



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-005

### Application of the BOARD OF EDUCATION OF THE WAPPINGERS CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

#### Appearances:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, Neelanjan Choudhury, Esq., of counsel

Gina DeCrescenzo, PC, attorneys for respondent, Gina M. DeCrescenzo, Esq., of counsel

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which ordered the district to fund independent educational evaluations (IEEs) of the student at public expense. 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**

At the time of the impartial hearing the student was 12 years old (Tr. p. 556). The student's medical history indicates that he received a diagnosis of cerebral palsy at an early age (Tr. p. 556-57; see Parent Ex. K at p. 2).<sup>1</sup> The student was found eligible for special education and related

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<sup>1</sup> Both of the student's parents were parties to the impartial hearing and are parties to this appeal but the student's mother proceeded pro se at the impartial hearing and has not appeared on appeal. The IHO determined that exhibits introduced into evidence by the parents would be labeled as having been submitted by either the student's mother or the student's father (see IHO Ex. IV at p. 3); however the student's mother did not introduce any exhibits into evidence during the impartial hearing and for purposes of this decision all exhibits submitted by the student's father are cited as parent exhibits.

services as a student with an other health-impairment and has received physical therapy (PT) and occupational therapy (OT) from the district, along with other special education programs and services (Dist. Exs. 1 at pp. 1, 12; 2 at pp. 1, 12; 3 at pp. 1, 12; 4 at pp. 1, 12; 5 at pp. 1, 12; 6 at pp. 1, 12; 7 at pp. 1, 11; 8 at pp. 1, 10-11). A review of the hearing record shows that the student has deficits in the areas of visual perceptual skills and visual motor integration, fine motor, gross motor, social/emotional, processing speed, listening comprehension, reading, writing, and math (Dist. Exs. 1 at pp. 3-12; 2 at pp. 2-12).

During the 2013-14 school year, the district conducted a reevaluation of the student (Tr. p. 135; Dist. Ex. 9 at p. 1; 11 at p. 1). As part of the reevaluation, the district conducted a PT evaluation which is detailed in a report dated March 19, 2014 (Dist. Ex. 9 at p. 1).<sup>2</sup> The district also conducted an OT evaluation in March 2014 (Dist. Ex. 11 at p. 1).

Counsel for the student's father's sent counsel for the district a letter dated April 17, 2014, in which the parent requested PT, OT, speech-language therapy, and neuropsychological IEEs to assess the student's needs (Parent Ex. L at p. 1). The parent's attorney sent a follow-up letter dated May 1, 2014, renewing the request for PT, OT, speech-language therapy, and neuropsychological IEEs (Parent Ex. J at p. 1). Both letters requested that the district provide its criteria for IEEs (*id.*; Parent Ex. L at p. 1).

In a May 15, 2014, e-mail to counsel for the district, counsel for the father indicated that if she did not receive a response regarding the parent's request for IEEs, she would file a State complaint (Parent Ex. I; see 8 NYCRR 200.5[I]). In a June 6, 2014, e-mail to the district, counsel for the father referenced a telephone conversation between the attorneys indicating that the father's request for IEEs in PT, OT, and speech-language therapy were approved, subject to the submission of the evaluators' rates and curriculum vitae to the district (Parent Ex. H). Counsel for the father provided the district with the names of and rates charged by the evaluators selected by the father in e-mails dated September 3, 2014, and September 5, 2014 (Parent Exs. E at p. 1; F at p. 1). Counsel for the district responded by e-mail on September 8, 2014, indicating that the district did not object to the choice of evaluators (provided they were qualified), but would only reimburse the father up to the rates indicated in the district's list of evaluators (Parent Ex. E at p. 1). In a September 29, 2014 e-mail, the district sent counsel for the father a copy of its list of independent evaluators and a table of "average costs" for evaluations (Parent Ex. D). On October 8, 2014, counsel for the father requested a decision regarding the costs of the IEEs, to which the district responded by e-mail dated October 10, 2014, indicating it would defend its evaluations at an impartial hearing unless the parent agreed to pick an evaluator from the district's list or agreed to reimbursement up to the amounts set forth on the district's list of evaluators, absent demonstration of "a unique circumstance" justifying waiver of the district's monetary restriction on reimbursement (Parent Ex. C).

In response to the parent's request for IEEs, the district filed a due process complaint notice dated October 21, 2014, "to defend its evaluations" or establish that its monetary limit on reimbursement for IEEs was appropriate (Parent Ex. B at p. 2). The district's due process

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<sup>2</sup> The March 2014 PT evaluation report does not indicate the date, or dates, on which the evaluation was conducted (Dist. Ex. 9).

complaint notice named the student's mother as a respondent, but did not identify the student's father (id. at p. 1).

The IHO conducted three prehearing conferences with counsel for the district, counsel for the student's father, and the student's mother, on October 29, 2014, and October 31, 2014 (IHO Exs. II-IV). During the conferences, the IHO determined the proper parties to the action, clarified the issues on appeal, and determined timelines for the completion of the hearing (id.). As a result of the conferences, the parties stipulated to add the student's father as a respondent in the proceeding subject to certain conditions and the IHO extended both of the parents' time to respond to the district's due process complaint notice (IHO Ex. IV at p. 1).

The student's father responded to the due process complaint notice on November 3, 2014 (Parent Ex. A). In his response, the student's father asserted that the district's OT, PT, and psychoeducational evaluations were not appropriate, that the district failed to conduct a speech-language therapy evaluation as part of its reevaluation of the student, that the district unreasonably delayed in responding to the father's request for IEEs and initiating an impartial hearing, and that the district's cost containment criteria were unreasonable because they did not reflect prevailing rates in the community (id. at pp. 1-6). The student's father also included a number of "counterclaims" in his response regarding the provision of a free appropriate public education to the student during the 2012-13, 2013-14, and 2014-15 school years (id. at pp. 6-10). As relief, the student's father requested IEEs in the areas of PT, OT, speech-language therapy, neuropsychology, and assistive technology (id. at pp. 10-11). The student's mother did not separately respond but, by letter to counsel for the district dated November 3, 2013, "adopted" the father's response to the due process complaint notice (IHO Ex. VII).

In an interim order dated November 5, 2014, the IHO found that the counterclaims contained in the father's response to the due process complaint notice were outside the scope of the impartial hearing, could not be properly raised using the due process response mechanism, and, consequently, would not be addressed during the hearing (IHO Ex. V at pp. 2-3).

A fourth prehearing conference took place on November 7, 2014, during which the parties discussed whether the father's request for a neuropsychological IEE was a proper subject of the due process hearing (IHO Ex. VIII). In her summary of the prehearing conference, the IHO ruled that the father's requests for a neuropsychological IEE and an assistive technology IEE would be addressed during the hearing (id. at p. 3). The IHO also indicated that the conditions stipulated to for the inclusion of the father as an additional respondent were met (id.).

An impartial hearing commenced on November 12, 2014, and concluded on November 20, 2014, after four days of proceedings (Tr. pp. 1-709).<sup>3</sup> In a decision dated December 2, 2014, the IHO thoroughly analyzed the issues identified during the prehearing conferences and determined that the district's PT and OT evaluations were not appropriate and that the district's speech-

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<sup>3</sup> The IHO actively conducted well-executed prehearing conferences, which resulted in completion of the hearing in a timely fashion, scheduled multiple hearing dates in advance and on consecutive days, and generally took effective, appropriate control in managing the impartial hearing (see IHO Exs. II-VI; VIII). All parties were given a fair opportunity to be heard and the proceeding was conducted in manner consistent with due process (34 CFR 300.514[b][2]).

language therapy evaluation was appropriate (IHO Decision at pp. 11-19, 20-22). Although the IHO found the district's speech-language therapy evaluation appropriate, the IHO determined that the district was obligated to provide an IEE in the area of speech-language therapy based on equitable considerations (*id.* at pp. 20-22). Specifically, the IHO found that because the district had previously agreed to provide an IEE in speech-language therapy, it could not rescind its agreement by filing a due process complaint notice after "protracted settlement discussions" (*id.* at p. 22). After analyzing the district's cost-containment criteria, the IHO found that they did not reflect the district's actual monetary cap for evaluations and awarded IEEs in the areas of OT, PT, and speech-language therapy at a cost of up to \$750 each (*id.* at pp. 26-32, 35-36). The IHO denied the parents' requests for neuropsychological and assistive technology IEEs but ordered the district to conduct neuropsychological and assistive technology evaluations of the student (*id.* at pp. 19-20, 23-26, 36-37).

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

The district appeals from the IHO's determinations that its PT and OT evaluations were not appropriate.<sup>4</sup> The district asserts that the PT and OT evaluators were competent, knew the student, and conducted appropriate evaluations. The district contends that the IHO erred in finding that certain aspects of the PT and OT evaluators' testimony were not credible and that the IHO applied an incorrect standard in analyzing the evaluations. The student's father answers the district's appeal, denies the substance of the allegations of error contained therein, and asserts that the IHO's decision should be affirmed in its entirety.<sup>5</sup>

#### **V. Applicable Standards: Independent Educational Evaluations**

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

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<sup>4</sup> The district does not appeal from the IHO's order directing the district to fund an IEE at public expense in the area of speech-language therapy, or from the IHO's order directing the district to conduct neuropsychological and assistive technology evaluations. Additionally, the district did not appeal the IHO's determinations regarding the district's cost containment criteria. Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

<sup>5</sup> To initiate an appeal, a district must serve a petition, along with a notice with petition, upon the respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[c], 279.3). Here, the district served a petition and a memorandum of law on both parents but did not serve a notice with petition along with those papers. After realizing its error in failing to serve a notice with petition, the district served a notice with petition on both parents on January 20, 2015. Although the student's mother has not responded to the district's allegations, the student's father was granted additional time to answer and answered the district's petition. Under the particular circumstances of this case, dismissal of the petition for the failure to serve the notice with petition would have the same result as the merits determination and I decline to do so in this instance (*see, e.g., Application of a Student with a Disability*, Appeal No. 12-047); however, I remind the district to adhere to State regulations in the future.

disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

## **VI. Discussion**

As indicated above, the district appeals only from the IHO's determinations that the district's PT and OT evaluations were not appropriate. However, upon review of the hearing record and the district's contentions, the IHO's findings are confirmed.

As an initial matter, the district contends that the IHO erred in finding that certain aspects of the PT and OT evaluators' testimony were not credible. Specifically, the IHO found that the physical therapist was credible regarding the student's diagnosis with cerebral palsy and how it affected him, but had "limited credibility" regarding the student's current program and abilities (IHO Decision at pp. 12-13). An SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]). In this instance, the hearing record supports the IHO's determination that the physical therapist was unable to testify regarding the student's current program and in particular his ability to navigate the school environment independently during classroom transitions (IHO Decision at pp. 12-13). The physical therapist testified that the student was able to navigate stairs and hallways safely; however, the physical therapist also conceded that he had not directly observed the student's ability to ascend or descend stairs while changing classes (Tr. pp. 169-70, 183-84). Accordingly, the hearing record does not justify or compel a contrary conclusion from the IHO's determination and due deference is accorded to the IHO's findings regarding the credibility of the testimony of the physical therapist (see B.O. v Cold Spring Harbor Cent. School Dist., 807 F Supp. 2d 130, 142 [E.D.N.Y. 2011]).

The district also asserts that the IHO applied an incorrect standard in determining the appropriateness of the district's evaluations. The district acknowledges that a reevaluation must "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" (34 CFR 300.303[a], 304[b][1], [2]; 8 NYCRR

200.4[b][4]). However, the district contends that initial evaluations and reevaluations have different requirements and that State regulations do not require reevaluations to use "a variety of assessment tools and strategies" (Dist. Mem. of Law at pp. 7-8). While the district's confusion in interpreting State regulations is understandable (see 9 NYCRR 200.4[b][1], [4]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10-\*11 [S.D.N.Y. Feb. 9, 2007]), the express provisions of the IDEA and federal regulations do not contain precise requirements that identify how initial evaluation procedures are distinguished from reevaluations,<sup>6</sup> leaving the reevaluation procedures used to be determined with input from both district personnel and the parents upon a review of existing data (34 CFR 300.305[a][1]-[2]); however, the IDEA and federal regulations require that all evaluations "use a variety of assessment tools and strategies," "not use any single measure or assessment as the sole criterion," and "use technically sound instruments" (20 U.S.C. §1414[b][2]; 34 CFR 300.303[a], 304[b]). Additionally, State guidance provides that reevaluations "must be multidisciplinary and sufficient to assess a student in all areas of the identified disability . . . [, t]he selection of tests and assessment techniques to be conducted in a reevaluation of a student with a disability must be determined on an individual basis . . . [and i]f it is determined that existing evaluations, reports and observations are appropriate to meet the requirements for the reevaluation, then no additional assessments would need to be conducted" ("Individual Evaluations and Eligibility Determinations for Students with Disabilities," VESID Mem. [Jan. 2002], available at <http://www.p12.nysed.gov/specialed/publications/policy/individevaluation.htm>). Accordingly, the IHO did not utilize an incorrect standard in determining that the March 2014 PT evaluation did not include a variety of assessment tools and strategies (IHO Decision at p. 14). Nevertheless, there is no specific requirement that that an evaluator employ standardized testing, and the physical therapist's decision not to utilize standardized testing does not by itself invalidate the evaluation.<sup>7</sup>

Pertinently, the physical therapist testified that a reevaluation in PT should "present a good picture" of a student's functionality related to how a student's gross motor skills affect the student's ability to negotiate the school environment and access his or her education (Tr. pp. 136-37, 156). The physical therapist explained that a reevaluation could include standardized evaluations, but "[s]ometimes it's more of a professional observation" (Tr. pp. 136-37). The March 2014 PT evaluation indicates that, because an age appropriate standardized test was not available, a checklist of skills related to PT was completed along with clinical observations (Dist. Ex. 9 at p. 1). The March 2014 evaluation lists skills the student was able to complete, including activities such as ascending and descending stairs, balancing, hopping, galloping, skipping, etc., and indicates that these skills were more difficult for the student when using his right side (id.). The evaluation indicates that the student could negotiate his environment safely and had improved eye-hand coordination and ball skills; however, the evaluation also indicates that he needed to improve

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<sup>6</sup> The Office of Special Education Programs and the Office of Special Education and Rehabilitative Services at the United States Department of Education suggested that certain relevant assessments must be conducted as part of a reevaluation of a student, but also indicated that the same procedures need not necessarily be used from prior evaluations of the student (see Letter to Shaver, 17 IDELR 356 [OSERS 1990]; Letter to Feehley, 211 IDELR 415 [OSEP 1986]).

<sup>7</sup> Furthermore, it is not clear that every assessment in a particular area of need is required to employ a variety of assessment tools and strategies, as opposed to the overall procedures used to determine a student's need for special education and related services (34 CFR 300.15; 8 NYCRR 200.1[aa]).

his range of motion and strength in his right lower extremity and his ability to hop on his right lower extremity, and needed to learn self-stretching exercises to be done at home (Dist. Ex. 9 at pp. 1-2). Despite stating the student's abilities and deficits, the March 2014 PT evaluation failed to include the impact of the student's strengths and weaknesses on his daily functioning and independence (id.). The physical therapist opined that he looked at all areas of physical activities that were related to school functioning; nevertheless, the March 2014 PT evaluation report does not describe how the PT checklist related to the student's functioning in the school environment (id.; Tr. p. 151).

Additionally, although the physical therapist testified that he was more concerned with the student's access to the school environment and his safety in the hallways than the student's results on standardized testing (Tr. pp. 144-46), the therapist did not observe the student during classroom transitions and was unable to indicate whether the student required assistance from his 1:1 paraprofessional in navigating the school environment (Tr. pp. 168-69, 183-84). The PT evaluation report did not indicate when or where the student was observed, on how many occasions the student was observed, or by whom the observations being reported were conducted (see Dist. Ex. 9).<sup>8</sup> Further, while the physical therapist testified he conducted observations of the student while the physical therapist assistant recorded them, the physical therapist could not recollect when he observed the student or if he observed the student on more than one occasion (Tr. pp. 191-93, 195-96). Under these circumstances, it is unclear whether the physical therapist conducted sufficient observations of the student to determine the student's present levels of performance with regard to his ability to navigate the school environment during classroom transitions or his ability to access his education. Accordingly, the IHO's determinations regarding the PT evaluation are confirmed.

The hearing record also supports the IHO's determination that the district's March 2014 OT evaluation was not appropriate because the occupational therapist did not assess the student in all areas related to the student's suspected disability, in particular the student's abilities related to activities of daily living (ADL) (IHO Decision at p. 17). The district contends that an assessment of a student's ADL skills is only required when planning for transition services; however, this bald assertion is wholly without merit. Although assessing and developing ADL skills is an important part of transition planning (see 8 NYCRR 200.1[fff][5]; 200.4[d][2][ix][d]), an assessment of a student's academic achievement, functional performance, and learning characteristics includes identifying the student's level of knowledge and development in ADL skills (8 NYCRR 200.1[ww][3][i][a]).

A review of the March 2014 OT evaluation shows that the student presented with deficits in visual motor skills, visual-perceptual skills and bilateral coordination skills (Dist. Ex. 11 at p. 3). The assessments administered during the March 2014 OT evaluation assessed the student's visual-motor integration, visual perception skills, and motor coordination (id. at p. 1). The evaluator's observations indicated that the student had difficulty with typing and suggested that he

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<sup>8</sup> Notably, the district did not offer any prior evaluative information regarding the student's abilities with respect to PT, further limiting the information available regarding the student's gross motor skills. The physical therapist described the March 2014 PT evaluation as a "compilation of [the student's] progress throughout the school year"; however, the physical therapist also indicated that he could not ascertain the student's progress without comparing the evaluation to those conducted in previous years (Tr. pp. 174-75, 178, 198).



would benefit from improving his bilateral coordination to improve his typing speed (Dist. Ex. 11 at p. 2). According to the occupational therapist, the March 2014 OT evaluation focused on assessment for educational access and did not include additional assessments to evaluate the student's ADL skills (Tr. pp. 372-75, 382). The occupational therapist testified that she did not complete a functional assessment because the student was already in 6th grade and he was not in a life skills program (Tr. pp. 372-73). The occupational therapist also indicated that she did not evaluate the student's ability to tie his shoes or button clothing because the student was wearing Velcro shoes, did not wear clothes that buttoned, did not have to change for gym class, and did not need these skills to access his education (Tr. pp. 373-74, 382, 385). She further indicated that because she had observed the student using his right hand functionally for tasks such as opening his locker, opening lunch items, carrying his books, taking things in and out of his binder, and holding down papers, a formal assessment was not needed (Tr. pp. 373-74; see Dist. Ex. 11 at pp. 1-3).<sup>9</sup> However, none of these observations were included in the evaluation report, and the report is devoid of information regarding the student's ADL skills (see Dist. Ex. 11). Accordingly, consistent with the IHO's determination, the March 2014 OT evaluation was not sufficiently comprehensive because it did not provide any information regarding the student's ADL skills.

Although I need not reach the issue, having already determined that the district's evaluations were not appropriate, the circumstances surrounding the district's PT and OT evaluations were similar to the circumstances that led the IHO to order the district to provide an IEE in speech-language therapy despite finding the district's speech-language therapy evaluation was appropriate (IHO Decision at pp. 17-18, 20-22). The district had an opportunity to defend its PT, OT, and speech-language therapy evaluations after the parent first requested IEEs in those areas in April 2014 (Parent Ex. L at p. 1). Instead, the district initially consented to the parent's request for IEEs in those areas, provided the IEEs were conducted by an evaluator from the district's list of evaluators or who otherwise met the district's criteria for evaluations, and did not indicate any intention to defend the appropriateness of its evaluations until October 2014 (see Parent Exs. C; E at p. 1; H). Accordingly, regardless of the appropriateness of PT and OT evaluations, equitable relief in this instance may very well have dictated that the district is responsible for the costs of IEEs in PT and OT provided they are conducted within the district's guidelines due to the district's delay in initiating a due process complaint notice to defend its evaluations and its initial consent to the parent's request for IEEs.

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<sup>9</sup> The district objects to the IHO's description of an inconsistency between the mother's closing statement indicating that the student could not open a zip lock bag and the occupational therapist's testimony that she believed the student could open a zip lock bag (IHO Decision at p. 16 n.9). However, the IHO did not make a credibility determination regarding this testimony, but rather declined to rely on either statement in rendering her decision (id.). As this matter is limited to a determination as to whether the OT evaluation was appropriate, and the occupational therapist's observation was neither included in the OT evaluation report nor is there any indication that it was imparted to the other members of the CSE reviewing the report, it has no relevance to the issues at hand and I concur with the IHO's decision not to rely on it in rendering her decision.

## **VII. Conclusion**

Based on the above, the hearing record does not provide a basis to depart from the IHO's findings that the district's PT and OT evaluations were not appropriate, and the district is directed to fund the costs of IEEs in the areas of PT and OT up to the amount of \$750 each.<sup>10</sup>

I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                      **February 12, 2014**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**

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<sup>10</sup> As indicated above, the district did not appeal from the IHO's decisions regarding the district's cost containment procedures. Accordingly, the IHO's findings that the district must fund OT and PT IEEs at costs of up to \$750 for each and that such an amount is within the district's cost containment criteria are not at issue (IHO Decision at p. 30).