



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-244

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Elmira City School District

Appearances:

Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioners, by Lisa M. Gibertoni, Esq.

The Law Firm of Frank W. Miller, PLLC, attorneys for respondent, by Charles C. Spagnoli, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) provided appropriate educational programming to the student and denied the parents' request for compensatory educational services for summer 2019, summer 2020, and the 10-month portion of the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has received diagnoses of autism spectrum disorder and attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 12 at pp. 1-2; Joint Ex. 1A at p. 1). He received special education instruction, speech-language therapy, and occupational therapy (OT) through the Early Intervention Program (Dist. Ex. 12 at p. 1). At about age three, the student was evaluated, found eligible for preschool special education services by a Committee on Preschool Special Education (CPSE), and thereafter received special education itinerant teacher (SEIT) services, speech-language therapy, OT, physical therapy (PT), and 1:1 aide services (*id.* at pp. 1-2). Beginning in kindergarten, a CSE found the student eligible for special education services as a student with autism and he received integrated co-teaching (ICT) services, resource room, related services, and

1:1 aide services (id. at p. 2).¹ At the end of first grade, the student's program changed to an "8:1[+]1 program" with continued related services (id.).

The student attended a charter school (Finn Academy) for third grade (2015-16 school year) through sixth grade (2018-19 school year) (Tr. pp. 550-51; Dist. Exs. 12 at p. 2; 20; 24).² While at Finn Academy the student was in a general education class and at various times received services including indirect consultant teacher services, direct consultant teacher services in math and English language arts (ELA), and/or resource room, OT, skilled nursing, speech-language therapy, music therapy, and 1:1 aide services, as well as supplementary aids and services, and 12-month services provided by the district (Dist. Ex. 12 at p. 2; Joint Exs. 1A at pp. 12-15; 2A at pp. 12-15; 3A at pp. 13-17; 4A at pp. 14-16).

Pursuant to a May 2019 IEP, the student received 12-month services during summer 2019 at one of the district's elementary schools consisting of a daily integrated special class for 300-minutes per day, two 40-minute sessions per month of individual music therapy, two 30-minute sessions per week of individual OT, daily skilled nursing, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of group speech-language therapy (Tr. p. 208; Dist. Ex. 28; Joint Ex. 1A at pp. 14-15).

The student attended Finn Academy for the 10-month portion of the 2019-20 school year (seventh grade) (Dist. Ex. 7). In 2019, the parents and district learned that Finn Academy amended its charter to become a kindergarten through sixth grade school beginning with the 2020-21 school year, meaning that the student would no longer be eligible to attend Finn Academy for the 2020-21 school year (eighth grade) (see Tr. pp. 219-20, 321, 1126-27; Joint Ex. 3D at p. 2). School buildings were shuttered statewide in March 2020 due to the COVID-19 pandemic.

The CSE convened on June 17, 2020 for a review of the student's programming (see Joint Ex. 5A). For summer 2020, the CSE recommended that the student receive 12-month services consisting of daily 30-minute sessions of resource room programming, daily 55 minute sessions of direct consultant teacher services in both ELA and math, two 40-minute sessions per month of individual music therapy, one 30-minute session per week of individual OT, skilled nursing services, one 30-minute session per week of individual speech-language therapy, and three 30-minute sessions per week of group speech-language therapy (id. at pp. 17-18). The CSE also recommended 120 minutes per week of indirect consultant teacher services, and direct consultant services in both OT and speech-language therapy (id. at p. 18). For the 10-month portion of the 2020-21 school year, the June 2020 CSE recommended daily resource room programming and daily ICT services in English language arts (ELA), math, science, and social studies (id. at p. 15). The June 2020 CSE also recommended related services of one 30-minute session per week of individual music therapy, one 30-minute session per week of individual OT, one 30-minute OT consultation per week, daily skilled nursing, one 30-minute session per week of individual speech-language therapy, three 30-minute sessions per week of group speech-language therapy, and one

¹ The student's eligibility for special education and related services as a student with autism is not in dispute (34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

² According to the parents, they previously filed due process complaint notices and received favorable decisions pertaining to the summer 2015 and summer 2016 programs (Dist. Ex. 44 at p. 2).

30-minute speech-language consultation per week (id.). The June 2020 IEP indicated that the student would receive the 10-month program at a charter school (id. at p. 21);³ however, according to the CSE meeting minutes, the CSE proposed a program to be delivered at a district public school (Joint Ex. 5D at p. 2). According to the minutes, the parents wanted "a more individualized instructional option for [the student] starting in the fall" and that a search had been underway to explore programming options for the student for the 2020-21 school year, which search had or would include Board of Cooperative Educational Services (BOCES) and out-of-district programs (Joint Ex. 5D at pp. 1-2). The CSE agreed to the parents request to reconvene in September to finalize recommendations for the 10-month portion of the 2020-21 school year (id. at p. 2).⁴

The student received 12-month services remotely from the district during summer 2020 (Tr. pp. 217, 560-61; see Dist. Ex. 1). The parents filed due process complaint notices dated August 6, 2020 and September 9, 2020, which were later consolidated and amended (see Dist. Exs. 42-43; see also Dist. Ex. 44; IHO Ex. II).

The CSE convened on September 10, 2020 to review the student's programming (see Joint Ex. 6A). The September 2020 CSE recommended a resource room program five days per week for 40-minutes together with daily ICT services in ELA, math, science and social studies to be provided in a district public school (Joint Ex. 6A at pp. 15-16, 21). In addition to the related services recommended by the June 2020 CSE, the September 2020 CSE also recommended one 30-minute music therapy consultation per week (compare Joint Ex. 5A at p. 15, with Joint Ex. 6A at p. 16). The September 2020 CSE also recommended 1:1 aide services, modification of math and ELA curriculums, use of a BIP, provision of a copy of notes, home communication, and use of visuals, as well as use of a computer throughout the school day, supports for school personnel on behalf of the student, testing accommodations, and special transportation (Joint Ex. 6A at pp. 11-12, 16-21).

The student did not begin receiving instruction from the district at the start of the 2020-21 school year (eighth grade) (see Dist. Exs. 15; 21). Over the course of fall 2020, district staff and the parents discussed the student's status as a "new" or "continuing" student and the need to enroll him in the district given his attendance at the charter school during the prior school year (see Parent Ex. M at pp. 1-4; Dist. Exs. 15; 16; Joint Ex. 6D at p. 1).

The CSE reconvened on October 8, 2020 to conduct an annual review (see Joint Ex. 7A). The program recommendation remained the same as in the September 2020 IEP (compare Joint Ex. 6A at p. 15, with Joint Ex. 7A at pp. 14-15). In addition to the related services recommended by the September 2020 CSE, the October 2020 CSE recommended one 30-minute session per month of an autism special education teacher consultation, and one 30-minute session biweekly of

³ The IHO refers to special education programming provided during July and August as extended school year (ESY) services; however, State regulation refers to these services as 12-month services (8 NYCRR 200.4[d][2][x]). Accordingly, these services are referred to as 12-month services throughout this decision.

⁴ The June 2020 IEP also included recommendations for supplementary aids, and services/program modifications/accommodations, including 1:1 aide services, as well as assistive technology and supports for school personnel but carried over the projected implementation date of November 14, 2019 and indicated that several of the services/accommodations would be provided at Finn Academy (Joint Ex. 5A at pp. 16-17).

individual music therapy (compare Joint Ex. 6A at p. 16, with Joint Ex. 7A at p. 15). Again, the recommended placement was at a district public school (Joint Ex. 7A at p. 21). Beginning on November 23, 2020, the parents elected to enroll the student in a district remote, synchronous program but after two days in that learning environment, the parents enrolled the student in a district asynchronous academic program, with remote synchronous resource room and related services (Tr. pp. 120-21; Dist. Ex. 44 at pp. 2, 5).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated December 15, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the summer 2019, summer 2020, and 2020-21 school year (see Dist. Ex. 44).⁵ In connection with the three periods of time under review, the parents claimed that the district failed to implement the recommended program and services, failed to evaluate the student, and failed to recommend an appropriate placement, program and services (id. at pp. 5-7).

With respect to the summer 2019 implementation claim, the parents alleged that the student was placed in "an overly-restrictive special education program" with students whose needs were "incompatible" with the student's, causing him to exhibit "severe behavior regression" (Dist. Ex. 44 at p. 5). Regarding the summer 2020 program, the parents alleged that the student was in an "overly restrictive" program with only one other part-time student (id.). The parents further claimed that the student did not have "access to general education students" and had no opportunity to develop and/or maintain his social and behavior skills (id.).

Regarding the CSEs processes that occurred for the purpose of developing IEPs for the student for the 2020-21 school year, the parents generally claimed they were "excluded" from meaningfully participating in the development of the student's program because they were denied access to information and documentation pertaining to the student (Dist. Ex. 44 at p. 7). Furthermore, the parents alleged that the district predetermined the student's programs and services in general without parental input and solely based upon financial reasons (id.).

Related to the district's evaluation of the student, the parents asserted that the district failed to administer "formal, standardized cognitive and academic functioning testing since October 2017" (Dist. Ex. 44 at p. 6). Specifically, the parents contended that the district failed to administer an assistive technology or OT evaluation since 2018 or conduct a triennial in October 2020 (id.).

For the 2020-21 school year, the parents argued that the June, September, and October 2020 IEPs were based upon outdated evaluative information; failed to include updated report cards and progress notes from Finn Academy; included "supports, services, accommodations, modifications, and goals" that were not "connected" to the student's actual needs; recommended ICT services, which was not sufficiently supportive for the student's needs; and failed to

⁵ As noted above, the parents initially filed due process complaint notices dated August 6, 2020 and September 9, 2020 (see generally Dist. Exs. 42-43). Then, on September 21, 2020, the IHO consolidated the August 2020 and September 2020 complaint notices (Dist. Ex. 38 at p. 3; IHO Ex. II). The parties confirmed on the hearing record that the December 2020 amended due process complaint notice superseded and replaced the consolidated case consisting of the other two due process complaint notices (Jan. 21, 2021 Tr. pp. 3-4).

recommend 1:1 instruction (Dist. Ex. 44 at pp. 6-7). Additionally, the parents contended that the September and October 2020 IEPs changed the student's group speech-language therapy to individual speech-language therapy which failed to address his pragmatic language and social/behavioral needs (id. at p. 7). The parents argued that the goals in the June 2020 IEP "merely restate[d], verbatim, the goals of the October 2019 IEP" (id.). Lastly, the parents also alleged that the October 2020 IEP was not modified to coincide with the student's remote instruction (id.).

In connection with the district's implementation of the student's IEP(s) during the 10-month portion of the 2020-21 school year, the parents asserted that the district denied the student access to his academics from September to November 2020 and failed to provide the student with a 1:1 aide during the 2020-21 school year (Dist. Ex. 44 at p. 5).

As relief, the parents requested a declaratory finding that the student was deprived of a FAPE for the summer 2019 and summer 2020, as well as the 10-month portion of the 2020-21 school year (Dist. Ex. 44 at p. 7). The parents requested an order directing the district to provide the student with a 1:1 aide pursuant to his June, September, and October 2020 IEPs (id.). The parents also requested that the district be required to fund independent educational evaluations (IEEs) of the student including a neuropsychological evaluation, OT evaluation, functional behavioral assessment (FBA), assistive technology evaluation, and other evaluations that may be warranted (id. at p. 8). Lastly, the parents sought an order placing the student at Shrub Oak International School or another private school or placement that the parents established as appropriate (id.).⁶

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 1, 2020 and concluded on August 30, 2021, after 15 days of proceedings, including five prehearing conferences (Tr. pp. 1-1413; see Dist. Exs. 37-39; Jan. 20, 2021 Tr. pp. 1-16).⁷ In a decision dated November 1, 2021, the IHO determined that the district offered the student a FAPE for summer 2019 and summer 2020, as well as the 10-month portion of the 2020-21 school year, and denied any relief to the parents (IHO Decision at pp. 11-18, 21-23).

At the outset, the IHO made certain determinations with respect to the testimony of the student's mother (IHO Decision at p. 10). The IHO held that the parent made statements during pre-hearing conferences, when called as a witness on the district's direct case, when called as a witness on her own behalf, and at other times during the proceedings which were "conflicting and/or inaccurate statements" (id.). The IHO held that, although the mother "intended to answer

⁶ The district interposed an answer to the parents' September 9, 2020 due process complaint notice (see Dist. Ex. 45).

⁷ The transcripts of the prehearing conferences were not consecutively paginated with the rest of the transcript of the impartial hearing. The transcripts for the prehearing conferences that were held on September 1, 2020, September 21, 2020, and November 12, 2020 were included in the hearing record as district exhibits and will be cited as such (Dist. Exs. 37-39). Citations to the January 21, 2021 prehearing conference will include the date of the transcript preceding the cite (Jan. 21, 2021 Tr. pp. 1-16). No transcript for the November 20, 2020 prehearing conference was included in the hearing record filed on appeal.

all questions truthfully and to the best of her knowledge," her inconsistent statements "impacted the weight" the IHO accorded her testimony (id.).

Next, the IHO discussed the parents' allegation that the district failed to implement the IEP during the summer 2019 program and whether such failure deprived the student of a FAPE (IHO Decision at pp. 10-11). The IHO held that the hearing record did not support the parents' contention that the student "experienced significant behavioral regression during" the summer 2019 program (id. at p. 11). Ultimately, the IHO held that the district "presented credible and un rebutted testimony" that the 12-month services were appropriate and the "[s]tudent performed well in the program" (id.).

For summer 2020, the IHO recognized that the district chose to provide 12-month services exclusively through remote instruction which "was consistent with guidance" issued by the United States Department of Education and the New York State Education Department (IHO Decision at pp. 11-12; see Joint Ex. 5A). The IHO concluded that the summer 2020 program was appropriate as the student made progress with the program and services provided to him (id. at p. 13).

With respect to the 10-month 2020-21 school year, the IHO concluded that the hearing record demonstrated that the district "complied with all IDEA obligations" and, therefore, offered the student a FAPE for the 2020-21 school year (IHO Decision at p. 14). The IHO held that the CSE "obtained and considered appropriate and comprehensive evaluations" and the CSE's recommendations were based on those evaluations (id.).⁸ In addition, the IHO concluded that the ICT services recommended for the 2020-21 school year offered the student "more special education support" than the previous IEPs that recommended consultant teacher services in the general education classes at Finn Academy (id. at p. 15). The IHO held that the ICT services enabled the student "to work toward meeting his goals and to progress from grade to grade" (id. at p. 16). Based upon the evidence in the hearing record, the IHO found that the student benefited from instruction and made meaningful progress (id.).

Next, the IHO addressed whether the district's failure to deliver instruction to the student from September through November 2020 was a denial of FAPE (IHO Decision at pp. 19-21). The IHO found that the parents, not the district, "interfered with the [s]tudent's ability to receive services during that time period" (id. at pp. 19, 22). The IHO found that the district requested that the parents complete and submit registration forms to enroll the student in the district prior to the 2020-21 school year but the parents refused (id. at p. 19). According to the IHO, it was not until she scheduled a hearing for the appointment of a guardian ad litem and the parents' retention of any attorney in November 2020 that the parents finally submitted the registration forms (id. at p. 20). The IHO held that the district witness's testimony established the registration forms were required for the student to attend the district schools for the 2020-21 school year (id. at p. 21). Ultimately, the IHO concluded that the "lack of academic instruction from September through mid-November did not constitute the type of prolonged or gross deprivation that would justify a

⁸ Considering these findings, the IHO declined to order the district to conduct evaluations or fund IEEs (id. at pp. 22-23).

compensatory education award" (*id.*). In the alternative, the IHO held that an award of compensatory education services "would not be warranted even" if a denial of FAPE was found (*id.* at p. 22).

Finally, in reviewing the 2020-21 school year overall, the IHO held that none of the arguments raised by the parents supported a finding that the student was deprived of a FAPE for the 2020-21 school year (IHO Decision at p. 21). Based upon a finding that the district offered the student a FAPE for the time periods in question, the IHO held that the parent was not entitled to any relief; however, alternatively, the IHO concluded that, even if she had found that the district denied the student a FAPE, the student's placement at Shrub Oak would not be ordered as the hearing record failed to demonstrate that the placement was appropriate for the student (*id.* at pp. 21-23).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in finding that the district provided the student with a FAPE for summer 2019, summer 2020, and the 10-month portion of the 2020-21 school year.⁹

In connection with summer 2019, the parents argue that the IHO failed to address their claims that the student was "inappropriately grouped" and "his behavior plan was not adequately or faithfully implemented" (Req. for Rev. at p. 2). The parents also assert that the IHO erred in finding that the district "presented credible and un rebutted testimony" that the student performed well in the summer program (*id.* at pp. 2-3).

With respect to summer 2020, the parents argue that the IHO incorrectly stated that the basis for the parents' claim was that the program was delivered remotely. The parents contend that their complaint was based upon the district's failure to implement the IEP, which in turn denied the student a FAPE. Additionally, the parents assert that the district did not develop an appropriate distance learning plan for the summer 2020 as it had no direct connection to the June 2020 IEP. Further, the parents argue that the IHO's findings that the student "did not experience regression during the Summer 2020 program, and in fact made progress" were "false and contradicted by the [hearing] record" (Req. for Rev. at p. 3). Lastly, the parents argue that the IHO erroneously found

⁹ The parents timely served the request for review upon the district on December 13, 2021 but did not file their appeal with the Office of State Review until December 21, 2021. State regulation provides that the "petitioner shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete" (8 NYCRR 279.4[e]). According to a letter from parents' counsel, dated December 21, 2021, she attempted to electronically file the request for review and supporting documents on December 14, 2021 but inadvertently used an incorrect email to do so, and the documents were not filed. Then, upon electronically filing her reply on December 21, 2021, parents' counsel realized there was a filing issue, and filed the request for review the same day (December 21, 2021). In this case, the timeline for rendering a decision did not commence until the parent's counsel filed the request for review. Based upon the foregoing, I decline to exercise my discretion to dismiss the parents' appeal as the district suffered no prejudice and the parents' attorney was attentive and acted quickly to self-correct the error once she became aware of the filing issue. There was minimal disruption of the State Review procedures in this case and the staff of the Office of State Review was not required to expend scarce resources locating the problems with the parents' filing.

that the participation of only one other student was not "overly restrictive" and did not constitute a denial of FAPE (id.).

For the 2020-21 school year, the parents assert that the IHO erred in finding that the district met its burden to prove that the IEPs were designed to enable the student to make meaningful progress. More specifically, the parents argue that the student was due for a triennial "over the period June 2020 to October 2020," and the lack of updated evaluative information led to a disconnect between the recommended ICT services and the student's needs (Req. for Rev. at p. 5). Next, the parents argue that the IHO's finding that the ICT services provided the student "with more special education support" than previously recommended was "conclusory and false" as the district witness's testimony contradicted documents in the hearing record (id. at p. 6).

The parents also allege that it was the district's refusal to provide instruction from September through November 2020 that caused the student to miss instruction and resulted in a denial of FAPE. Additionally, the parents argue that the IHO weighed their election of remote instruction for their child against them, and therefore, determined that the student did not require a 1:1 aide during remote instruction. Further, the parents argue that, contrary to the IHO's finding that the student made progress during remote instruction during the 2020-21 school year, the evidence demonstrated "a distinct lack of progress and even regression in all areas other than music" (Req. for Rev. at p. 8). Lastly, the parents argue that the IHO erred in denying the parents' requests for relief.

The parents seek the following relief: a finding that the district failed to offer the student a FAPE for summer 2019, summer 2020, and the 10-month portion of the 2020-21 school year; compensatory education to remedy the district's "failure to provide an appropriate education, appropriate 1:1 instruction, and/or a 1:1 aide to" the student; district funded IEEs, including but not limited to a neuropsychological evaluation, OT evaluation, FBA, assistive technology evaluation and any other evaluation warranted by the circumstances; an amended IEP for the student to reflect the results of the requested evaluations and to include an appropriate placement; placement of the student at Shrub Oak International School or compensatory education in the form of tuition at Shrub Oak International School (Req. for Rev. at pp. 9-10).

The district answers, denying the material allegations contained in the parents' request for review. In its answer the district also argues that the request for review fails to state a claim and seeks relief beyond the scope of an SRO's authority. The district also argues that the issues raised by the parents were the result of the "conduct or nonfeasance" of the parents and not the district (Answer at pp. 1-2).¹⁰

¹⁰ The parents reply to the district's answer. Within their reply, the parents assert that the district's answer contains conclusory statements and the district elaborated on and expanded upon arguments in support of the issues in the answer solely within the memorandum of law. The district filed a proposed amended answer based on the objections raised by the parents in their reply. Although the district asserts that the answer was compliant with State regulations, in an "excess of caution" if there was a deficiency in the answer, the district requests that the answer be "accepted nunc pro tunc." As the district's original answer largely requested that the IHO's decision be upheld in its entirety, it sufficiently complied with State regulations (see 8 NYCRR 279.5; 279.8), and I decline to consider the proposed amended answer.

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 Andrew 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹¹

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

VI. Discussion

A. Implementation of 12-Month School Year Services

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, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [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

¹¹ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

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]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]; 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 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]).

Here, the evidence in the hearing record does not support a finding that there was a material deviation from the May 2019 or June 2020 IEPs with respect to the summer 2019 or summer 2020 programs, respectively.

1. Summer 2019

On appeal, the parents assert that the IHO erred by failing to address the parents' claims that, while receiving 12-month services during summer 2019, the student was inappropriately grouped and his BIP "was not adequately or faithfully implemented" such that he exhibited behavior "regression," and erroneously concluded that "the [s]tudent performed well in the program."

a. Functional Grouping

Turning first to grouping, according to the May 2019 IEP, the student's 12-month services consisted of an integrated special class, five days per week, for 300 minutes (about 5 hours), in a general education classroom (Joint Ex. 1A at p. 14). The student's special education teacher for the 2019 12-month program testified that, although there were 20 available spots, the student was one of 13 students in the program, and he was the only student whose IEP indicated that 12-month services were required (Tr. pp. 771-75; see Dist. Ex. 28). She noted that there were four regular education students in the class, as well as eight other students with IEPs, and a regular education teacher (Tr. pp. 773-74; see Dist. Ex. 28). The special education teacher explained that, because the students were going into seventh grade, the program was set up much like a middle school setting in that the students had schedules and they "switched classes" (Tr. p. 776). She further indicated that the students were grouped for reading instruction as well as mathematics instruction based on their level derived from scores obtained through a reading computer program and a math computer program (id.).

The evidence describing the "integrated special class" was akin to a general education class with ICT services in that it consisted of the "provision of specially designed instruction and academic instruction to a group of students with disabilities and nondisabled students" delivered by both a special education teacher and a regular education teacher (see 8 NYCRR 200.6[g]). Unlike State regulations which require that students in special classes students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]), there are no such grouping requirements for disabled

students who attend integrated settings alongside their nondisabled peers in a general education setting. Moreover, in arguing that the district failed to demonstrate appropriate grouping, the parents point to a lack of evidence regarding the "disability classifications" of the other students in the class (Parent Mem. of Law at p. 10); however, grouping requirements in State regulation are tied to the similarity of needs of the students, meaning their "range of academic or educational achievement," as well as their "learning characteristics," and levels of "social and physical development (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). There is no requirement that students be grouped according to disability classification, and the parents' arguments are without merit.

Even if there were State regulations that imposed grouping requirements for an "integrated special class," review of the evidence in the hearing record discussed above, specifically the testimony of the student's special education teacher nevertheless lead to the factual conclusion that students in the class received academic instruction in groupings based upon assessed levels (see Tr. p. 776). Moreover, on appeal, the parents do not point to evidence in the record that shows how a purported inappropriate grouping of the student amounted to a material deviation from the student's IEP or contributed to the alleged regression in the student's behaviors.

b. Behavioral Intervention Plan

Turning now to the implementation of the student's behavior plan, the May 2019 IEP noted that the student's BIP addressed disruptive behaviors across all areas, and that a 1:1 aide provided additional behavioral support (Joint Ex. 1A at p. 8). The IEP indicated the student used a behavior modification system to reinforce classroom expectations and complete work, and he used a self-regulation chart three times daily to identify and describe his feelings (*id.*). The May 2019 IEP stated that the student had shown a significant increase in problematic behaviors such as yelling out, singing, swearing, demonstrating some physical aggression toward adults such as hitting and pushing, and breaking some peer boundaries including privacy, turning off computers during work time, grabbing eyeglasses from a peer's face, and attempting to erase and take school assignments from peers (*id.* at pp. 6, 8). The May 2019 IEP noted that the student was working towards minimizing abrupt interruptions of established conversations or unintentional interference (*id.* at p. 6). In addition, the May 2019 IEP stated that the student continued to need direct explanations and social stories regarding personal space of others and how to appropriately communicate his needs, as opposed to asking peers to repeat nonsensical scripts or curse words (*id.*). The IEP further indicated that the student had become more inconsistent with attending to teacher directions and participating in simple classroom routines, that he required prompts and verbal reminders during transitions, and that he often used negative attention seeking methods (*id.* at p. 7). In addition, the IEP noted that each section of the behavior management plan should be followed to address the behaviors, and, additionally, a weekly behavior update was emailed to the parent to stay informed on a regular basis (*id.* at p. 8). The IEP stated that the student had a 1:1 aide with knowledge of the BIP; and that with respect to transportation, the driver, bus aide, and substitutes were to be familiar with the student's BIP and trained in appropriate responses described therein (*id.* at p. 17).

The June 12, 2019 BIP indicated that the student's target behaviors included self-directed disruptive behaviors, such as yelling, verbal outbursts, and noises, which created a distraction or disruption in the classroom; and self-regulation behaviors, such as screaming, yelling, swearing,

and verbal outbursts including repetitive scripting, sometimes leading to physically aggressive behaviors such as attempting to hit others or biting/picking himself (Joint Ex. 12 at p. 1). The BIP noted that data from the 2019 third quarter report was used for baseline of the behavior plan update; and frequency, duration, intensity, and latency were included for both target behaviors (*id.*). According to the BIP, the student's social skills (i.e., eye contact, spontaneous greetings, sharing) were improving, and he displayed and expressed empathy for peers and was more aware of social cues (*id.* at p. 2). Further, the BIP indicated that the student talked about peers at home, was able to say when he did not like something or was angry, was more aware of and expressed his physical needs, and might indicate that he needed support such as a hug or squeeze to help regulate (*id.*). The BIP stated that the student was able to ask for help appropriately in a variety of settings, was very motivated by positive reinforcement such as his points system, and followed his schedule well (*id.*). The BIP noted that the student demonstrated a strength in basic math computation and spelling, and an increased willingness to engage with peers in play such as during recess, basketball, and intramurals (*id.*). With respect to functional theory, the BIP indicated that the student's self-directed behaviors that disrupted the class/lesson led to avoidance of a non-preferred task or activity and that, when transitions and or non-preferred/difficult tasks/activities occurred in the context of the classroom environment, the student exhibited physically aggressive and disruptive behaviors in order to self-regulate (*id.* at p. 3). For each target behavior, the BIP provided setting event strategies, preventative strategies, behavior teaching strategies, and response strategies including replacement behaviors and how new behaviors would be taught (*id.* at pp. 3-5). The BIP noted that the individuals responsible for implementation of the behavior plan were the classroom teachers, including general education and special education teachers as well as special area providers and the student's 1:1 aide (*id.* at p. 5). Further, the BIP indicated that the people responsible for monitoring the BIP were classroom staff, who were to compile behavior data with frequency counts collected by the 1:1 aide at random intervals of about one to two times per week, as well as longer term trends monitored by the special education case manager and reviewed with the building special education coordinator (*id.*). The BIP stated that the schedule to measure the effectiveness of interventions included frequency counts and behavior trends reviewed weekly and considered by the team monthly, and a written progress report sent home quarterly (*id.*).

The student's special education teacher for summer 2019 testified that the 12-month services were offered at the district school because the student's IEP indicated that he required a summer school program (Tr. pp. 771, 774; *see* Joint Ex. 1A at pp. 14-15). According to the special education teacher the summer program was six weeks long, the other students in the program had volunteered to attend, she attended two team meetings, one in July 2019 and one in August 2019, and the parent was present at both team meetings (Tr. pp. 773-75). The special education teacher testified that she and the regular education teacher went through the student's IEP, and looked at what was in there, what the goals were, and what needed to be addressed, which was how they determined exactly how they would set up the day (Tr. pp. 773, 777-78). She noted that the student's IEP was the only one that she was responsible to implement because he was the only student whose IEP required 12-month services (Tr. p. 788).

With respect to behavior, the special education teacher stated that in the first two weeks of the summer 2019 program, the student's behavior was "pretty good," that she and the student "didn't really have any issues," he "was cooperative," "did his work," "came to school," and that there were "[n]ot too many problems" (Tr. p. 778). The special education teacher testified that

after the first two weeks the student's behavior became aggressive, and he started acting out, hitting, kicking, and using inappropriate language for about two weeks (*id.*). She further testified that after the middle two weeks of the program, the student's behavior improved for the last two weeks of the program, which she attributed to the implementation of behavior management strategies that were discussed at a team meeting, which was attended by the parent and the behavior specialist (Tr. pp. 778-79). The special education teacher confirmed that the staff followed the provisions of the student's BIP and IEP and did not deviate from the BIP until after the team meeting where they made some changes, "came up with some suggestions that" would be done "differently" and implemented some new behavior strategies that had not previously been used with the student (Tr. pp. 790-91, 799). Additionally, the special education teacher testified that the new suggestions and strategies "were different ways to apply the things in the [BIP]" (Tr. p. 799). Although the parents are correct that the behavior specialist testified that during one of her observations during summer 2019 staff was not implementing the strategies in the student's BIP, she also testified that during a subsequent observation, the team was following the BIP and behavior strategies "with greater fidelity" resulting in "slight improvement" in the student's behaviors (compare Tr. pp. 1094-95, 1111, with Tr. pp. 1114-15).

Therefore, although the student may have exhibited an increase in behavioral difficulties for approximately two weeks out of a six-week summer 2019 program, the evidence in the hearing record shows that the district was responsive to the student's needs and made adjustments to the behavior strategies that resulted in improvement in the student's behaviors. As discussed above, implementation standards require a material or substantial deviation from the student's IEP in order to constitute a denial of a FAPE, and as discussed here, the evidence in the hearing record does not support that there was any material or substantial deviation from the student's May 2019 IEP or implementation of the June 2019 BIP.

2. Summer 2020—Distance Learning

On appeal, the parents assert that the IHO incorrectly identified the basis of the parents' complaint regarding summer 2020 services, arguing that their claim was actually that the June 2020 CSE knowingly drafted an IEP recommending in-person instruction when at the time the IEP was developed the district knew that it would not be offering in-person programming; as such, the parents allege that the district could not implement the June 2020 IEP "as written." The parents also allege that the IHO erred by finding that the district developed an appropriate distance learning plan for summer 2020. With respect to the IHO's determination that the student did not regress and made progress in the summer 2020 program, the parents argue that finding is not supported by the hearing record. Further, the parents allege that that having one other student in the summer 2020 program was not appropriate and that the IHO erred in concluding was not "overly restrictive" or that it did not deny the student a FAPE.

State guidance issued shortly after school buildings closed in March 2020 due to the COVID-19 pandemic indicated that, during such closures, "the provision of FAPE [could] include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically" ("Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at p. 3, Office of Special Educ. Mem. [Mar. 2020], available at [15](http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-</u></p></div><div data-bbox=)

[services-to-swd-during-statewide-school-closure-3-27-20.pdf](#)). Additionally, the guidance provided that, in planning for continuity of learning, districts would be required to consider ways of ensuring that students with disabilities had access to the remote instruction, "including strategies to ensure that students with disabilities have equal access to the continuity of learning and receive educational benefits that are comparable to those received by others in the program and modified, or separate, aids and services necessary to provide access to students with disabilities" ("Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at p. 3). According to the guidance, "educators [could] still meet their legal obligations by providing children with disabilities equally effective alternate access to the curriculum or services provided to other students" and that "if online or virtual learning is part of a school closure recommendation, the school district would not be required to amend students' IEPs as online or virtual learning would be considered an alternate mode of instructional delivery" (*id.* at pp. 3, 5). Indeed, subsequent State guidance went further to state that an initial IEP should not be developed "to accommodate a temporary situation" but instead should include recommendations that would address a student's needs once schools reopen ("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State – Additional Questions and Answers," at p. 6, Office of Special Educ. Mem. [Apr. 2020], [available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf](http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf)). However, federal and State guidance documents provided that, in the meantime:

CSEs may, but are not required to, include distance learning plans in a student's IEP that could be triggered and implemented during a selective closure due to a COVID-19 outbreak. Such contingent provisions may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and may identify which special education and related services, if any, could be provided at the student's home. Creating a contingency plan gives the student's service providers and the student's parents an opportunity to reach agreement as to what circumstances would trigger the use of the student's distance learning plan and the services that would be provided during the closure.

("Preliminary Guidance on the Preparation for Novel Coronavirus (COVID-19) Outbreak in New York State," at pp. 5-6, Office of Commissioner of Educ. Mem. [March 13, 2020], [available at http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-second-guidance-3-13-20.pdf](http://www.nysed.gov/common/nysed/files/programs/coronavirus/nysed-covid-19-second-guidance-3-13-20.pdf); see "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77, Question A-6 [OCR & OSERS 2020]; "Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State – Additional Questions and Answers," at p. 6).

Thus, the district acted in conformance with federal and State guidance issued to address the evolving situation by developing an IEP for the student with recommendations focused on in-

person learning (see Joint Ex. 5A), with an accompanying distance learning plan to address the time during which the district offered remote learning due to circumstances surrounding the COVID-19 pandemic (see Dist. Ex. 1).

Specifically, the June 2020 IEP indicated that the recommended 12-month services—to be provided at a district elementary school—consisted of five 30-minute sessions per week of a resource room program, two hours per week of indirect consultant teacher services, one 55-minute session per day of direct consultant teacher services for ELA in a general education classroom, and one 55-minute session per day of direct consultant teacher services for mathematics in a general education classroom (Joint Ex. 5A at p. 18). Recommended related services included music therapy in the therapist's room, OT in the general education classroom, OT consultant service, skilled nursing in the nurse's office, speech-language therapy in both the speech-language therapy room as well as in the general education classroom, and speech-language therapy consultant service (id.).

While school districts were given the flexibility in summer 2020 to determine whether or not they could deliver in-person instruction to special education students;¹² however, for the greater student population in public schools, districts were mandated to submit reopening plan components to the State's Education Department as well as the Department of Health over the course of summer 2020 (<http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf>). The supervisor of special education and student support services (supervisor of special education) testified that, because of the COVID-19 "situation," the district had the choice to offer summer 2020 services remotely or in person, and the district chose to offer 12-month services remotely (Tr. pp. 1002, 1004-05). Therefore, to address the provision of 12-month services remotely, on June 16, 2020 the district developed an interim emergency distance learning plan (distance learning plan) with a start date of July 6, 2020 and an end date of August 14, 2020 (Dist. Ex. 1 at pp. 1, 2). The distance learning plan contained the student's basic demographic information, and indicated that the student's placement and location for his 12-month services were "[v]irtual" (id. at pp. 1-2). The distance learning plan indicated the parents' preferred mode of contact and preferred mode of student access to remote learning which was digital and/or Class Dojo as well as distance learning packets (mail) for OT, and tele-practice/ZOOM (id. at pp. 2-3). The distance learning plan noted that the family had access within their home to phone, internet, computer/tablet, email, capability to download and access from an electronic platform such as Schoology, access to mail to receive distance learning packets, capability to send mail/progress examples to school/classroom teacher, and capability to download and access tele-practice/ZOOM or other preferred video conferencing (id. at p. 3). The special educator/related service provider direct instruction schedule included in the distance learning plan indicated that the parents' preferred frequency of direct instruction was on a weekly basis for the classroom/teacher, speech-language therapy, OT, and music therapy, with physical education indicated on an "[a]s [r]equested" basis (id. at pp. 3-4). In addition, the distance learning plan noted that the parent-accepted frequency for contact/consultation with the special education

¹² Then-Governor Cuomo authorized, but did not mandate, schools under Executive Order 202.37 to provide in-person instruction to special education students (see <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-3-covid-qa-memo-6-20-2020.pdf>); however there was no modification of the school building closure orders for the general student population at that time.

classroom teacher or related service providers was weekly, in the afternoon, and that there was a need to set up a schedule (id. at p. 4). According to the distance learning plan, progress tracking toward IEP goals would occur monthly with reports due on July 22, 2020 and August 12, 2020 (id.). In addition, the distance learning plan stated that there was a total of 16 IEP goals, with three goals that would be addressed by the family, while the 13 remaining goals would be remotely addressed by the educational team (id.). The distance learning plan indicated that returned samples of the student's work would be used to assess progress, and that the student's current behavior/attention to structured learning in the home environment affected his ability to work remotely on IEP goals (id. at pp. 4-5). Two district parent consent forms for the use of teletherapy during COVID-19 were included in the distance learning plan but the copies included in the hearing record do not include the parents' signatures (id. at pp. 7, 9).

The student's special education teacher for the summer 2020 program testified that there was one other student that was in the remote program, and that the district had no other summer program that she was aware of (Tr. pp. 780-81). The special education teacher stated that there was a virtual team meeting regarding the summer 2020 program, that the student's mother attended it, that she was on board with the program and felt that what they "had planned was okay" (Tr. p. 781). In addition, the special education teacher stated that the parent was "a little concerned that it might be a little too much" for the student, and "that he might not be able to handle all the time [district staff] had scheduled for him to be in the Zoom" (id.). The special education teacher denied that the parent raised any objection to the fact that the program was going to be held virtually and confirmed that due to the COVID-19 emergency, she was unable to provide in-person instruction to the student during summer 2020 (Tr. pp. 781-82). Further, the special education teacher noted that she also felt it was "a long time for a student to be on a Zoom," but that the student "did very well" in the summer program, much better than many thought he would do, including herself (Tr. pp. 782, 793). She opined that the student did so well due to the combined effort between herself and the family and that they worked well together, noting that the family was very supportive in bringing the student back to the virtual classroom if he left it and encouraging him to participate (Tr. pp. 793-94).

The special education teacher explained the student's daily schedule and testified that she developed the program by going through the student's June 2020 IEP, looking at each of his goals, and creating the program so that every activity that was done with him met one of his goals on his IEP (Tr. pp. 782-83, 794). With respect to the student's behavior, the special education teacher testified that during summer 2020 remote learning sessions, his behavior was "pretty good," adding that first thing in the morning the student was usually tired and required some encouragement to sit up or to be seen in the screen or to participate, but as the morning wore on, he would wake up and participate (Tr. p. 783). She further explained that, at times, the student would "leave the Zoom" and need to be brought back by someone, and occasionally he would not want to do things and would refuse, but eventually he did complete the work that was asked of him (id.). The special education teacher reported that the student usually participated and completed his work (Tr. p. 784). According to the special education teacher, with respect to academic performance in the summer 2020 program, the student did "really, really well," and she was very impressed with his writing, further stating that it was some of the best writing she had seen from him in the five years that she had worked with him (Tr. p. 784). She further commented that the student was "writing complete sentences, capitals, periods, paragraphs, five, six sentences, long" and "[d]oing a really nice job" (id.). The special education teacher testified that in social studies, the student required a

little more assistance to keep him going, but he did complete the work, and that the student's reading, mathematics, and science improved during summer 2020 (Tr. pp. 784-86). Additionally, the special education teacher explained that the student typically required assistance such as reminders to re-read a paragraph, use a graphic organizer, find evidence in the text, and that she provided him with re-teaching, repetition, music, visuals and pictures, and positive encouragement (Tr. pp. 795-96). The special education teacher agreed that the 1:1 or 1:2 ratio worked well for the student during the 12-month program, and he made a lot of progress (Tr. p. 794).

As to the parents' position that the 12-month services were overly restrictive, at least one court has held that, when children with disabilities are offered the same remote instruction that is available to children without disabilities, the remote instruction setting qualifies as a regular educational environment under the LRE provision because the provision's text and legislative history indicate that a regular educational environment is any learning environment where a child with disabilities has not been separated from his or her classmates without disabilities (Hernandez v. Grisham, 508 F. Supp. 3d 893, 999 [D.N.M. 2020]; see also "Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021] [acknowledging that instruction in the home "was generally considered one of the most restrictive environments" but stating that virtual learning during the pandemic could be "deemed less restrictive if it is available to all children and provides the child with a disability, meaningful opportunities to be educated and interact with nondisabled peers in the regular education environment"]). Here, given the lack of enrollment of regular education students in the district's summer remote learning program, the district may have been in violation of LRE requirements (see T.M., 752 F.3d at 162-65 [finding specifically that the LRE requirement applies to the summer component of the student's recommended 12-month school year program]; see also 34 CFR 300.107; 300.114; 300.117; 8 NYCRR 200.4[d][2][v][a][1]-[3]).¹³ However, under the circumstances, it is unclear at this juncture, what relief, if any, would be necessary to remediate such a violation given the evidence that supports the student's progress during that time period. As discussed below, the circumstances surrounding remote instruction during the COVID-19 pandemic were far from ideal and the parents may request the CSE to consider whether the student suffered a loss of skill due to the delivery of remote instruction. However, it seems very unlikely

¹³ The Court in T.M. very clearly states that an LEA does not have to create a mainstream summer program under IDEA for a disabled student, but at the same time appears to indicate that that an LEA must nevertheless find one if it lacks one of its own, noting that "[i]nstead, the school district may choose to place the child in a private mainstream summer program, or a mainstream summer program operated by another public entity" (T.M., 752 F.3d at 166). However, the State has no requirement that public schools created ESY programs for nondisabled students or any mandate that nondisabled students must attend school in the summer. One of the questions that has therefore arisen in light of this language in the Second Circuit opinion in T.M. is where to precisely find such summer programming that has the nondisabled students with whom the disabled students are supposed to be placed in order to satisfy the IDEA's LRE requirement. The Court's opinion seems to suggest that even if the district in question does not have to be the entity that creates the program, some public agency in the State is nevertheless required to create such a program or must authorize a private option that serves the exact same purpose. But T.M. does not explicitly say which public agency is required to create or authorize such programming for nondisabled students during the summer and seems to presume it is readily available, when the reality is that most nondisabled students simply do not go to school during the summer because it is not required in this State. The rule that SROs applied prior to T.M. was that disabled students could not be excluded from otherwise appropriate, available nondisabled summer programming if the public agency opted to create it or it was located in a nearby public program.

that there an appropriate award of a compensatory education for an LRE violation for this student for summer 2020. It is more appropriate to simply require that the district to comply with the LRE requirements in the public school on a going forward basis, a mandate already imposed by State and federal law.

As discussed above, the district created the remote 12-month 2020 program from the student's June 2020 IEP and developed the June 2020 distance learning plan that reflected the parents' preferences regarding direct instruction. According to the special education teacher who provided the summer services, the student made progress during the summer 2020 program. Given that the district was working on the student's annual goals as set forth in the June 2020 IEP during summer 2020, deviations in the means of implementing the IEP program and services during the school closures related to the COVID-19 pandemic do not amount to a material deviations from the student's IEP such that they would support a finding that the district denied the student a FAPE.

B. 2020-21 School Year

1. Evaluative Information

The parents argue on appeal that the IHO erroneously determined that the CSE obtained appropriate and comprehensive evaluations of the student, including an FBA, in the years prior to the development of the 2020-21 school year, and that the student was not "due" for a triennial evaluation prior to the CSEs making program recommendations for the student for the 10-month portion of the 2020-21 school year.

Under the IDEA, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

According to the May 2019 IEP, the following evaluations were conducted: a November 2015 speech-language evaluation, an October 12, 2017 district psychoeducational evaluation, an October 18, 2017 educational evaluation, an October 15, 2018 OT evaluation, a fall 2018-19 school year "NWEA," and a "recently" conducted music therapy evaluation (Joint Exs. 1A at pp. 2-6; 11; 16; Dist. Ex. 12).¹⁴ Additional assessment results reflected in the October 2019 IEP and October 2019 prior written notice were from a September 2019 classroom observation,¹⁵ an October 2019 speech-language evaluation, a fall 2019-20 NWEA test, a Fountas and Pinnell reading level, and a level one vocational assessment (Joint Ex. 3A at pp. 3-6; 3C at p. 1; 13 at pp. 1-2; 15 at pp. 1-5). The June 2020 IEP added June 18, 2020 academic update information (Joint Ex. 5A at pp. 7-8). Further, the hearing record indicated that additional evaluations conducted prior to the June 2020 CSE meeting included a March 2016 FBA, an August 2018 assistive technology evaluation with a September 2018 addendum, and an October 2019 OT evaluation (Joint Exs. 8 at pp. 1-11; 9 at pp. 1-6; 10 at pp. 1-4; 18 at pp. 1-2).

While the parents allege that, based on the date of the October 2017 psychoeducational evaluation, the district was required to reevaluate the student in 2020, the foregoing reflects that the district conducted several assessments of the student since 2017. While State regulations define that certain assessments must be performed as part of an initial evaluation of a student to determine initial eligibility (8 NYCRR 200.4[b][i]-[v]), it is left to the collaborative process of the CSE to determine what additional data is needed during a reevaluation of a student (8 NYCRR 200.4[b][5]).¹⁶ Other than the student's behavioral needs, the parents do not point to any area of need that the evaluative information did not sufficiently describe, and there is no indication in the hearing record that the parents requested that the district conduct updated standardized cognitive or academic testing of the student or that the other sources of information available to the CSEs did not sufficiently describe the student's levels of functioning.

With respect to whether an updated FBA was warranted, the behavior specialist who conducted the student's March 2016 FBA confirmed that there was no information presented in a CSE meeting or elsewhere regarding a change in the student's behaviors since 2016 that rendered the 2016 FBA inappropriate or insufficient to serve as an evaluation of the student's pertinent behaviors, and there was no need for a new FBA (Tr. pp. 48, 56-58, 82-84). She noted that the student's BIP was revised at least annually between 2016 and 2019, and more frequently than that in terms of the alternative skills and interventions, but not specific to the function of the problem

¹⁴ The music therapy evaluation report dated April 1, 2019 was included in the hearing record (see Joint Ex. 11).

¹⁵ The September 2019 classroom observation was conducted by the school psychologist and is titled as a psychoeducational evaluation; however, it appears in the prior written notice as a classroom observation and the "reason for evaluation" noted is for re-evaluation at the request of the speech therapist (compare Joint Ex. 13 at pp. 1-2, with Joint Ex. 3C at p. 1).

¹⁶ State regulations provide that "[t]he reevaluation shall be conducted by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of the student's disability" and that "the reevaluation shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]).

target behaviors (Tr. pp. 98-99, 1116-117).¹⁷ The behavior specialist stated that in looking at the student's "newish" property damage behavior in late 2018 and the 2019-20 school year, staff determined through data analysis that the function was consistent with what staff had observed with previous reaction-seeking behaviors and escape-avoiding behaviors (Tr. pp. 100-01). In addition, the coordinator of special education and interventions at Finn Academy testified that based on the information she had concerning the student's behaviors, including any information she reviewed during the June 2020 CSE meeting, she agreed the student did not require an updated FBA (Tr. pp. 668, 677). The coordinator explained that staff "really were able to capture" the functions and motivations of the student's behaviors, which she "would expect" to still be consistent (Tr. p. 677). Further, she noted that the student's BIP was updated yearly, and staff "looked at if any additions, things, discoveries" were found, which were added to the plan such as effective coping strategies, and self-regulation "pieces" (Tr. pp. 677-78).

Based on the foregoing, the evidence in the hearing record supports the IHO's finding that, in the three years prior to the June 2020 CSE meeting, the student was evaluated several times, and the evaluative material was sufficient (IHO Decision at p. 14; see Joint Exs. 9-11; 13-16; 18). In addition, review of the hearing record supports the IHO's finding that an updated FBA was not warranted because the function of the student's behaviors had not changed, which was reviewed each time the BIP was revised (IHO Decision at p. 14; see Joint Exs. 8; 12).

2. ICT Services

The parents assert that the IHO erred by determining that the CSE considered the evaluative information and progress reports available at the time it recommended ICT services, as there was a "significant disconnect between the recommended ICT program and the available reporting as to [the student's] needs." The parents also argue that the IHO failed to appreciate the "very small, individualized, and nurturing" Finn Academy program the student attended during the 2019-20 school year "relative to the [d]istrict's ICT program," and erred in concluding that the ICT services provided the student with more special education support than his prior IEP.

Although the October 2020 present levels of performance are not in contention on appeal, a brief discussion of the student's needs is necessary to determine whether the October 2020 CSE's recommendation of ICT services in conjunction with related services and other supports provided the student with an appropriate educational program for the 2020-21 school year.

Review of the October 2020 IEP reflects evaluative information/results from the October 2017 psychological evaluation, the October 2017 educational evaluation, the October 2018 OT evaluation, the October 2019 speech-language evaluation, the fall 2019-20 NWEA, the level one vocational assessment, and the June 2020 academic update (Joint Ex. 7A at pp. 2-6). Generally, the October 2020 IEP noted that the student had made progress with the grade level curriculum, that he continued to learn best through visual and/or auditory instruction, and that he required

¹⁷ A June 12, 2019 BIP and an April 3, 2020 BIP quarterly report were included in the hearing record (Joint Ex. 12 at pp. 1-5; Dist. Ex. 13 at pp. 1-2).

modifications in all grade-level content area curriculum and one to one support throughout each school day (Joint Ex. 7A at p.6).

The October 2020 IEP indicated that although the student exhibited strong reading decoding skills, he had "significant deficits in comprehension skills" (Joint Ex. 7A at p. 6). According to "the Fountas and Pinnell model," the student was at a reading level "towards the end of first grade" and he exhibited difficulty summarizing information from grade-level texts read aloud, especially when new vocabulary words and/or identifying the main idea were involved (id.). On an administration of the NWEA to the student in winter 2019, he demonstrated below grade level ELA skills (3rd percentile for achievement) but achieved scores in the 9th percentile for growth, demonstrating progress (id.). Further, the student demonstrated below grade level skills on a language usage test (10th percentile for achievement); however, "he placed in the 70th percentile for growth," which demonstrated "significant progress" (id.). In addition, the IEP noted that the student struggled with poetry units as his literal perspective often created confusion with understanding figurative language and connecting the content to real life models/examples helped the student (id.).

With respect to writing, the October 2020 IEP stated that student performed better when writing a paragraph about a topic of his choice rather than a nonfiction paragraph, and that he wrote some very basic sentences and worked on making sentences longer and more detailed (Joint Ex. 7A at p. 5). Further, the IEP noted that the student was most successful writing paragraphs when a paragraph graphic organizer/paragraph planner with sentence starters was provided (id. at pp. 5, 6). He required reminders to use punctuation throughout most of his writing but was able to make corrections with simple reminders (id.). In addition, the IEP stated that the student required instruction in writing and revising texts for purpose and audience (id. at p. 6).

The October 2020 IEP indicated that the student excelled at basic computation skills in all math operations, but needed to work on developing his problem-solving skills in mathematics as well as identifying key math vocabulary while solving multi-step word problems (Joint Ex. 7A at pp. 5-6). Further, the IEP noted that the student needed to work on statistics and probability, geometry, real and complex number systems, and operations and algebraic thinking (id. at p. 5). The IEP stated that the student was making gains with numerical operations, and successfully completed most modified classwork and assessments aligned with the common core standards with in-class supports (id. at p. 6). In addition, the IEP indicated that although the student's skill levels were significantly below grade level, he had strong mental math skills and could multiply large numbers in his head quickly and accurately (id.). The IEP noted that visual and hands-on learning strategies were necessary for the student to make connections between math concepts, and that these instructional strategies aided the student's processing and reinforced long-term learning (id.).

According to a level one vocational assessment results reflected in the October 2020 IEP, the student enjoyed social studies, art and music therapy, worked best in small group settings, especially when the noise level was limited, and outside of school the student enjoyed relaxing, working with computers and wanted to become a teacher (Joint Ex. 7A at p. 6).

With respect to speech-language development, the October 2020 IEP reflected information from an October 2019 evaluation report, which indicated that the student demonstrated below average skills in both receptive and expressive language (Joint Ex. 7A at p. 6). While the student's expressive vocabulary skills were in the average range, the IEP stated his receptive vocabulary skills fell below average and it was noted that lower scores for receptive vocabulary could indicate distractibility during the exam (id.). The IEP included the student's progress towards his speech-language goals such as answering "wh" questions, applying conversational and pragmatic language skills, and improving self advocacy and perspective taking skills (id. at p. 7). According to the IEP, the student's progress toward answering "who" and "when" questions was variable when provided with prompts and a field of two choices (id.). Regarding the pragmatic language goal, although the student enjoyed interacting with his peers, he appeared to apply skills more appropriately with adults, and this goal was often significantly impacted by the student's environment, mood, health and academic demands (id.). With respect to the student's self-advocacy goal, the IEP stated that the student showed more initiative towards self-care, but became very prompt reliant in the classroom and was unaware that directives were for him (id.). In connection with the perspective-taking goal, the IEP noted the student demonstrated a significant presence of scripting which was an interfering factor for him requiring multiple opportunities and brief explanations as real time situations arose for application (id.). Additionally, the IEP indicated that the student benefitted from implementation of his behavior plan and social stories and that the student needed to continue to improve his pragmatic language, critical thinking (problem solving), and self-advocacy skills (id. at pp. 7-8).

For social development, the October 2020 IEP noted that the student had a desire to interact with peers yet required "a great deal of prompting" and 1:1 assistance to have appropriate interactions with them (Joint Ex. 7A at p. 8). Specifically, the IEP indicated that the student had increased difficulty respecting peers' boundaries and used negative attention-seeking methods to have relationships with peers (id.). The student inconsistently followed teacher directions and participated in classroom routines, and he required frequent verbal reminders/prompts during transitions (id.). According to the IEP, the student continued to work on using appropriate conversations skills with peers and adults, and identifying his feelings using a self-regulation chart (id.). He needed support to understand how to appropriately engage with others, to work on improving his self-advocacy skills as well as requiring support controlling his emotional responses, especially when agitated or excited (id. at p. 9). The IEP stated that the student needed to further explore and develop the use of music as a self-regulation activity integrated into his day as a means to increase or decrease his energy level as appropriate to task or maintain inhibitory control (id.).

In connection with physical development, the October 2020 IEP indicated that the student demonstrated functional fine motor coordination to participate in a variety of classroom activities, and that he could fully participate in all school related physical activities with peers (Joint Ex. 7A at p. 10). Regarding the student's needs, the IEP indicated that the student benefitted from movement breaks that naturally fit within his daily schedule and routines, from adjustments to visual presentation of written work including defined boundaries for written responses, and from reduced items on a page or large bodies of text broken into smaller chunks with white space in

between (id.). The IEP noted that the student presented with some difficulty with executive functioning and benefitted from structure during academic tasks, and also that he needed visual schedules outlining expectations and upcoming tasks (id.).

Regarding the student's management needs, the October 2020 IEP reflected that the student demonstrated distracting behaviors during learning time that interfered with the boundaries of peers and adults, displayed aggressive behavior towards adults as a response to undesirable tasks or requests, and engaged in technology destruction when he appeared agitated (Joint Ex. 7A at p. 11). The IEP included strategies to address the student's management needs such as continued use of the BIP to address disruptive behavior throughout the school day in all areas (id. at p. 10). Specifically, the IEP indicated that each section of the student's BIP should be followed to address behaviors, especially as they related to providing prior notice of transitions or changes, using limited verbal directions, using social stories, breaking difficult tasks into smaller components, and helping the student earn points and reinforcers (id. at p. 11). According to the IEP, the student required 1:1 aide support throughout the day which helped him maintain focus and/or provided behavioral support as needed (id. at pp. 10, 11). The IEP stated that the student required 1:1 re-teaching of most skills, which included breaking down activities into chunks, providing appropriate situational social stories, and providing a daily schedule (id. at p. 11). Additionally, the IEP indicated that the student would continue to use a self-regulation chart three times per day to help him identify his feelings (id.). Further, the IEP indicated that the student used classroom strategies such as close proximity with his 1:1 aide, verbal/visual prompts, redirection, scaffolding, content modifications, and front-loading new vocabulary terms in all core subjects, and had access to a device throughout the school year (id. at pp. 10-11).

The October 2020 CSE recommended that beginning on November 19, 2020, the student's special education program and services include one 40-minute session per day of resource room, and one 40-minute session per day of ICT services in ELA, math, science, and social studies (Joint Ex. 7A at pp. 14-15). ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15, Office of Special Educ. [Nov. 2013], [available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf](http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf)).

In addition, the CSE recommended related services including one 30-minute session per month of autism special education teacher consultant services, one 30-minute session per week and one 30-minute session biweekly of individual music therapy, one 30-minute session biweekly of music therapy consultant services, one 30-minute session per week of individual OT, one 30-minute session per week of OT consultant services, daily skilled nursing services, four 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy consultant services (Joint Ex. 7A at p. 15). The CSE recommended 1:1 aide services for the student for academic and special area classes, cafeteria lunches, transitions throughout the building and assistance entering and exiting the school building to and from special

transportation, with the exception noted that the aide was not needed when the student was receiving related services, for either push in or pull-out services (*id.* at pp. 15-16). The October 2020 IEP also stated that the recommended supplemental aid of modifying all academic curriculum was necessary in order to assist in the provision of appropriate instruction and content due to the student's significant deficit in reading comprehension and limited problem-solving skills in general education classes in ELA and mathematics (*id.* at p. 16). The IEP indicated that the student's BIP would be utilized throughout the school environment, that copied notes and visuals, as well as use of a computer were recommended (*id.* at pp. 16-17). Additionally, the IEP provided for weekly email communication with the parent regarding the student's needs and progress, and supports for school personnel on behalf of the student included a bi-monthly autism spectrum disorder (ASD) parent support group, consult from a nearby university as per contract, and a monthly team meeting with staff connected to the student (*id.* at p. 17).

The evidence in the hearing record shows that the student's special education program at Finn Academy during the 2019-20 school year consisted of, among other services and supports, direct consultant teacher services, a program with which the parents assert the student did not make meaningful academic progress (*see* Req. for Rev. ¶¶ 11-12; Joint Exs. 2A at p. 12; 3A at pp. 13-14; 4A at p. 14). According to the district school psychologist, the consultant teacher services model provided "services based on skills for a limited amount of time, which may not be the entire instructional time for that skill," whereas ICT services provided "a second teacher in the classroom, who's fully responsible for the curriculum along with the general education teacher" (Tr. pp. 729-30, 744). The BOCES school psychologist, who served as the CSE chairperson for Finn Academy testified that ICT services consisted of "a special education teacher and a general education teacher in a classroom taking the curriculum and developing lessons together and teaching to the entire class" (184-85, 220). As such, the district school psychologist testified that with ICT services, "[t]here [wasn't] any class instruction that's not supported by special ed and by general ed" (Tr. p. 744).

The Finn Academy CSE chairperson attended the June 2020 CSE meeting and testified that the student's program for fall 2020 was discussed at that meeting (Tr. pp. 215, 219). She stated that because the student would no longer be attending Finn Academy, the district's public school ICT "model" in ELA, science, mathematics and social studies would best support the student (Tr. pp. 219-20). The Finn Academy CSE chairperson testified that based on her familiarity with the student's disabilities and special skills, the ICT model was "better" for the student than a consultant teacher model because it was more comprehensive, provided a slightly higher level of support, and it was very well-coordinated and integrated in that classroom (Tr. pp. 220-21, 1382-383). The coordinator of special education and intervention at Finn Academy agreed that based on her familiarity with the student's disabilities and background, ICT services would be appropriate and beneficial as part of a form of instruction for the student (Tr. pp. 673, 685). She noted that previously the parent had inquired whether providing ICT services was something Finn Academy would be able to do and that the parent indicated she was "a huge proponent of inclusive programming" (Tr. pp. 686-87). The district school psychologist noted that the parent wanted the student to receive ICT services while he was attending Finn Academy, but the staff from Finn

Academy indicated that they offered a consultant teacher model and if the committee determined ICT was a more appropriate level of service, the student's program "would have to be at a different placement" (Tr. pp. 742-43). In addition, the district school psychologist noted that the parent did not want the student to access an ICT program that was not offered at Finn Academy (Tr. pp. 743-44, 755-56).

Based on the foregoing, the evidence in the hearing record supports the IHO's findings that the recommendation of ICT services in conjunction with the other supports and services in the October 2020 IEP was appropriate to address the student's needs and offered the student a FAPE (see IHO Decision at pp. 14-21).

3. Implementation

a. September through November 2020—Enrollment

A central issue presented in this impartial hearing was the student's enrollment status with the district for the 2020-21 school year beginning in September 2020 (see Tr. pp. 815, 818-19; see Parent Exs. M; S; see Dist. Exs. 15-16; 21-23; see Joint Ex. 20).

As noted above, Finn Academy was a charter school located within the district and the student was enrolled at Finn Academy from the 2015-16 school year through the 2019-20 school year (Tr. pp. 550-51, 1269-70; Dist. Exs. 12 at p. 2; 20; 24). Prior to the start of the 2020-21 school year, the district requested that the parents complete registration forms to enroll the student in the district (see Dist. Ex. 21).

The district's director of student services explained that "[r]egistration is the process that leads to enrollment" (Tr. pp. 812, 814). He testified that students attending charter schools within the district were not enrolled in the district but that the district CSE was responsible for the special education students attending a charter school (Tr. pp. 814-15). The director testified that a student not enrolled in the district is not permitted to attend instruction within the district (Tr. pp. 815, 822). He testified that for a student to be enrolled he or she must go through the registration process to determine if he or she resides within the geographic boundaries of the district, if the parents or guardians have the legal authority over the student, that the student is not homeless, and the student's primary language, as well as to obtain updated contact and emergency contact information for the student and updated medical information, i.e., proof of vaccinations (Tr. pp. 815-16). He testified that once this information was obtained it would be entered into the district's "Student Management System" which would then permit the State access to the student's information (Tr. pp. 816-17). The director of student services testified that, when the student began attendance at Finn Academy (2015-16 school year), he was unenrolled from the district and enrolled at Finn Academy (Tr. pp. 818-19; see Dist. Exs. 20; 24).

During several of the prehearing conferences and prior to retaining counsel, the registration issue was discussed and the parents set forth their concerns that signing the registration forms would affect funding arrangements and result in a waiver of their claims under the IDEA (see Tr. p. 584; Dist. Exs. 37 at pp. 28-30; 38 at pp. 17-23; 39 at pp. 9-16). Later, in a letter dated September 22, 2020, the district offered to modify the registration forms to reflect that the student was not a "new" registrant (see Dist. Ex. 15 at pp. 1-2); however, it does not appear that the parents agreed

with the district's proposal at that time. At the November 12, 2020 pre-hearing conference, the IHO "expressed" her "increasing concern" that the student was not receiving services because of the enrollment issue (see Dist. Ex. 39 at pp. 9-16). At that time, the parents indicated that the registration forms had been completed, but they had not been provided to the district (Tr. p. 500; see Dist. Ex. 39 at p. 10). The IHO then advised that at the next prehearing conference (November 20, 2020) she would determine if a guardian ad litem should be appointed for the student during the proceedings (see Dist. Ex. 39 at pp. 20-23, 25, 27-28). According to the IHO, at the November 20, 2020 prehearing conference, the parents indicated that the registration forms had been provided to the district (IHO Decision at p. 20).¹⁸

It is undisputed that the student at all times relevant to this dispute was a resident of the district (Dist. Exs. 18; 23; 25; see Joint Ex. 20). Education Law § 3202(1) provides that "[a] person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition." State regulation contemplates that parents will request that districts enroll students prior to their attending (8 NYCRR 100.2[y][3]); however, once a student is enrolled, there is no indication that the parents must request enrollment on an annual basis. Here, prior to the 2020-21 school year, the student attended a charter school within the district's geographic boundaries for the 2015-16 through 2019-2020 school years. According to the State's Charter School Act, "[t]he enrollment of students attending charter schools shall be included in the enrollment, attendance, membership and, if applicable, count of students with disabilities of the school district in which the pupil resides" (Education Law § 2856[1][a]). Likewise, the Charter School Act states that "[s]pecial education programs and services shall be provided to students with a disability attending a charter school in accordance with the [IEP] recommended by the [CSE] of the student's school district of residence" (Educ. Law § 2853[4]). Thus, students enrolled in a charter school are considered enrolled in the district, at least for funding purposes.

Based upon the foregoing, the student is a resident of the district and, in order to attend the charter school, must have been deemed a student with a disability enrolled in the district. The district points to no State law or regulation in support of its position that the student was not enrolled in the district leading into the 2020-21 school year, continuing from those years when he attended the charter school. Indeed, further undermining the district's position is the fact that, during summer 2020, the district provided the student with 12-month services and beginning in late September began providing the student with related services remotely notwithstanding the district's position that the student was not "enrolled" in the district during those times (Tr. pp. 596, 974; Joint Ex. 5A at pp. 17-18).

Moreover, even if student was not officially enrolled in the specific district school, courts have recognized that a district's duty to offer the student a FAPE is triggered by the student's residency in the district, not the student's enrollment status or the parent's intent (see E.T. v. Bd. of Educ., 2012 WL 5936537, at *14-*15 [S.D.N.Y. Nov. 26, 2012] [noting that "residency, rather than enrollment, triggers a district's FAPE obligations" and "the issue of parental intent vis-à-vis the child's enrollment is not dispositive of whether a school district has a FAPE obligation to a

¹⁸ As noted above, a transcript of the November 20, 2020 prehearing conference was not included in the hearing record.

disabled child") [internal quotations omitted]). Thus, a district of residence has an obligation to provide a FAPE to a resident student with a disability that does not end with the enrollment of the student in a school that is not a district school or, as in this case, a charter school (see Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 450-51 [2nd Cir. 2015]; District of Columbia v. Vineyard, 901 F. Supp. 2d 77, 87-88 [D.D.C. 2012]; E.T., 2012 WL 5936537, at *14-*15; see also N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1209 [9th Cir. 2008] ["A school district cannot abdicate its affirmative duties under the IDEA"]).

To be sure, this confluence of State statute and court rulings places the district in a challenging position with respect to its administrative processes and recordkeeping and, as discussed further below, the parents should cooperate with the district's reasonable documentation requirements. As further described below, the matter became even more complicated, because in this instance, there is also evidence that the parents declined to consent to the provision of the recommended special education and related services during this time period (Joint Ex. 6E). Upon a parental revocation of consent, a district shall not be found to have violated the requirement to make a FAPE available to the student because of the failure to provide the student with further special education programs and services (8 NYCRR 200.5[b][5][i]-[iii]; see 34 C.F.R. 300.300[b][4]). On a form dated September 10, 2020—the same date as the September 2020 CSE meeting—the district requested the parents' consent for the special education program and services recommended by the CSE (Joint Ex. 6E). In an email dated September 11, 2020, the parents stated their objections to the CSE meeting "on procedural and substantive grounds" and stated their expectation that the student would receive pendency services via virtual instruction while the due process proceedings continued (Dist. Ex. 33). On September 20, 2020, the parents checked the box on the consent form reflecting that they did not consent to the provision of special education and related services to the student (Joint Ex. 6E).¹⁹ The hearing record also includes a consent form dated October 8, 2020, the same date as the October 8, 2020 CSE meeting, but it is not signed by the parents (see Joint Ex. 7D). It is unclear by when the parents ultimately consented to the district's provision of special education and related services.

Ultimately, the district has not pointed to any authority to support its position that it was not obligated to provide the student with a special education program and related services pursuant to the IEP at the start of the 2020-21 school year because of the parents' failure to complete enrollment paperwork. However, given the parents' lack of cooperation with the district (discussed further below) and their refusal to consent to delivery of special education and related services, it is not appropriate to award relief in this instance to remedy a denial of a FAPE for the period of September through November 2020.

b. After November 2020—Distance Learning and 1:1 Aide

In connection with the 10-month portion of the 2020-21 school year, the parents contend that the district failed to implement the October 2020 IEP by failing to provide the student with a

¹⁹ The consent form has various handwritten notices on it that seem to reflect the recommended program and the parents' objections to the September 2020 CSE meeting; however, there was no testimony offered during the impartial hearing regarding the source or purpose of the handwritten notes or their import, if any (Joint Ex. 6E).

1:1 aide as per his IEP and developed a distance learning plan that had "no visible or meaningful connection" to the student's IEP.

After submitting the student's district registration forms on November 22, 2020, the parent elected for the student to receive instruction remotely, which began on November 23, 2020 (Tr. pp. 120, 500-02, 967; see Dist. Exs. 3; 46). On November 23 and 24, 2020 the student participated in synchronous (live time) remote instruction (Tr. pp. 120-21). Subsequently, the parents elected for the student to receive asynchronous (video recordings and digital assignments) remote instruction, except for resource room and related services, which continued to be provided synchronously (Tr. pp. 121, 866-67, 967).²⁰

The district's assistant supervisor of special education testified that the student's 2020-21 IEP did not need to be modified because of the parent's decision to only allow the student to attend instruction asynchronously, because "[t]hat [was] done through a distance learning plan," which described how the instruction would be delivered in a virtual setting (Tr. pp. 930, 967). She further testified that the change from synchronous to asynchronous instruction was not a change in the student's educational program because the "program that [was] recommended for him, the integrated co-taught, remain[ed] in place on the IEP" and that the "distance learning plan, which [was] a contingency plan, describe[d] how that instruction w[ould] be delivered, whether asynchronous or synchronous" (Tr. p. 968). The student's special education teacher who provided ICT ELA and resource room services testified that he and the student's mother developed the distance learning plan prior to the student starting remote instruction (Tr. pp. 128-29, 157; see Dist. Ex. 46).²¹ He testified that the purpose of the distance learning plan was "to address how the components and elements of the IEP w[ould] be addressed during the virtual instruction" (Tr. pp. 128-29, 156-57). Additionally, he testified that the updated distance learning plan reflected the fact that "two IEP goals . . . required direct observation of [the student] with his peers, to be correctly measured" and therefore, he indicated on the updated distance learning plan "that two of the goals would not be able to be monitored during virtual asynchronous instruction" (Tr. pp. 129-30, 135).

The October 2020 CSE recommended that the student receive 1:1 aide services for academic and special area classes, lunch, transitions throughout the building, and exiting and entering the school to/from special transportation (Joint Ex. 7A at p. 15 at pp. 15-16). The October 2020 IEP specifically indicated that the 1:1 aide was "not needed when related services [were]

²⁰ There was testimony that the parents chose to switch the student to asynchronous instruction following what the parents perceived to be a "zoom bombing incident" (see Tr. pp. 158-59, 520; see Parent Exs. N, Q). During prehearing conferences before the IHO, the parents also indicated that they preferred asynchronous instruction to provide the student instruction "at his own pace" and for flexibility purposes given the parents need to work from home during the day (Dist. Exs. 38 at p. 9; 39 at p. 13).

²¹ The first distance learning plan for the 2020-21 school year was prepared on November 22, 2020, prior to the student attending synchronous instruction the next day (Tr. pp. 120, 127-28; see Dist. Ex. 46). However, once the student began attending remote instruction asynchronously, the distance learning plan was updated on November 30, 2020 and discussed at a December 18, 2020 team meeting with the mother present (Tr. pp. 128-30, 134-35; see Dist. Ex. 3).

being provided for a push-in or pull-out setting" (*id.* at p. 16).²² The assistant supervisor of special education testified that the 1:1 aide was hired by the district and ready to deliver services at the beginning of the 2020-21 school year (Tr. pp. 963, 974; *see* Tr. p. 320). She further testified that with respect to the 1:1 aide, that individual was "available for synchronous instruction" and in-person instruction but not asynchronous instruction at the student's house (Tr. pp. 993-94).

The IHO discussed the parents' contention that the district failed to provide the student with a 1:1 aide as part of the student's remote/distance learning plan (IHO Decision at p. 18). The IHO found that as the parents had "opted for an exclusively remote program with the [s]tudent receiving academic instruction asynchronously by viewing video-recordings, [t]here was . . . no part of the school day in which the [s]tudent needed a 1:1 aide in order to participate in a group instructional setting with other students" (*id.*). Further, she held that it was not "necessary, nor appropriate" for the student to have a 1:1 aide "'on call'" during the undesignated periods of time when the student was watching the video-recordings or completing assignments (*id.*). The IHO continued that "[n]or was it possible for the [d]istrict to send a 1:1 aide to the [p]arent's home" (*id.*). Accordingly, the IHO found no evidence in the hearing record "to suggest that the [s]tudent required a 1:1 aide as part of his distance learning plan" (*id.*).

Regarding the student's academic performance subsequent to November 22, 2020, the special education teacher testified that the student completed some work asynchronously, that he completed ELA and math tasks during "resource support time," and that he passed his courses in fall 2020 with the exception of technology (Tr. p. 126; *see* Dist. Ex. 8). According to the report card, the student's 2020-21 school year second marking period GPA was 83.80 (Dist. Ex. 8).²³ Other than his technology grade, the assistant supervisor of special education testified that the students' second marking period grades indicated that he was making progress within the educational curriculum (Tr. pp. 940-41). The special education teacher stated that he had not noted that the student exhibited academic regression based on the prior progress monitoring goals (Tr. p. 127).

Based on the foregoing, the evidence in the hearing record supports the IHO's conclusion that the lack of 1:1 aide services to the student while he received remote, asynchronous academic instruction did not impede the student's "ability to benefit from instruction" and he made some progress during the 2020-21 school year (*see* IHO Decision at p. 18). However, as discussed below, if the parents are concerned that the student experienced a loss of skill as a result of the remote delivery of instruction and services during the COVID-19 pandemic, they may request the CSE to consider whether the student might benefit from compensatory education.

²² Review of the October 2020 IEP shows that the student's related services, had he attended the district in-person, were to be provided either in the general education classroom, a therapist's room, or the nurse's office (Dist. Ex. 7A at p. 15).

²³ The assistant supervisor of special education testified that marking period two went from November to mid-January (Tr. p. 939).

C. Relief

1. Compensatory Education

As set forth above, the district has not pointed to any authority to support its position regarding the enrollment issue. However, even if the district's position was contrary to law and resulted in a denial of a FAPE, no relief would be warranted under the circumstances.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, although the district's view that it was not obligated to deliver a FAPE to a resident student because the parents had not completed enrollment forms is not supported by any legal authority of which I am aware, based on the parents' conduct and lack of cooperativeness with the district's reasonable requests, I decline to order equitable relief in this instance (see Parents of Student W., 31 F.3d at 1497 [finding that the parent's behavior was also relevant in fashioning equitable relief]). That is, although the district was required to provide the student a FAPE with or without the parents act of signing enrollment paperwork, the parents acted unreasonably in refusing to cooperate with "reasonable documentation requirements" of the district (Abrams v.

Carranza, 2020 WL 6048785, at *2 [S.D.N.Y. Oct. 13, 2020], aff'd sub nom., Abrams v. Porter, 2021 WL 5829762 [2d Cir. Dec. 9, 2021]). The evidence in the hearing record established that the district was ready to implement the June 2020 IEP at the beginning of the 2020-21 school year (Tr. pp. 963-966, 974). Accordingly, the evidence in the hearing record supports the IHO's view that the parents interfered with the district's ability to implement the IEP and, therefore, even if the evidence supported a finding that the district denied the student a FAPE, no relief is warranted.

As alluded to above, a final word about compensatory education is warranted in this matter. In terms of the parents complaints regarding remote instruction or services during remote instruction, both the United States Department of Education (USDOE) and the New York State Education Department's (NYSED's) Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf>). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

To address these delays and other delivery-related issues that occurred as a result of the pandemic, OSEP and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf>). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232;

"Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(l), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

In sum, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. There is no indication that this has yet occurred for this student. Therefore, the parents may request a CSE for this purpose or raise their concerns at the student's next annual review.²⁴

2. Independent Educational Evaluations

Finally, in both the amended due process complaint notice and request for review, the parents seek IEEs as relief (Dist. Ex. 44 at p. 8; Req. for Rev. at p. 10). The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public

²⁴ As I mentioned previously; however, the evidence thus far suggests that the student was progressing, so it is unclear what further information could be available that would justify compensatory services, but the parties should nevertheless follow the process established by the administrative agencies in light of the COVID-19 pandemic.

agency defeated a parent's claim for an IEE at public expense]). Here, the parents have not articulated the basis for their request for IEEs, i.e., disagreement with a district evaluation (see Dist. Ex. 44 at pp. 1-7; see Req. for Rev. at pp. 2-9). Accordingly, as the parents have not stated a disagreement with a district evaluation, they are not entitled to IEEs at district expense.

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the time periods of summer 2019, summer 2020, and that portion of the 2020-21 school year after November 22, 2020. As for the period of September 2020 through November 22, 2020, although the district may have been obligated to provide the student with a FAPE despite the issue of the parents' refusal to complete enrollment paperwork, given the parents' failure to cooperate and refusal to consent to the district's provision of special education to the student, no relief is warranted under the circumstances, and the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 20, 2022**

**JUSTYN P. BATES
STATE REVIEW OFFICER**