist. Ex. 4 at p. 11, 13-14). The May CSE continued to find the student eligible for special education as a student with autism and recommended ICT services in math, ELA, social studies, and sciences until June 28, 2017 (id. at p. 8).[12] With respect to related services, the CSE recommended that the student receive one 30-minute session per week of individual OT; one 30-minute session per week of group OT; one 30-minute session per week of individual PT; one 30-minute session per week of individual speech-language therapy; and two 30-minute sessions per week of group speech-language therapy, all to begin in June 2017 (id. at pp. 8-9). The CSE also recommended one 30-minute session per week of group counseling beginning September 7, 2017 (id. at p. 8). Additionally, the CSE recommended that the student receive the support of a daily individual health paraprofessional for part of the school day (.8) until June 28, 2017 and breaks every 15-20 minutes for 3-5 minutes during academic instructional periods staring in June 2017 (id. at p. 9). The CSE also recommended parent counseling and training (id.). The CSE did not recommend 12-month school year services for the student (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 31, 2017, the parent asserted that the district denied the student a free appropriate public education (FAPE) for the 2015-16 and 2016-17 school years (Dist. Ex. 57).

The parent asserted that the June 2016 CSE removed "service recommendations for Spanish language mandates, SETSS, and the extended year program" (Dist. Ex. 57 at p. 8). The parent argued that the district did not "conduct the required regression review … prior to removing the extended year program" (id.). The parent asserted that she "expressed her concerns and disagreement with the removal of these services," that the student's first language is Spanish, and that the student benefitted from SETSS as it addressed her behavioral needs and sensory processing needs (id.). The parent acknowledged that the CSE responded by adding the extended year program back on the student's IEP (id.).

[12] The parent testified that she had some confusion regarding the recommended program as the May 2017 IEP indicated ICT services; however, at the conclusion of the meeting she believed the recommendation was for placement in a general education class (Tr. pp. 274-75). The parent's confusion in this respect is understandable as the prior written notice also indicated a recommendation for ICT services; however, it also went on to indicate ICT services were considered and rejected and that the most appropriate service for the student was a general education dual language class with related services only (see Dist. Ex. 52).

The parent contended that the November 2016 CSE "did not add the language mandates or SETSS back to [the student's] IEP" (Dist. Ex. 57 at p. 10). "Instead, the CSE removed additional supports and services," specifically "the extended year program, parent counseling, and the one-to-one paraprofessional" (id.). The parent argued that the district again failed to conduct a "requisite regression review" (id.). The parent asserted that the district promised to provide her with a related services authorization due to lapses in the provision of OT; however, the parent alleged that she never received the authorization or make-up services (id.).

The parent asserted that the January 2017 CSE convened at her request and added a 1:1 paraprofessional back to the student's IEP; however, the parent contended that in April 2017 she learned the student was not receiving the support of a 1:1 paraprofessional (Dist. Ex. 57 at p. 11). Further, the parent asserted that the January 2017 CSE meeting was completed without her because she left after being "shouted at" (id.).

According to the due process complaint notice, the CSE met again in May 2017 at the parent's request in order to review a private neuropsychological evaluation (Dist. Ex. 57 at p. 11). The parent contended that she left the May 2017 CSE meeting confused as to what the CSE's recommendations were, except she knew that the student's "services were being taken away without due consideration of [her] disability as it relates to her special education needs" (id. at p. 12). The parent further argued that the "CSE did not explain how it came to the conclusion that [the student's] special education needs, with regards to her academic skills and cognitive functioning, would be met without specialized instruction, when her working memory scores were so low" (id.). The parent asserted that "[t]he neuropsychological evaluation recommended a highly structured educational setting to prevent [the student's] executive functioning weaknesses from compromising her academic progress" (id. at pp. 12-13). Moreover, the parent asserted that the student was not consistently receiving her related services (id. at p. 13). The parent argued that the May 2017 CSE "wholly ignored [the student's] social/emotional, behavioral, developmental, and functional needs" (id.).

The parent argued that there were multiple reports during the 2015-16 and 2016-17 school years, which "confirmed that without the proper supports, including a properly trained one-to-one paraprofessional, [the student] had fallen and injured herself various times" (Dist. Ex. 57 at p. 13). The parent asserted that the district failed to provide the incident reports to the parent in its response to a record request (id. at p. 14). Further, the due process complaint notice included allegations that the student was bullied on the bus ride home from school (id.). Moreover, the parent asserted that her daughter was struck by other students more than once while at school and that none of these incidents were recorded in the student's evaluations or IEPs (id.). The parent argued that these incidents "were affecting [the student's] education and safety" (id.). The parent contended that she informed the CSE that the student "needed consistency and repetition to understand and remember daily functioning tasks" (id. at p. 15). Further, she asserted that she informed the CSE that the student "does not appreciate or understand dangerous or inappropriate situations or behaviors" (id.). The parent asserted that the CSE chose to ignore all of the evaluations, parent concerns, and "widely accepted academic and medical findings about supporting students with [autism], and all of the indications that its recommendations were creating dangerous situations for a six year old female student diagnosed with moderate [autism]" (id.).

In a section entitled "disputed issues," the due process complaint notice set forth seventeen enumerated allegations as to how the district allegedly failed to offer the student a FAPE for the 2015-16 and 2016-17 school years (Dist. Ex. 57 at pp. 15-17). The allegations were that (1) the district evaluations were "not sufficiently comprehensive to assess [the student's] special needs, or her ability to progress in the general education curriculum"; (2) the district did not base its recommendations "on a review of the existing data related to [the student's] special education needs"; (3) the recommendations "were not reasonably calculated to provide [the student] with an educational benefit"; (4) "assessments were not provided in [the student's] native language"; (5) assessment results and notices were not provided to the parent in her native language; (6) "[r]equired notices were never provided to [the parent]"; (7) "[m]andatory eligibility reviews were not conducted prior to the denial of a service"; (8) "IEP recommendations did not consider [the student's] disability; (9) "IEP recommendations were not sufficiently defined or communicated"; (10) "[t]esting accommodations were either inappropriate or not provided"; (11) the student did not receive recommended services; (12) "regression in [the student's] social/emotional development was ignored"; (13) "IEP program recommendations were appropriate";[13] (14) the parent was denied meaningful participation in the student's "educational program planning"; (15) the parent never received parent counseling and training although it was recommended; (16) "IEP recommendations did not address [the student's] behavioral needs"; and (17) "[a]s a result of the [district's] inappropriate actions and recommendations, [the student] has regressed educationally" (id. at pp. 16-17).

The parent requested that the district amend the student's IEP to include all of the recommendations from her August 2015 IEP, which included a 12-month program, Spanish language mandates, ICT services, and SETSS (Dist. Ex. 57 at p. 17). In addition, the parent requested that the student continue to receive the related services the student was currently receiving (id.). The parent further requested that the student's IEP be amended to include assistive technology, a reading program "that teaches phonemic awareness using a multisensory approach to address the student's working memory needs," social/emotional therapy services with an independent provider of the parent's choosing, and a one-to-one full-time paraprofessional who is present for special transportation services and is required to submit bi-weekly progress reports (id.at pp. 17-18). The parent also requested parent counseling and training with an independent provider of her choosing (id. at p. 17). Further, the parent requested an order that the district develop a behavioral intervention plan (BIP), "consistent with the observations and recommendation in the private neuropsychological exam to address [the student's] executive functioning needs" (id. at p. 18). Finally, the parent requested an order that the district be prohibited "from removing special education services from [the student's] IEP without proper support confirming that [the student's] specific need no longer exists, unless upon [the parent's] request or consent" (id.).

[13] Based on the other allegations contained in the due process complaint notice, it appears that this allegation may have been a typographical error; however, even if it were an allegation that the IEP program recommendations were not appropriate, it remains a generic allegation that adds nothing more to the specific allegations outlined as to why the parent believed the IEPs for the 2015-16 and 2016-17 school years were deficient.

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on August 17, 2017, which concluded on October 20, 2017 after three days of proceedings (Tr. pp. 1-329).[14],[15] In a decision dated January 5, 2018, the IHO noted that "the parent [was] not contesting the 2015-16 school year" and the district [was] defending the May 2016 IEP and May 2017 IEP" (IHO Decision at p. 4).

Initially in laying out the standard for determining whether the district offered the student a FAPE, the IHO determined that Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, [2017] did not apply because the "relevant CSE/IEP meeting was held on May 23, 2016," before Endrew F. was decided by the Supreme Court (IHO Decision at p. 20).

The IHO found that both parents attended all of the student's CSE meetings and the "parents fully participated in the IEP process" (IHO Decision at p. 23). The IHO noted that the lack of an additional parent member at the May 2016 CSE meeting did not deny the student a FAPE because for the reasons outlined in the decision, the student was provided with a FAPE for the 2016-17 school year (id.).

After reviewing the evaluative information considered by the May 2016 CSE, the IHO reviewed the testimony of the IEP Coordinator and SETSS provider who attended the May 2016 CSE and found their testimony to be credible and uncontroverted (IHO Decision at pp. 23-27). The IHO determined that the CSE was "comprehensively composed, reviewed the available evaluative material regarding the student, created goals and management needs reasonably calculated to provide the student with an educational benefit and allowed for the Parents full participation at the meeting" (id. at p. 27). The IHO acknowledged the parent's concerns regarding moving the student from a 12:1 special class in preschool to a general education setting with the support of ICT services and that the student was having social/emotional issues; however, after assessing the district's obligation to recommend a program in the student's least restrictive environment (LRE), the IHO found that the district "did produce an IEP for the student's 2016-17 school year that complies with the procedural requirements set forth in the IDEA, that [was] reasonably calculated to enable the student to receive educational benefits, that accurately reflects the results of evaluations to identify the student's needs, and that established annual goals related to those needs, through the use of appropriate special education services, in the 'least restrictive environment' for that student" (id. at pp. 28, 31-32).

[14] The first day of the hearing addressed the parent's request for pendency and resulted in an interim decision on pendency dated September 6, 2017, in which the IHO ordered the student's August 2015 IEP as the student's stay-put placement for the duration of the proceedings (see IHO Decision on Pendency).

[15] Exhibit A was entered into the hearing record for the purposes of the pendency hearing, this exhibit was a copy of the August 25, 2015 IEP (Tr. p. 6; Parent Pendency Ex. A; IHO Decision on Pendency at p. 4). At the impartial hearing, another exhibit A was entered, which was an undated district counseling report (Tr. p. 216; Parent Ex. A; see Dist. Ex. 11). Since, the August 25, 2015 IEP was also entered into evidence as District Ex. 11, it will be referred to as District Ex. 11 in this decision (Tr. p. 212; Dist. Ex. 11).

IV. Appeal for State-Level Review

The parent appeals. The parent asserts that the IHO decision should be reversed and requests a finding that the district denied the student a FAPE for the 2015-16 and 2016-17 school years. The parent contends that the IHO failed to rule on the June 2016, November 2016, and May 2017 IEPs, which the parent alleges denied the student a FAPE. The parent asserts that the IHO should have found that the district failed to meet its burden regarding these IEPs.

The parent asserts that the IHO applied the incorrect legal standard by refusing to apply the standard set forth by the Supreme Court in Endrew F. and further alleges the IHO erred in failing "to analyze the procedural flaws and substantive deficiencies that were alleged and unrefuted by [the district]." The parent asserts that the IHO erred in failing to find due process violations and in denying the parent's due process rights. The parent contends that the IHO ignored assertions in the due process complaint notice that the district failed to provide the parent with required notices and a clear recommendation of services and that the district "failed to issue a legally compliant Response to the [due process complaint notice], in which it defended a May 2017 ICT recommendation that they [sic] then refuted without notice at the hearing." The parent asserts that the IHO ignored these clear procedural violations and that these denials "affected [the parent's] ability to participate in the special education process and assert her rights in the hearing." The parent further asserts that the IHO displayed bias, in prohibiting the use of telephonic testimony and in expressing views inconsistent with his neutral role and in favor of the district. The parent further asserts, without specificity or citations to the hearing record, that [t]he IHO "failed to analyze and address the impact of significant procedural violations established by admissions and evidence." Additionally, the parent asserts that the IHO failed to support his findings as his findings regarding the May 2016 CSE "contain[ed] no citations to the record and w[ere], in fact, not established by testimony or documentary evidence." The parent also asserts that the IHO improperly credited the district witnesses despite the witnesses recanting some factual assertions after being presented with contradictory evidence.

The parent asserts that the IHO failed to address claims included in the due process complaint notice regarding the sufficiency and adequacy of the evaluative information considered by the June 2016, November 2016, and May 2017 CSEs. The parent contends that the district did not defend either of these allegations. The parent further asserts that the IHO did not rule on her claim that the district rejected the recommendations included in privately obtained evaluations despite not having "any contrary comparable evaluations." The parent asserts that the private evaluations "contradicted the [district's] claims regarding [the student's] skills and levels of performance." The parent alleges that the IHO failed to reference any of the private evaluations or explain why the district's rejection of and/or failure to consider the evaluations was appropriate.

The parent asserts that the district improperly terminated 12-month school year services "without conducting the required assessment." Further, the parent notes that the IHO incorrectly stated that 12-month school year services were reinstated after the May 2017 CSE meeting. The parent asserts that the district should not have terminated the student's paraprofessional and the district "failed to defend or justify" this decision. The parent also implies that the district did not follow Section 504 and the IDEA "in making a substantial change in placement," asserting that prior to terminating services, the district should "(a) conduct[] a legally sufficient comprehensive reevaluation in all areas of suspected disability across a variety of domains, including safety; (b)

issu[e] legally sufficient notices; and (c) hold[] an IEP meeting that complies with the procedural mandates of the IDEA and prior to which the parent is provided with written documentation of the materials to be discussed at the IEP meeting."

The parent asserts that the district opened the door for her to contest the May 2016 IEP. The parent asserts that the district determined it would defend the May 2016 IEP rather than the June 2016 IEP. Specifically, regarding the May 2016 IEP, the parent argues that the CSE did not consider evaluations or written reports and that the IHO's findings regarding the May 2016 CSE are not supported by the record. Moreover, the parent asserts she did not "fully" participate in the May 2016 CSE meeting as the CSE met to review documents prior to the meeting without the parent, the CSE did not consider written reports and did not provide the parent with written documents for the meeting, and the parent's input at meetings was ignored. The parent further contends that district admitted that decisions were based on policies rather than the student's needs.

The parent contends that the IHO should have rejected the district's position that the student's progress supported termination of services. The parent asserts that the student's progress demonstrated that the services she was receiving were appropriate, not that they should be removed. Further, the parent asserts that there "was no evidence that the program was too isolating or restrictive for [the student], and thus, the [district's] LRE argument should have been rejected." The parent argues that the IHO misapplied the law concerning LRE.

The parent argues that the IHO ignored the parent's claims regarding implementation of the IEPs. Specifically, the parent asserted that OT, parent counseling and training, 12-month school year services, counseling, and a paraprofessional were not properly implemented by the district. The parent contends that the district failed to defend these claims and therefore, these facts should be deemed admitted.

Additionally, the parent asserts the IHO failed to address her allegations that the district ignored the student's physical and emotional safety by failing to "consider all of the existing data indicating [the student's] need for health and safety supports." The parent asserts that the district did not address or rebut evidence of safety and bullying incidents or the student's inability to recognize danger. Further, the parent asserts that the IHO did not address the student's non-academic needs and contends that the IHO ignored the student's skills in the social, emotional, functional, sensory, and communication domains. Moreover, the parent argues that the IHO ignored evidence that the student "regressed in her daily social/emotional and daily functioning skills due to the service reductions in 2016-[17]."

The parent submits additional evidence on appeal and contends that events subsequent to the impartial hearing should be considered as evidence that general education without support is not sufficient for the student.

In addition to the claims under the IDEA, the parent asserts that the district violated Section 504 "because the [district] adopted discriminatory policies, denied [the student] reasonable accommodations, and committed widespread violations of the IDEA."

The parent requests compensatory education as set forth in the due process complaint notice and parent's post-hearing brief, as well as compensatory education for the district's failure to maintain the student's stay-put placement.

In its answer, the district generally denies the parent's claims. As for the legal standard of review, the district contends that the IHO's findings were correct because the standard as articulated under either Rowley or Endrew F. would lead to the same outcome. The district argues the IHO decision should be affirmed as the district offered the student a FAPE for the 2016-17 and 2017-18 school years. Moreover, the district contends that the parent's request for review does not comply with the form requirements of the State regulations governing appeals from an IHO decision and should be rejected.

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. __, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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 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]).[16]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).

[16] 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., 137 S. Ct. at 1000).

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district asserts that the request for review should be dismissed because it failed to formulate a clear and concise statement of the issues presented for review and was not in compliance with State regulations. The district points to the fact that the request for review did not number the issues sequentially and many allegations lacked specificity as to the IEP or school year at issue.

State regulations provide that a "request for review shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). Additionally, all pleading must have pages numbered consecutively (8 NYCRR 279.8[a][3]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

The parent's request for review enumerates 29 issues; however, these issues were not numbered sequentially with many numbers repeated. Upon review and notwithstanding the accuracy of the district's contentions relative to the form of the parent's request for review, I decline, as a matter within my discretion, to dismiss the request for review on these grounds given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058). [17]

[17] After the district filed the answer, the parent submitted an amended request for review as an attachment to a reply to the district's answer, in which the parent renumbered the issues presented on appeal, months after filing the original request and without seeking permission from the undersigned to serve an amended pleading. While I appreciate the desire to correct the numbering issue, serving an amended pleading at that late juncture muddles the process, especially when attempted without permission from the Office of State Review. The allegations in the amended pleading do not differ materially from the original. The time for filing a request for review had long since elapsed by the time the parent's reply was due. It is unclear if counsel for the parent believed the district should seek permission to extend the timelines again to serve an amended answer after the regulatory timelines for these pleadings had already passed. The result is that the amended request for review unfairly exchanges one procedural deficiency (the mis-numbering) for

2. Additional Evidence

The parent attached the following documents with her request for review: an August 29, 2017 e-mail from the IHO to the parties regarding conduct of the hearing; the parent's post-hearing brief; a February 2018 affidavit of the parent regarding events post-dating the impartial hearing; and a January 2018 letter from the student's school to the parent (Request for Review Exs. A-D). The district does not specifically object to the consideration of this additional evidence; however, the district contends that "any allegations … concern[ing] incidents that occurred after the impartial hearing are impermissibly plead, and should be dismissed."

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

I decline to review the February 2018 affidavit and January 2018 letter presented with the request for review as they concern events post-dating the hearing and are not necessary for my review of the claims addressed herein. Nevertheless, the parent may present her concerns to the CSE and the CSE should consider the parent's concerns related to the student's safety in school and her request for a "safety transfer." I will consider the August 2017 e-mail from the IHO with respect to the parent's allegations regarding the conduct of the impartial hearing, which is further addressed below. I will also accept the parent's post-hearing brief as State regulations required both the IHO and district to ensure that the parties' post hearing briefs were identified and included with the administrative hearing record (see 8 NYCRR 200.5[j][5][vi][b]; see also 8 NYCRR 279.9[a]).

3. IHO's Standard of Review

I next turn to the IHO's determination that the district "need only provide that it complied with the procedural requirements set forth in the IDEA, and develop an IEP for the student that [wa]s reasonably calculated to enable her to receive educational benefits" and the determination that Endrew F. did not apply to the case because the CSE meeting predated the decision in Endrew F. (IHO Decision at p. 20).

The Supreme Court has found "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law" (Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 96 [1993]).[18] Consequently,

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new deficiencies (failure to seek permission, untimeliness, cutting off the district's opportunity to be heard in response).

[18] The Supreme Court further state that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule (Harper, 509 U.S. 86, 97 [emphasis added]).

the IHO should have applied the standard set forth by the Supreme Court in Endrew F. The IHO incorrectly found that since Endrew F. was rendered after the May 2016 CSE, that standard did not apply. However, the standard of Endrew F. should have been applied as it set the standard for all IDEA cases as Supreme Court precedent is applied retroactively. The U.S. District Court for the Southern District of New York has applied the standard set forth in Endrew F. multiple times, even though the CSEs convened prior to the Supreme Court's decision in Endrew F. (see M.B. v. City School Dist. Of New Rochelle, 2018 WL 1609266 [S.D.N.Y.] [2018]; C.S. v. Yorktown Central School Dist. 2018 WL 1627262 [S.D.N.Y.] [2018]). The IHO is reminded for any future cases that he should apply the standard from Endrew F. even when the IEP was developed prior to the date of that decision. Despite the IHO's refusal to apply Endrew F., this is not grounds to reverse the IHO's findings out right as I will fully review the IHO's findings using the legal standard set forth by the federal courts. [19]

4. IHO Bias and Conduct of the Impartial Hearing

The parent alleges that the IHO demonstrated bias by adopting a general ban on telephonic testimony and expressing views suggesting bias in favor of the district and inconsistent with his neutral role. Specifically, the parent asserts that the IHO expressed concern for the district's financial interests and the forum itself. The district contends that the IHO properly conducted the hearing.

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

[19] The Second Circuit in Mr. P v. West Hartford Board of Education, 885 F. 3d 735, 756-57 [2018] applied the standard set forth in Endrew F., even though, Endrew F. was decided six months after the district court's decision. The Second Circuit acknowledged the standard set for in Endrew F.; however, it found that "[p]rior decisions of this Court are consistent with the Supreme Court's decision in Endrew F." (Mr. P. v. West Hartford Board of Education, 885 F. 3d 735, 757 [2018]). This finding supports the district's assertion that application of the Rowley standard would lead to the same result. In Cerra, the Second Circuit held that a school district satisfies its obligation to offer a FAPE under the IDEA if it develops "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]). In Rowley, the Supreme Court found that 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 (458 U.S. at 206-07 [citations omitted]).

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]).

At the start of the hearing, the IHO informed the parties that he required all witnesses to testify "live" (Tr. p. 7). The IHO explained his reasoning for requiring witnesses to testify in person, which included his view that witnesses improperly read "documents over the telephone which does not constitute testimony," that with telephonic testimony he is unable to see and judge a witness's credibility, and that due in part to the commonplace allowance of telephonic testimony, "nobody has a stake in the game anymore and nobody's taking the process seriously anymore" (Tr. pp. 7-8). Moreover, the IHO stated that when witnesses appear live, they are prepared, he can appropriately instruct them, and he can assess their credibility (id.). The IHO indicated that this enables both parties to take the process more seriously as there are too many cases where districts "are making disingenuous arguments" and times the parent is "also make disingenuous arguments" (Tr. p. 9).[20] The IHO also noted that direct testimony by affidavit would be accepted and encouraged the parties to use it (Tr. pp. 12-14).[21]

An IHO has the discretionary authority to receive testimony by telephone; however, an IHO is not required to do so (8 NYCRR 200.5[j][3][xii][c]). While I understand the reasons for the IHO's decision to adopt a general policy requiring in-person testimony, the approach can in some cases limit the use of a tool available to the IHO that could potentially be used to ease scheduling difficulties and ensure that parties have the opportunity to present evidence and witnesses while ensuring the timely completion of the hearing (see Application of a Student with a Disability, Appeal No. 18-036). The IHO's decision to disallow telephonic testimony did not demonstrate bias in favor of one party over the other. Notably, the parent's attorney did not object during the impartial hearing to the IHO's directive to have witnesses testify in person. Although, the parent asserts on appeal that she was harmed by the IHO's decision because she was unable to call her private evaluators to testify due to the cost (Parent Mem. of Law at p. 14), the hearing record reveals no indication that the parent requested an exception to the IHO's general rule so that the expert witnesses' could testify through alternative means. Nor did the parent attempt to present pre-filed direct testimony by affidavit, which the IHO expressly encouraged.[22] The IHO did not abuse his discretion by requiring that witnesses testify in person in order to judge their credibility more efficiently.[23] The IHO conducted the hearing within the bounds of standard legal practice

[20] In an e-mail to the parties on August 27, 2018, the IHO reiterated the requirement that the parties and their witnesses appear in person at the hearing and repeated similar rationale as that explained during the hearing (Req. for Rev. Ex. A). The IHO also indicated that "[t]he rule requiring personal appearance is subject only to 'exigent' circumstances" (id.at p. 2).

[21] The parent in her request for review and memorandum of law only cites to the IHO's August 2017 e-mail correspondence and statements during the hearing regarding telephonic testimony to support her allegation of bias (Req. for Rev. at p. 6; Parent Mem. Of Law at pp. 13-14). A review of the transcript does not support an assertion that the IHO displayed bias during witness testimony or during any other part of the impartial hearing.

[22] I have also encouraged parties and provided examples of how pre-filed direct testimony by affidavit can be used effectively in complex administrative hearing matters (see Application of a Student with a Disability, Appeal No. 18-036).

[23] While I share the IHO's concern to ensure that the parties and witnesses are prepared and are treating the

and the hearing record does not support a finding of bias. Overall, an independent review of the hearing record demonstrates that the parent had a full and fair opportunity to present her case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514 [b][2][i], [ii]; 8 NYCRR 200.5[j]).

5. Burden of Proof

The parent asserts that the IHO improperly shifted the burden of proof to demonstrate that the student still required services.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).[24]

Here, the IHO cited the Schaffer ruling that the burden was on the party seeking relief but failed to note anywhere in his decision that Education Law § 4404 thereafter shifted the burden in this case to the district (see IHO Decision at p. 14). However, an examination of the IHO's analysis reveals that the IHO appeared to weigh the evidence presented at the impartial hearing under a preponderance standard and resolved the issues regarding the May 2016 IEP in favor of the district (IHO Decision at pp. 23-32). Although the parent disagrees with some of the conclusions reached by the IHO, such disagreement does not support the conclusion that the parent must prevail because the IHO failed to correctly state the burden of proof standard in his analysis.

The parent does not point to any specific findings made by the IHO to support her argument that the IHO shifted the burden of proof. The parent's bald assertion is an insufficient basis to overturn the IHO's decision. Furthermore, to his credit, the IHO correctly enunciated the district's statutory burden of proof under New York law on the record at the impartial hearing (Tr. p. 14). The parent's conclusory statement regarding the burden of proof does not support a finding that the IHO actually shifted the burden to the parent and a review of the IHO decision demonstrates that the IHO's analysis properly applied the burden of proof to the district even if the legal standards in his decision were incomplete. However, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was

impartial hearing process with respect and decorum, I am also of the view that as long as the impartial hearing can be accurately transcribed, the use of inexpensive video-streaming technologies such as Skype or FaceTime—which can be used with most modern computers, smartphones, and a broadband connection—may alleviate virtually all of the IHO's concerns with audio-only approaches that prevent the finder of fact from being able to see the witnesses.

[24] The Court in Schaffer left open the question of whether States have the authority to shift the burden of proof through legislation (546 U.S. at 61-62).

in equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; M.H., 685 F.3d at 225 n.3). Furthermore, I have conducted an impartial and independent review of the entire hearing record under the correct standard and, as discussed below, largely concur with the IHO's ultimate determinations such that reversal is not warranted (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

6. Scope of Review

The parent asserts that the district opened the door to the May 2016 IEP as the district defended that IEP even though it was not challenged in the due in the due process complaint notice. Additionally, the parent alleges that the IHO failed to address her claims regarding Section 504.

The district, at the impartial hearing, indicated that it would be defending the May 2016 IEP, not the June 2016 IEP challenged in the due process complaint notice (Tr. p. 38; Dist. Ex. 57 at p. 8). It is not clear why the district chose to defend the May 2016 IEP as the May 2016 IEP was not mentioned in the due process complaint notice (see Dist. Ex. 57) and may have only been implemented for a short period of time before being replaced by the June 2016 IEP (compare Dist. Ex. 2 at p. 1, with Dist. Exs. 22 at p. 1; 23). When the IHO requested clarification on which IEP was disputed, the parent's attorney agreed that the May 2016 IEP was in dispute (Tr. pp. 41-42). The hearing record demonstrates that the May 2016 IEP and June 2016 IEP were substantially similar (compare Dist. Ex. 2, with Dist. Ex. 22). There were two differences between these IEPs; the June 2016 CSE added parent counseling and training and clarified that for the 12-month school year program, the student would receive the same program as recommended for the 10-month school year (compare Dist. Ex. 2 at pp. 8-9 with Dist. Ex 22 at pp. 11-12).[25] As these minor differences between the two IEPs were not challenged in the due process complaint notice and both IEPs resulted in the educational plan for the 2016-17 school year, there is no difference in the outcome of this case by choosing either the May or June 2016 IEP over the other when addressing the issues raised in the due process complaint notice. For the purposes of consistency with the IHO's decision, I will refer to the May 2016 IEP when conducting a review of the challenged IEP provisions in this decision. As discussed in further detail below, the May 2016 and June 2016 IEPs were reasonably calculated to enable the student to make progress appropriate in light of her circumstances.

Next, the parent raises claims outside the scope of the IDEA and Article 89 of the Education Law. Specifically, on appeal, the parent alleges violations of section 504. State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and Article 89 of the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parent's claims regarding section 504, discrimination, or retaliation (see A.M. v. New York City Dep't of Educ. 840 F. Supp. 2d 600, 672 n. 17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v.

[25] The CSE did not reconvene in June 2016, the June 2016 IEP was an amendment of the May 2016 IEP (see Dist. Ex. 22 at pp. 14-15).

New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Accordingly, the parent's claims related to section 504 shall not be reviewed in this appeal.

In addition, the parent raised claims in the due process complaint notice that are not specifically raised in the request for review. For example, in the due process complaint notice, the parent alleged that "assessments were not provided in [the student's] native language"; assessment results and notices were not provided to the parent in her native language; the June 2016 CSE removed "service recommendations for Spanish language mandates"; "[r]equired notices were never provided to [the parent]"; "IEP recommendations were not sufficiently defined or communicated"; and that "[t]esting accommodations were either inappropriate or not provided" (Dist. Ex. 57 at pp. 8, 16-17). Although the IHO did not address these claims in his decision, the parent does not allege that the IHO failed to address the issues described above or attempt to advance these issues in the request for review and, consequently, they have been abandoned with respect to the parent's claims regarding the May 2016 IEP and June 2016 IEP.[26] Pursuant to State regulations, a party is required to identify in the request for review an IHO's failure or refusal to make a finding (8 NYCRR 279.4[a]), and "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]).

B. 2015-16 School Year

Tuning to the substance of the parent's claims in this matter, I will first address the parent's claims that the district failed to implement parent counseling and training, counseling services, and OT services during the 2015-16 school year, that is, services that were to be delivered by the district in accordance with the August 2015 IEP.[27] Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see

[26] As the IHO entirely failed to address the parent's claims related to the November 2016 IEP and May 2017 IEP, and as those matters are being remanded to the IHO for further development of the hearing record, the parent's claims with respect to the November 2016 IEP and May 2017 IEP are not abandoned.

[27] During the impartial hearing, the parent's attorney clarified that she was not alleging the student was denied a FAPE based on the design of student's IEP for the 2015-16 school year but was arguing that the student did not receive all of the recommended services, which included counseling and OT (Tr. pp. 42-43).

also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

The hearing record regarding implementation of parent counseling and training, counseling services, and OT services during the 2015-16 school year was not fully developed to allow for a decision to be rendered on this issue. As noted above, although, the district acknowledged that it did not provide the student with OT services, it asserted that it provided the parent with a related service authorization (RSA) for these services (Tr. p. 37). However, there is no RSA in the hearing record to support the district's assertion. Instead there is a poor copy of a letter from the district, written in Spanish, indicating that the district recognized some absence of or need for compensatory related services (Parent Ex. R).[28] Absent evidence of the services actually provided to the student during the 2015-16 school year, as well as any makeup services the district may have offered, a meaningful review of the parties' dispute is not possible with the current state of the hearing record. Therefore, remand of this matter to the IHO is appropriate for a determination of the parent's claim that the district did not implement portions of the student's IEP for the 2015-16 school year (see Educ. Law § 4404[2]; 8 NYCRR 279.10[c]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Accordingly, this matter is remanded for the IHO to develop the hearing record with respect to whether the district implemented the recommended services during the 2015-16 school year and render a determination on the merits as to whether any failure to implement on the part of the district resulted in a denial of FAPE to the student (see 8 NYCRR 279.10[c]).[29]

[28] There is a document written in Spanish which is potentially related to OT services; however, as this document is in Spanish and was not entered into evidence with a translation it is not sufficient by itself to establish an award of compensatory services (Parent Ex. R).

[29] Additionally, the parent asserted that the district failed to implement pendency following the IHO decision (Req. for Rev.at pp. 6-7). Beyond the parent's allegation in the request for review and post-hearing brief, there is no information in the hearing record regarding this issue. If the parent continues to pursue this allegation, the IHO should address the parent's claim on remand. Additionally, unlike the analysis for implementation of an IEP, the Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive all of the pendency services to which they were entitled as a compensatory remedy (Doe v. E. Lyme Bd. of Educ. , 790 F.3d 440 at 456 [2d Cir. 2015] [awarding full reimbursement for unimplemented pendency services because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]).

C. 2016-17 School Year

1. May 2016 IEP and June 2016 IEP

Turning next to review of the IHO's decisions regarding the evaluation of the student, the CSE process and the allegations that the parent's participation was impeded with respect to the May and June 2016 CSE meetings, I find that the evidence in the hearing record is insufficient to overturn the IHO's denial of the parent's claims.[30]

At the outset, I note that during the impartial hearing, the parent's attorney clarified during opening statements that the parent was not challenging any evaluations that the CSE relied on as being inappropriate, but instead that the parent "had her own independent evaluations performed and provided" and that "the evaluations that she provided weren't taken into consideration during the IEP" (Tr. pp. 43-44).[31]

As discussed above, the May and June 2016 IEPs were created only a few weeks apart and were formulated out of the same CSE process and the two documents were substantially similar with regard to the challenged issues in this case. Accordingly, my ruling in this matter is intended to address both documents together in a single discussion.

With regard to updating IEPs under the IDEA's annual review procedures, State regulations provide that:

> Any meeting to develop, review or revise the IEP of each student with a disability to be conducted by the committee on special education or subcommittee thereof, pursuant to section 4402(1)(b)(2) of the Education Law, shall be based upon review of a student's IEP and other current information pertaining to the student's performance.
>
> (1) Such review shall consider the following factors:

[30] As part of his analysis the IHO discussed the standard for assessing whether a placement is within the LRE and found that the May 2016 IEP was reasonably calculated to enable the student to receive an educational benefit in the LRE (IHO Decision at pp. 29-32). The parent contends that the IHO misapplied the law concerning the issue of LRE. The district asserts that it is obligated to recommend special education services in the LRE and that it complied with this obligation by gradually decreasing services to the student. While an assessment that a placement is in a student's LRE cannot be the sole rationale for why it is appropriate (see L.R. v. New York City Dep't of Educ., 193 F. Supp. 3d 209, 215 [E.D.N.Y. 2016]), the CSE is tasked with balancing the presumption in favor of mainstreaming against the importance of providing an appropriate education (see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 162 [2d Cir. 2014]). Accordingly, the IHO's consideration of LRE concepts as a part of his overall determination as to whether the student was offered a FAPE was not a misapplication of the law as alleged by the parent.

[31] The request for review simply refers back to the due process complaint notice and describes the evaluation by the district as insufficient, which suggests that the assessments by the district were inappropriate or incorrectly performed. The parent's clarification from the impartial hearing continues to apply and I will consider the parent's challenge as a claim that the district failed to consider additional evaluation materials.

(i) the strengths of the student;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial or most recent evaluation of the student;

(iv) as appropriate, the results of the student's performance on any general State or district-wide assessment programs;

(v) the academic, developmental and functional needs of the student;

(vi) the special factors described in paragraph (d)(3) of this section; and

(vii) the educational progress and achievement of the student with a disability and the student's ability to participate in instructional programs in regular education and in the least restrictive environment.

(8 NYCRR 200.4[f]; see also 34 CFR 300.324).

Here, the parent argues that the student was denied a FAPE because the CSE failed to review several evaluations: the July 2015 psychoeducational evaluation, the August 2016 psychoeducational addendum, and the January 2017 neuropsychological evaluation. However, with regard to the May and June 2016 CSE meetings, only the July 2015 psychological evaluation was available at the time of the May 2016 CSE meeting, which meeting in turn resulted in the updates to the student's present levels of performance that were written into May and June 2016 IEPs. Thus, there was no procedural violation at the time that the May and June 2016 IEPs were formulated that resulted from a failure to review the August 2016 psychoeducational addendum or the January 2017 neuropsychological evaluation, and any claim by the parent to the contrary must be rejected.

a. May and June 2016 Meetings

The CSE members convened on May 23, 2016 to conduct the annual review of the student's IEP, including the student's parents, the general education teacher, the special education teacher, the SETSS provider, the guidance counselor, the speech-language provider, the physical therapist, the school co-director, and a district representative (Dist. Ex. 2 at p. 14; see Tr. pp. 57-58). While it is clear who participated in the CSE meeting, the evidence in the hearing record is conflicting and unclear regarding the information that the CSE actually reviewed and/or considered in the development of the student's IEP for the 2016-17 school year (Tr. pp. 58, 65-66; Dist. Ex. 2 at p. 14).

The district representative testified that the May 2016 CSE reviewed classroom assessments of reading achievement and performance assessment data for reading and math, and that the teachers discussed the student's present levels of performance at the CSE meeting (Tr. pp. 59-63, 106-10). The district representative further testified that the student's social development was assessed by the guidance counselor and teachers based on their experiences working with the student, and this information was shared in the discussion of the student's present levels of

performance at the May 2016 CSE meeting (Tr. pp. 103, 107, 111). The student's kindergarten (2015-16) SETSS provider testified that she participated in the May 2016 CSE meeting and provided information to the CSE regarding the student's academic and social-emotional progress (Tr. pp. 150-55).

However, there is conflicting witness testimony regarding the extent to which the May 2016 CSE focused or relied upon the July 2015 psychoeducational evaluation during the annual review. The district representative testified that the psychoeducational evaluation report was not reviewed at the May 2016 CSE meeting (Tr. pp. 112-14).[32] In contrast, the student's special education teacher, despite providing somewhat confusing testimony, ultimately indicated that the July 2015 psychoeducational evaluation report was "used" at the May 2016 CSE meeting (Tr. pp. 182-85). Consistent with the testimony of the special education teacher, a prior written notice dated June 24, 2016 indicated that the May 2016 CSE considered the July 2015 psychoeducational evaluation report in the development of the student's IEP (Dist. Ex. 21).

However, the June 24, 2016 prior written notice itself contains notable flaws when compared to the other documents in the hearing record. According to the prior written notice, the May 23, 2016 CSE used the following assessment reports to inform their recommendations: the July 2015 psychoeducational evaluation report, an April 2016 teacher report, a May 2016 counseling progress report, a June 2016 OT progress report, and a June 2016 speech-language progress report (Dist. Ex. 21 at pp. 1-2).[33] Thus, two of the reports (OT and speech-language) ostensibly relied upon during the May 2016 CSE meeting post-date that meeting (id.). Additionally, the hearing record does not include copies of any of the reports identified in the June 2016 prior written notice except for the July 2015 psychoeducational evaluation report (Parent Ex. C; Dist. Ex. 10). As noted above, the student's teacher, counselor, and speech-language provider were present at the May 2016 CSE meeting and provided reports orally; however, there is no testimony explaining why the prior written notice identified reports that post-date the CSE meeting (Dist. Ex. 2 at p. 14).

Consequently, I find the evidence does not show procedural compliance with sufficient clarity by establishing how the CSE used the July 2015 psychoeducational evaluation in the development of the May and June IEPs, especially when the prior written notice with questionable accuracy indicates that the psychoeducational evaluation was used, but the witness testimony is so weak. The Second Circuit recently called this lack of procedural compliance a "serious procedural violation" because it is the district's responsibility to establish at the impartial hearing what evaluative materials were reviewed by the CSE in developing the student's IEP (L.O. v. New York

[32] Results from the July 2015 psychoeducational report included a diagnostic impression of autism spectrum disorder, a summary of the student's overall cognitive functioning described as "well within age expectation" on the Stanford-Binet Intelligence Scale-5 (SB-5) and, similar to the March 2015 assessment results with the Wechsler scales (Wechsler Preschool and Primary Scales of Intelligence-IV full scale IQ in average range, working memory index in low average range), and the evaluator opined that the student would do well in an environment with a regular education curriculum along with appropriate supports and related services (Dist. Ex. 10 at p. 8; see Dist. Ex. 61).

[33] The hearing record includes a May 25, 2016 PT clinical guide; however, it was not listed on the prior written notice as being reviewed by the May 2016 CSE (see Dist. Exs. 19; 21).

City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016]). The Court in L.O. cautioned that, when a CSE fails to accurately document the evaluative data it relied on in developing an IEP, reviewing authorities or courts, often times months or years later, are left to speculate as to how the CSE formulated the student's IEP and it causes other errors or omissions in the IEP to be called into question (id.). In that case, the Court concluded that the violation was not, by itself, a denial of a FAPE, but that the consequences of the violation were a denial of a FAPE.

The factual circumstances of this case are different than those in L.O., which the Court was left to speculate whether the CSE had reviewed the materials in question because of witness testimony of a CSE participant indicating that "she could not recall reviewing any evaluative material at the CSE meeting, nor could she recall the CSE team engaging in any discussion about K.T.'s skills or functioning" (L.O., 822 F.3d at 111). In this case, as noted above, there were divergent views by the witnesses on the extent to which the July 2015 psychoeducational evaluation was reviewed and there were oral reports regarding the student's progress. Additionally, hearing record in this case shows that the CSE had already reviewed the July 2015 psychoeducational evaluation on two previous occasions and that the results of that evaluation were reflected in both the August 2015 and September 2015 IEPs (Dist. Exs. 11 at pp. 1-3;13; 15 at pp. 1-3; 16). I am not persuaded that a court like L.O. would, in these factual circumstances, hold that the district denied the student a FAPE because the CSE failed to spend the meeting time reviewing the results of the July 2015 psychoeducational evaluation a third time. Nor do I find that another psychoeducational evaluation was required in May or June 2016, less than one year from the July 2015 psychoeducational (and between 14 and 15 months from the March 2016 psychoeducational evaluation). While the IDEA requires reevaluation at least once every three years, reevaluation [m]ay occur not more than once a year, unless the parent and the public agency agree otherwise" (34 CFR 300.303; 8 NYCRR 200.4[b][4]).

b. The Student's Needs

The next question to address is the significance of the procedural violation. As noted previously, the July 2015 psychoeducational evaluation included a review of relevant records, a parent interview, observation of the student during testing, and the results of standardized tests and rating scales (Dist. Ex. 10 at p. 4). The evaluating psychologist reported that the student's overall intellectual development was well within expectation and that the student had developed concepts and information "adequate and appropriate for a child her age" (id. at p. 5). The psychologist further reported that the student was bilingual, relied on both English and Spanish to express herself, but responded more readily to Spanish when it came to directions, cues, and prompts about day-to-day activities (id. at p. 6). According to the psychologist, the student's adaptive use of language was an area of weakness, especially in listening and understanding, and the student had difficulty answering "wh" questions and following directions (id.). The student demonstrated gross motor weaknesses related to motor planning and balance and her fine motor development was characterized as "immature," and sensory processing abilities and organization as "significant issues" (id. at p. 7). The psychologist reported that the student tended toward being "inattentive and distractible, as well as self-directed," and could also be oppositional and defiant (id. at p. 8). The psychologist's diagnostic impression of the student was that she had an autism spectrum disorder without accompanying intellectual impairment (id.). At the time of her evaluation report in July 2015, the psychologist opined that an "optimal" setting for the student would be a full-day

setting with both a regular education and special education teacher, and that the student needed appropriate bilingual support, including the 1:1 support of a bilingual paraprofessional (id.).

With respect to the oral reports provided by the student's teachers at the May 2016 CSE meeting, the district representative testified that the student's teachers reported that the student was performing at grade level academically (Tr. pp. 61-63, 109). A review of the student's May 2016 IEP shows that it reflected the teachers' oral reports that the student demonstrated above grade level skills in reading, and grade level skills in mathematics and writing based on classroom assessments and performance assessment tasks (Dist. Ex. 2 at p. 1).[34]

The May 2016 IEP indicated that the student had made a lot of gains during the 2015-16 school year, including the ability to communicate her needs appropriately to adults and to her peers in most cases with support (Dist. Ex. 2 at p. 2). In addition, the May 2016 IEP reflected that the student enjoyed being a leader in group activities, was able to demonstrate empathy in most situations, appeared confident when interacting with peers in social situations, followed instructions consistently, transitioned well with little support, and was able to self-regulate in most situations (id. at p. 2). The May 2016 IEP also indicated that the student could be moody and selective at times, but her feelings did not manifest in disrespectful behaviors (id.). According to the May 2016 IEP, the parent reported that the student had difficulties with transitioning and interacting with peers in the beginning of the year; however, the parent had noticed improvement and the student had reported feeling more comfortable in peer interactions (id.). The parent reported a concern that the student forgot items in school and needed reminders to pack all of her items before going on the bus (id. at p. 1).

With respect to the student's speech-language development, the May 2016 IEP indicated that the student was able to speak with age appropriate vocabulary, express herself in complete sentences with details, take part in a conversation with multiple verbal exchanges and remain on topic for the duration of the conversation, and follow multi-step directions with less prompting and cuing (Dist. Ex. 2 at p. 1).[35] The student exhibited some difficulty with sequencing stories in the proper order using temporal words and writing sentences containing details (id.). According to the May 2016 IEP, the student made significant progress in all areas of receptive and expressive language and her pragmatic/social language continued to improve (id.).

Descriptions of the student's physical development needs in the May 2016 IEP showed that the student made "remarkable progress" with her gross motor skills, managed the classroom and playground environments well, kept up with her peers in all gross motor activities, and performed gross motor skills at or above her age level (Dist. Ex. 2 at p. 2).[36] The student was described to be independent with all transitions; however, some issues with safety were noted and the physical

[34] The IEP does not document any parent concerns regarding the student's academics (see Dist. Ex 2 at pp. 1-3). The IEP indicated that the parent reported that the student was understanding more when reading (id. at p. 1). As discussed below, the parent's concerns regarding the student in other areas were documented in the IEP (id. at pp. 1-3).

[35] The student's speech-language therapist attended the May 2016 CSE meeting (Dist. Ex. 2 at p. 14).

[36] The student's physical therapist attended the May 2016 CSE meeting (Dist. Ex. 2 at p. 14).

therapist opined this was due to the student's distractibility and decreased attention to task (id.). The May 2016 IEP included parent concerns regarding the student's balance and accidents that involved falling (id.).

Regarding the student's fine motor needs, the May 2016 IEP indicated that the student required minimal assistance to manage clothing and fasteners, had not mastered the proper use of utensils during mealtimes, and continued to demonstrate poor scissor and writing skills (Dist. Ex. 2 at p. 2). The May 2016 IEP also reflected that, with respect to OT, the student presented with a poor attention span, body awareness/motor planning, readiness to learn, and consistency in following directions and routines (id. at p. 1).

While the parent has argued that evaluations reviewed by the CSE were inadequate and that more evaluations were required before changing the student's programing, this is not a case in which the CSE was lacking actual and recent evaluative data from the student's education providers (see L.O., 822 F.3d at 110). The parent has not challenged the accuracy of the description of the student's present levels of performance in the IEP, which, at the time the IEP was developed in May and June 2016, was based significantly upon information from the student's providers. To the contrary, the May 2016 CSE determined that the student exhibited improved academic achievement as she was meeting grade level expectations in both reading and math (see Tr. pp. 62-63) and based on reports and recommendations by the student's teacher and counselor determined that the student no longer required the support of SETSS or counseling (Tr. pp. 63-65). Unlike L.O., in which there was a dearth of evidence that CSE spent time considering the information regarding the student's current performance in school, the evidence in the record does not support the conclusion that the alleged inadequate evaluation of the student at the time of the May and June 2016 CSE meetings or the poorly crafted prior written notice led to a denial of a FAPE to the student.

c. Recommended Special Education Services

I will next address whether the procedural violation resulted in services that were inadequate to address the student's needs. To address the student's educational needs, the May 2016 CSE recommended ICT services for mathematics, ELA, social studies, and science, and related services, including two 30-minute individual sessions per week of OT, one 30-minute individual session per week of PT, one 30-minute individual session and two 30-minute group sessions per week of speech-language therapy (in Spanish), and a full-time health paraprofessional (Dist. Ex. 2 at pp. 8-9). The May 2016 IEP included 14 annual goals, testing accommodations, and resources to address the student's management needs (id. at pp. 3-8, 10). The May 2016 IEP recommendation for ICT services is consistent with the July 2015 psychoeducational evaluation report in which the psychologist recommended a general education curriculum in a setting with both a general education teacher and a special education teacher (compare Dist. Ex. 2 at pp. 8-9, with Dist. Ex. 10 at p. 8). Although the CSE did not recommend a bilingual paraprofessional for the student, it recommended that the student be provided with an individual paraprofessional and that speech-language therapy be provided in Spanish (Dist. Ex. 2 at p. 8).

Although the May 2016 CSE recommended discontinuing SETSS for reading and mathematics, the CSE continued to recommend ICT services to provide the student with specially designed instruction (Tr. pp. 62-64; Dist. Ex. 2 at pp. 1). The May 2016 IEP also included

academic goals related to reading, writing, focusing, and mathematics (Tr. pp. 62-64; Dist. Ex. 2 at pp. 1, 6-8).

To address concerns regarding the student's attention, readiness to learn, and consistency in following directions and routines, the May 2016 IEP indicated that the student benefitted from small grouping in the classroom and repetition and reminders when instructions were not understood, and that she required visuals and checklists for initiating and completing tasks (id. at p. 3). With respect to the student's needs in the areas of attention and memory, the May 2016 IEP included goals to address the student's ability to retell stories including key details, focus on a topic and respond to questions and suggestions from peers, and listen attentively using appropriate eye contact and body language (Dist. Ex. 2 at pp. 3-6).[37] The special education teacher testified that the May 2016 CSE addressed the student's weakness in working memory, identified in the July 2015 psychoeducational evaluation, by recommending the use of checklists, nonverbal cues, and timers to help the student focus on daily activities (Tr. pp. 185-86; see Dist. Ex. 2 at p. 3).[38]

Regarding the student's social development, the May 2016 IEP reflected that the student had made a lot of social gains and the district representative testified that the student's counselor made a recommendation to discontinue counseling at the May 2016 CSE meeting (Tr. pp. 64-65; Dist. Ex. 2 at p. 2).

To address the student's speech-language needs, the CSE recommended speech-language therapy services provided in Spanish and the May 2016 IEP included four speech/language goals to address the student's needs with respect to oral and written sequencing skills, correct use of grammar in writing, increasing sentence length and complexity, and listening skills/pragmatic language (Dist. Ex. 2 at pp. 4-5, 9).

With respect to the student's physical development, the May 2016 IEP included a recommendation for both occupational and physical therapy (Dist. Ex. 2 at p. 9). In addition, the May 2016 CSE developed four OT goals to address the student's weaknesses in daily living skills (such as use of utensils and fasteners) and handwriting/graphomotor skills and a PT goal to address the parent's concern regarding the student's balance (id. at pp. 7-8).

Given that the student was performing at or above grade level academically, the May 2016 CSE's recommendation to discontinue SETSS for reading and mathematics was reasonable, especially when the student continued to receive special education support in the form of ICT services (Dist. Ex. 2 at pp. 1, 8). The CSE's decision to discontinue counseling services was also reasonable given the student's reported progress in social development, the counselor's recommendation to discontinue counseling, and the inclusion of goals on the IEP to address the student's social language skills (Tr. pp. 64-65; Dist. Ex. 2 at pp. 2, 5-6). Assuming without deciding that the district did not review the July 2015 psychoeducational evaluation a third time, the hearing record shows that many of the recommendations made by the May 2016 CSE were nevertheless

[37] Working memory, attention, and distractibility were identified as factors impacting the student's functioning in the July 2015 psychoeducational evaluation report (Dist. Ex. 10 at p. 5).

[38] The July 2015 psychoeducational evaluation report lists the student's working memory skills on the SB-5 in the low average to borderline range (Dist. Ex. 10 at p. 4).

consistent with the recommendations of the July 2015 psychoeducational evaluation report (compare Dist. Ex. 2 with Dist. Ex. 10 at p. 8).

d. Parent participation

As to the parent's allegation that she was denied the right to fully participate in the development of the student's program for the 2016-17 school year, the hearing record demonstrates that the parent's concerns were documented by the May 2016 CSE (see Dist. Ex. 2 at pp. 1-3). The parent has not identified in her request for review any specific concerns that were ignored by the CSE. The parent testified that the May 2016 CSE did not recommend parent counseling and training; however, that omission was rectified by the June 2016 amendment (Tr. pp. 239-40; Dist. Ex. 22 at p. 11). The parent testified that she was concerned in May 2016 about the lack of 12-month services; however, the student was recommended for a 12-month program and the specific program was clarified in the June 2016 amendment (Tr. pp. 241-42; Dist. Exs. 2 at p. 9; 22 at p. 12). The parent testified that she was concerned about the recommendation to stop PT services; however, the May 2016 CSE determined that PT should continue (Tr. p. 243; Dist. Ex. 2 at p. 9). Based on the hearing record, the parent's concerns were addressed by the May 2016 CSE and she was able to participate in the development of the May and June 2016 IEPs.[39]

In summary, the procedural flaw regarding the evaluative procedures before the May and June 2016 CSE did not result in a denial of a FAPE because it did not (a) impede the student's right to a FAPE, (b) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) cause 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]).

2. November 2016 IEP and Subsequent IEPs

The parent claims that the IHO failed to address the issues raised regarding the November 2016 IEP and the district failed to meet its burden as it failed to address or defend the IEP. Additionally, the parent alleges that the district improperly removed 12-month school year services in November 2016 as it did not re-evaluate the student prior to terminating the service. Further, the parent asserts that the IHO incorrectly stated that 12-month school year services were reinstated in May 2017. The district contends that it offered the student a FAPE for the 2016-17 school year but does not make any specific argument regarding the November 2016 IEP.

The November 2016 CSE recommended ICT services in math, ELA, social studies, and science (Dist. Ex. 34 at p. 7). The CSE recommended one 30-minute session per week of individual OT; two 30-minute sessions per week of group OT; one 30-minute session per week of group PT; one 30-minute session per week of individual speech-language therapy; and two 30-minute sessions per week of group speech-language therapy (id.). Additionally, the CSE

[39] The parent also alleged that the CSE predetermined the May and June 2016 IEPs as they were based on polices rather than that the student's needs. However, the evidence is that the decisions of the May and June 2016 CSE were based upon consideration of the student's individualized needs. That the student may have received results from testing from the district's English Language Learners Office does not change the fact that the CSE reviewed the student's individual needs (see, e.g., Tr. pp. 95-96).

recommended a daily 0.8 FTE shared paraprofessional in health to address concerns regarding balance and wandering for the day (id.). The CSE determined that the student was not eligible for 12-month school year services and recommended that all of the student's special education and related services other than speech-language therapy be provided in English (id. at pp. 7-8).

The district did not indicate that it was defending the November 2016 IEP even though this IEP was challenged by the parents in the due process complaint notice (Tr. p. 38; Dist. Ex. 57 at pp. 10, 16). Since the district only chose to defend the May 2016 and May 2017 IEPs during the hearing, the hearing record was not developed with respect to this IEP and there is insufficient information in the hearing record to decide the parent's claims. As there is insufficient information in the hearing record and the IHO did not make any findings regarding the parent's claims, they must be remanded to the IHO to make a determination in the first instance. Upon remand, both parties should have the opportunity to present their cases regarding the November 2016 IEP.[40] Further, the parents should have the opportunity to clarify the record as to what issues are being raised and what an appropriate remedy would be should a finding be made that the student was denied a FAPE as of November 2016.

It is noted that following November 2016 and prior to May 2017, the CSE reconvened two times, in December 2017 and January 2017. However, neither of these IEPs were disputed by the parent in the request for review. Despite this, the parent has raised claims that the student's disputed IEPs have not addressed her safety concerns and allegations of bullying (see Dist. Ex. 57 at pp. 13-15). The hearing record indicates that the parent reported several incidents of alleged bullying to the district and that the parent had concerns for her daughter's safety (see Parent Exs. N; O; P). Nevertheless, these reports were made following the November 2016 CSE meeting (see Parent. Ex. N). There is an indication that the issue was to be discussed at the December 2016 CSE meeting (id. at p. 1). However, a review of the December 2016 IEP does not indicate that these issues were discussed (see generally Dist. Ex. 38).[41] Upon remand, the issue of the parent's safety concerns and bullying allegations should also be developed by the parties and addressed by the IHO.

D. 2017-18 School Year

The parent claims that the IHO failed to address her claims regarding the May 2017 IEP. Specifically, the parent challenges the May 2017 IEP, asserting that the district did not properly evaluate the student, failed to consider the private evaluations, denied the parent's right to participate in the CSE process, and that the removal of services caused the student to regress.

[40] The parent's claim with respect to the removal of 12-month school year services relates to the November 2016 IEP as the service was removed at that time (Dist. Ex. 34 at p. 8). The IHO stated that the service was placed back into the student's May 2017 IEP; however, contrary to the IHO's statement, the evidence shows that 12-month school year services were not recommended in the May 2017 IEP (IHO Decision at p. 17; Dist. Ex. 4 at p. 9).

[41] There is also no indication in the January 2017 IEP that these issues were discussed (see generally Dist. Ex. 41).

The district indicated that it would defend the May 2017 IEP; however, the hearing record was not fully developed on this IEP. As the hearing record is silent on this issue, it must be remanded to an IHO to make a determination in the first instance and the matter is remanded for the IHO to render a determination on the merits (see 8 NYCRR 279.10[c]).

VII. Conclusion

In summary, the parent's claims of error on the part of the IHO are insufficient to overturn his decision with regard to the CSE meetings and IEPs resulting from the May 2016 and June 2016 process. However, as discussed above, the hearing record is not sufficiently developed to render a decision on the merits of the parent's claims related to implementation during the 2015-16 school year, the appropriateness of the November 2016 IEP, the parent's claims related to allegations of bullying and the student's safety in school based on incidents occurring during the 2016-17 school year, or the appropriateness of the May 2017 IEP. In light of the above, the matter must be remanded for the IHO to develop the record and render a determination on those issues.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the matter is remanded to the IHO who issued the January 5, 2018 decision to develop the evidentiary record and render a determination of the merits of the parent's implementation claims for the 2015-16 school and the development and adequacy of the November 2016 and May 2017 IEPs in accordance with this decision; and

IT IS FURTHER ORDERED that the IHO shall address claims asserted by the parent that the district has failed to implement the student's pendency placement; and

IT IS FURTHER ORDERED that, in the event the IHO who issued the January 5, 2018 decision is not available, the district shall appoint a new IHO in accordance with the rotational selection procedure and State regulations.

Dated: **Albany, New York**
August 6, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER